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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The month of September 2018 has been interesting in terms of legal developments.

On 6 September 2018, a five-judge bench of Supreme Court of India handed down a unanimous decision in *Navtej Singh Johar & Ors v Union of India* to decriminalise sexual relations between persons of the same gender. According to the learned judges, this colonial-era law was unconstitutional as it discriminated persons on grounds of their sexual orientation. This decision is particularly noteworthy as the apex court overturned its earlier decision by a two-man bench about four years ago in *Suresh Kumar Kousal & Anr v Naz Foundation & Ors* (2014) 1 SCC 1.

As September drew to a close, the same panel of judges of the Supreme Court as in *Navtej Singh* laid down another benchmark on the 27th in *Joseph Shine v Union of India* by striking down section 497 of the Indian Penal Code, which renders it an offence for a man, but not a woman, to commit adultery. Although the decision was unanimous, four of the five judges gave different reasons for their conclusion that section 497 is unconstitutional. Notwithstanding its decriminalisation, adultery remains a ground for divorce.

On 26 September 2018, a five-judge bench of the Malaysian Federal Court unanimously ruled in *Chong Chieng Jen v Government of State of Sarawak & The State Financial Authority* that Federal and State Governments are entitled to sue for defamation under section 3 of Government Proceedings Act 1956. Various groups, including politicians, journalists, lawyers and civil rights groups, have expressed concern that this decision may impede the freedom of speech in Malaysia. As the grounds of judgment have not been issued as we head to the press, it is not possible to comment on our apex court's reasoning for its decision.

We shall endeavour to cover one or two of the above cases in the next issue of Legal Insights. In the meantime, we hope you will enjoy reading the articles and case commentaries contained in this issue of our newsletter.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

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ANNOUNCEMENTS

ASIALAW PROFILES 2019 RANKINGS

We are pleased to announce that Asialaw Profiles has ranked our Firm as an "Outstanding Firm" in seven industry and practice areas in its 2019 Rankings, namely –

- Competition/Antitrust
- Corporate and Mergers and Acquisitions
- Dispute Resolution
- Energy
- Infrastructure
- Intellectual Property
- Technology and Telecommunications.

We have also been ranked as a "Highly Recommended Firm" in eight industry and practice areas in the Asialaw Profiles 2019 Rankings, namely –

- Aviation and Shipping
- Banking and Finance
- Construction
- Consumer Goods and Services
- Insurance
- Labour and Employment
- Real Estate
- Resatructuring and Insolvency.

Ten of our lawyers have also been listed in the rankings as leading or upcoming lawyers in their respective practice areas, namely –

- Selvamalar Alagaratnam
- Dato' Philip Chan
- Siva Kumar Kanagasabai
- Lee Ai Hsian
- Lee Tatt Boon
- Leong Wai Hong
- Dato' Lim Chee Wee
- To' Puan Janet Looi
- Charmayne Ong
- Vinayak Pradhan

SENIOR ASSOCIATES

The Firm congratulates Alyshea Low and Diba Natalia Ishak on their promotion to Senior Associates.

Alyshea is a member of our Intellectual Property Division. Her practice focuses on intellectual property litigation and advisory matters, and enforcement of intellectual property rights.

Diba is a member of our Dispute Resolution Division. Her practice areas include banking litigation, commercial crimes, corporate and commercial disputes, debt recovery and insurance.

THE NEW INTELLECTUAL PROPERTY

Lam Rui Rong discusses the use of blockchain

Blockchain is known as the technology underpinning the Bitcoin cryptocurrency. Cryptocurrencies are intangible and have no physical representation. A claim to a cryptocurrency can only be proven by an entry in the Blockchain ledger.

Similarly, intellectual property rights are also intangible rights. A claim over certain types of intellectual property, such as a patent, trademark or industrial design, is usually proven by an entry in a register kept by the intellectual property authority such as the Intellectual Property Corporation of Malaysia ("MyIPO"). In Malaysia, the *prima facie* evidence of your rights over the aforesaid intellectual property rights would be an entry in MYIPO's registry which proves that you are a *bona fide* proprietor of that right.

These similarities with cryptocurrency have led to great interest in the possibilities of the application of the Blockchain technology to the protection of intellectual property rights. This article sets out some possible use of the Blockchain technology for the protection of intellectual property rights in a Malaysian context.

WHAT IS BLOCKCHAIN?

It is useful to first understand the basics of Blockchain. Whilst most would be familiar with Bitcoin, the Blockchain technology is slightly less understood. In keeping up with its enigmatic nature, there is still no universally accepted definition of a Blockchain. As a technology that is lauded to bring about the 'Fourth Industrial Revolution', Blockchain's debut to the world was done with little fanfare, through a paper unassumingly titled "Bitcoin: A Peer-to-Peer Electronic Cash System" by Satoshi Nakamoto (a pseudonym). A Blockchain can be identified by the following key features:

(i) a system of record;
(ii) peer-to-peer networks (when two or more PCs are connected and share resources without going through a separate server);
(iii) cryptography technology; and
(iv) consensus algorithms.

In essence, Blockchain is a database which records events using peer-to-peer networks, with the consensus of its key players in the network and protected by cryptography. Each event that is recorded is immutable. Any change will require more than one-half of the computing power of the network. Anyone with an internet connection and the unique key to the Blockchain will be able to access the database.

USE TO COMBAT COUNTERFEITS AND PIRACY

The Problem

Intellectual property rights are highly valuable assets to companies and, in some industries, are considered the most valuable assets of a company. Counterfeiting and piracy are among the biggest and most persistent problems to both companies and consumers. The Organisation for Economic Co-operation and Development (OECD) in 2016 reported that counterfeit and pirated goods were

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KID ON THE BLOCKCHAIN

technology in the protection of intellectual property

worth nearly half a trillion dollars a year, or around 2.5% of global imports. Closer to home, in 2017, the discovery of counterfeit infant formula in Malaysia that caused children to fall ill raised serious concerns throughout the nation.

In simple terms, counterfeiting is the manufacturing and sale of goods that is an imitation of brands customers know and trust. Counterfeits can be found across all industries including apparel, pharmaceutical drugs, electronics and general consumer goods. Counterfeits hurt companies' hard-earned brand and tarnish the existing goodwill and reputation. They may also pose a real danger to consumers. This is because counterfeit goods are generally made from lower quality materials and components and without the necessary quality control. The danger of counterfeit medications and electronics may sometimes even be deadly. Today, the rise of e-commerce compounds the problem and makes the fight against counterfeits even more challenging.

Malaysia already has existing laws such as the Trade Descriptions Act 2010, border measures as set out in the Trademarks Act 1976, and the Copyright Act 1987 in place to deal with the issue of counterfeits and piracy. However, the real challenge lies in the enforcement. At present, there is a lack of a streamlined method and cooperation amongst the relevant enforcement agencies. For example, the border measures provided for in the Trade Marks Act 1976 are rarely invoked because of the complexity of the process. In addition to that, counterfeit goods are by nature difficult for the average consumer to identify and distinguish. In the counterfeit infant formula situation, the brand owner had to release images comparing the genuine product with the counterfeit product to educate the public to identify the counterfeit product. At present, even when enforcement officers suspect a consignment or a batch of product to be counterfeits, the officers will still need to contact the brand owner and wait for a representative to confirm whether it is indeed a counterfeit product. This process is time consuming and simply inefficient.

The Blockchain-based solution

A company can implement a private Blockchain-based intellectual property ledger with details of the owner, licensee, sub-licensee and any other details necessary to identify its product, such as the registration number. With access to the ledger, both the enforcement officers and consumers will be able to instantly confirm the genuineness of a product.

The company can set up a permissioned network and place restrictions on who is allowed to participate in the network. In other words, this would be a private Blockchain. The permanency and immutability feature of the Blockchain makes it a reliable source for the enforcement agencies as well. For example, enforcement officers with access to the Blockchain can immediately ascertain whether the product is a genuine product, and who the owner or licensee is. It will save time, resources and improve the enforcement against counterfeit products in Malaysia.

A popular suggestion, and in fact one that has caught on with some industry players, is the idea of adding scannable Blockchain connected tags or tamper proof QR codes that are linked to a Blockchain ledger of the genuine products. Whisky aficionados will be delighted that the Scottish Highland Ardnamurchan Distillery has started adding a unique QR code on its bottles using the Blockchain in its fight against counterfeit whiskies. A scan of the Blockchain connected QR code will reveal whether that bottle is a genuine bottle from that distillery.

From the Malaysian perspective, the above method fundamentally solves the problems with the current enforcement system. Companies merely have to inform the enforcement agencies of the existence of these Blockchain connected tags or QR codes and for the enforcement officers to perform a check of whether these products are genuine or not. Products without these Blockchain connected tags or codes or that cannot be verified against the relevant Blockchain ledger will be treated as counterfeit or fake products and can be prevented from reaching the Malaysian market. This reduces the red tape and increases the efficiency of the enforcement process.

COPYRIGHT PROTECTION AND LICENSING

Copyright is an aberration in the intellectual property rights protection realm, being an unregistered intellectual property right. This means that there is no registration requirement, and a failure to register does not mean that copyright does not subsist in the work. Under the Copyright Act 1987, a copyright owner can file for a voluntary notification of copyright pursuant to Section 26A the said Act. A statutory declaration by the owner of the copyright is admissible in evidence in any proceedings and shall be *prima facie* evidence of the facts contained therein.

The Problem

Since there is no registration requirement, MYIPO does not have a complete record database of all copyrighted works. MYIPO will have piecemeal records based only on copyright owners who chose to file a voluntary notification. Therefore, in Malaysia, there is no single database which can be referred to in order to ascertain whether a piece of work is copyrighted or not. This becomes a problem when it comes to licensing and royalty collection activities as there is difficulty in figuring out who to pay and how much to pay them.

This has been a persistent problem in the Malaysian music industry. Prior to February 2018, there were four music licensing bodies in

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ADDING SPICE AND SEASONING TO THE MALAYSIAN BOND AND SUKUK MARKET

Kok Chee Kheong provides an overview of the recent measures introduced to boost retail investment in bonds and sukuk in Malaysia

On 19 September 2018, the Securities Commission Malaysia ("SC") announced several measures to liberalise the framework for retail investment in the domestic bond and sukuk market. These measures involve amendments to the Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors ("Retail Issuance Guidelines"), Guidelines on Sales Practices of Unlisted Capital Market Products ("Sales Practices Guidelines") and the Prospectus Guidelines and the introduction of the new Guidelines on Seasoned Corporate Bonds and Sukuk ("Seasoning Guidelines").

This article will explain these new measures which come into effect on 11 October 2018.

ISSUANCE OF BONDS OR SUKUK BY QUALIFIED ISSUER

The revised framework introduces a new Chapter 22 to the Retail Issuance Guidelines that liberalises the requirements for the issuance of corporate bonds and sukuk by a qualified issuer ("Qualified Issuer").

To be a Qualified Issuer, an issuer must satisfy the three conditions set out in paragraph 4.01 of the Retail Issuance Guidelines. First, it must be any of the following: (a) a licensed bank, licensed investment bank or licensed Islamic bank; (b) a company whose shares are listed on a stock exchange; (c) Cagamas Bhd; (d) Danajamin Nasional Berhad; (e) Khazanah Nasional Berhad; or (f) an unlisted public company if (i) the bonds or sukuk are irrevocably and unconditionally guaranteed by any of the entities referred to in sub-paragraphs (a) to (e) or the Credit Guarantee and Investment Facility, or (ii) established by one of the entities referred to in sub-paragraphs (a) to (e) and there is full recourse to the establishing entity in its capacity as obligor (severally an "Eligible Issuer").

Second, an Eligible Issuer must have issued or guaranteed corporate bonds or sukuk with an aggregate amount of at least RM500 million in the past five years. Third, the corporate bonds or sukuk to be offered must have a minimum credit rating of AA- (or its equivalent).

A Qualified Issuer is permitted to issue corporate bonds or sukuk to retail investors without a prospectus, provided that it prepares a Product Highlights Sheet in accordance with the Sales Practices Guidelines. Where applicable, a Qualified Issuer may issue an information memorandum in connection with its issue of corporate bonds or sukuk to retail investors.

SEASONED BONDS OR SUKUK

Existing corporate bonds or sukuk (currently tradeable on an over-the-counter basis only by sophisticated investors) may be distributed to retail investors if the relevant conditions set out in the Seasoning Guidelines are satisfied.

General requirements

The criteria that must be satisfied in order for corporate bonds or sukuk to be distributed to retail investors are as follows. First, the issuer of the relevant bonds or sukuk must be an Eligible Issuer (as described earlier in this article).

In addition, the corporate bonds or sukuk must: (a) be denominated in Ringgit Malaysia; (b) have a tenure of more than one year; (c) have a minimum rating of A (or its equivalent) by a credit rating agency registered with the SC; (d) have completed the full seasoning period, i.e. in the case of a one-off issue, 12 months from the date of issue to sophisticated investors or in the case of a tranche under a debt or sukuk programme, 12 months from the date of issue of the tranche to sophisticated investors; (e) have a fixed term with principal and accrued interest or profit payable at maturity; (f) have a fixed or variable rate of return or profit rate; (g) have interest or profit paid periodically or at specified intervals (except for zero coupon bonds or sukuk without periodic distribution); (h) rank at least equally with unsecured and unsubordinated obligations of the issuer; and (i) have no embedded swaps, options or other derivatives except the option, exercisable at the discretion the investor, to convert or exchange to shares which are listed on a stock exchange.

Capital adequacy bonds or sukuk

Less stringent criteria apply to corporate bonds or sukuk that meet the requirements for regulatory capital set out in the relevant guidelines on capital adequacy issued by Bank Negara Malaysia ("Capital Adequacy Guidelines").

Among others, the Seasoning Guidelines require the aforesaid bonds or sukuk to (a) be issued by (i) a licensed bank, licensed investment bank or licensed Islamic bank, or (ii) the holding company of the entities mentioned in sub-paragraph (i), or (iii) a public company established by any of the entities referred to in sub-paragraphs (i) or (ii) for the purpose of issuing corporate bonds or sukuk to meet capital adequacy requirements; (b) be denominated in Ringgit Malaysia; (c) have a tenure of more than one year; (d) have a minimum rating of A (or its equivalent) by a credit rating agency registered with the SC; (e) have completed the full seasoning period; and (f) if so provided in the terms of issue, be written off or converted into equity only to meet the requirements set out in the Capital Adequacy Guidelines.

Multi-currency bond programme

The Frequently Asked Questions on the Seasoning Framework issued by the SC ("FAQs") state that a tranche of Ringgit-denominated bond in a multi-currency bond programme may be distributed to retail investors if that tranche meets the relevant eligibility criteria set out in the Seasoning Guidelines.

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Distribution of Seasoned Bonds and Sukuk

The Seasoning Guidelines also regulate the manner in which the eligible corporate bonds or sukuk ("Seasoned Bonds or Sukuk") are to be distributed to retail investors.

To be eligible to distribute Seasoned Bonds or Sukuk, an entity must be a licensed bank, a licensed investment bank, a licensed Islamic bank, a holder of a licence for dealing in securities or for dealing in securities for over-the-counter bonds under the Capital Markets and Services Act 2007 (severally an "Eligible Distributor").

An Eligible Distributor must ensure that its employees or agents who are involved in the distribution of Seasoned Bonds or Sukuk hold one of the qualifications, and are fit and proper persons, as prescribed in paragraphs 4.01 and 4.02 respectively of the Seasoning Guidelines.

An Eligible Distributor is also required to make available on its website the information set out in paragraph 5.01 of the Seasoning Guidelines. Such information includes an explanation of the key characteristics and the essential terms of, and risks associated with, the Seasoned Bonds or Sukuk.

An Eligible Distributor who intends to distribute Seasoned Bonds or Sukuk must submit an initial notification ("Initial Notification") to the SC at least two business days prior to its intended distribution date. In addition, it must register its interest with the SC at least seven business days prior to the submission of the Initial Notification. The requirements for the registration of interest and the Initial Notification are set out in paragraph 6.01 and Appendix 1 of the Seasoning Guidelines.

An Eligible Distributor must provide the SC with the information and documents set out in Appendix 2 of the Seasoning Guidelines in respect of any additional Seasoned Bonds or Sukuk that it has distributed within seven business days after the end of each quarter by way of a Post-Distribution Notification.

In addition, an Eligible Distributor is required to submit to the SC a post-distribution quarterly report within seven business days after the end of each quarter in accordance with Appendix 3 of the Seasoning Guidelines.

An Eligible Distributor must immediately notify the SC once it becomes aware that the Seasoned Bonds or Sukuk no longer satisfies the criteria to be Seasoned Bonds or Sukuk under the Seasoning Guidelines.

Further, an Eligible Distributor must notify the SC within seven business days prior to its intention to cease distribution of Seasoned Bonds or Sukuk. The FAQs provide that, notwithstanding the termination of the distribution, an Eligible Distributor may continue dealing with the investor on matters relating to the Seasoned Bonds or Sukuk purchased through the Eligible Distributor, including assisting with the subsequent transfer or sale of the bonds or sukuk concerned.

The FAQs also provide that Seasoned Bonds or Sukuk may be re-denominated into smaller lot sizes for distribution to retail investors. This would make those bonds or sukuk more marketable to this segment of investors.

COMMENTS

The liberalisation of the framework for the offering to retail investors of corporate bonds and sukuk that meet the criteria set out in the relevant guidelines is an interesting initiative by the SC.

The dispensation of the requirement for a prospectus for the offering of corporate bonds or sukuk by a Qualified Issuer to retail investors will reduce the time frame, and possibly, the cost of such offerings. However, it raises the question as to whether this dispensation will compromise the level of information and legal safeguards available to a retail investor.

The implementation of the Seasoning Guidelines will open avenues for retail investors to invest in Seasoned Bonds or Sukuk that have hitherto been inaccessible to them. It will also be welcomed by entities that qualify to be Eligible Distributors as it will provide them with an additional income stream. As the approval or consent of the issuer is not required in order for Seasoned Bonds or Sukuk to be distributed under the Seasoning Guidelines, it is interesting to see how palatable this is to issuers who may prefer to deal with sophisticated investors (i.e. high-net-worth entities, high-net-worth individuals or accredited investors) rather than a gaggle of retail investors.

These initiatives to increase retail participation in the local corporate bond and sukuk market are timely in light of the capital flight from emerging markets, like Malaysia, to countries that have raised their interest rates, such as the United States. At first blush, these new measures have the potential to spice up the domestic capital market. However, as Malaysians have traditionally placed their savings in time deposit accounts with financial institutions or invested them in landed property and shares, it remains to be seen whether investing in corporate bonds and sukuk will be a new flavour that will be irresistible to retail investors.

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THE INEQUALITY OF DUAL CLASS SHARES

Sheba Gumis explains the concepts underlying dual class shares

Dual class shares have been the talk of investors in recent years with at least two major stock exchanges amending their rules to allow for dual class shares to be listed on their markets and to be more attractive to companies seeking listing.

Yet, dual class shares are relatively unknown to the Malaysian layperson, given that such shares are not allowed to be listed on Bursa Malaysia. Notwithstanding this, the concept of dual class shares has existed since the early 1920s in America.

Dual class shares refer to the issuing of various types of shares by a single company. A dual class share structure can consist of Class A and Class B shares, for example. These classes of shares would possess different traits, which would usually be based on differing voting rights and possibly, economic benefits.

WHY DUAL CLASS SHARES?

Dual class shares are issued primarily to ensure that a select group of shareholders control the management of the company in excess of their capital contribution to the company while still being able to access the capital market. For example, Class A shares would hold 10 votes each, whereas Class B shares hold 1 vote each. Class A shares would only be issued to certain people, e.g. the founders of the company, whereas Class B shares would be issued to members of the public. By doing so, the Class A shareholders' votes would outweigh those of the Class B shareholders. The company would still be able to seek funds from the public without the Class A shareholders giving up control of their company.

This structure was previously implemented in family-owned companies, such as the previous Dodge Brothers' Company, which is credited to be the first listed company in the United States to adopt a dual class share structure, and media companies, such as The New York Times Company. Media companies implemented this structure to protect editorial independence, whereas family-owned companies wanted to ensure that only members of the family controlled the company.

However, the current trend is for technology companies to adopt the dual class share structure, with companies such as Google and Facebook implementing the same. The reason technology companies require such a structure is to ensure that the management has control of the company in order to implement long-term goals of the company. This is more beneficial to the company in the long run as compared to control being placed in the hands of the public shareholders who may have shorter term goals and be interested only in short term profits.

WHO IMPLEMENTS DUAL CLASS SHARE STRUCTURES?

Since its introduction in the 1920s, the number of listed companies in the United States which have adopted the dual class share structure has increased to 701, with 214 being listed in the 10-year period ending in 2015 (*Report on Dual Class and Other Entrenching Governance Structures in Public Companies dated 27 February 2018 by the Investor as Owner Subcommittee of the Securities Exchange Commission*). These companies range from family-owned companies, conglomerates to technology companies.

Family-owned companies, such as Ford Motor Company, implemented the dual class share structure to retain control of the company within the family. The Fords collectively own less than 2% of the shares in the company, but control 40% of the total voting power.

In the case of The New York Times Company, holders of Class A shares are entitled to elect 30% of the board members whilst the family trust and members of the Sulzberger family, the sole holders of Class B shares, are entitled to elect 70% of the board members.

Berkshire Hathaway Inc, the renowned conglomerate helmed by investment guru, Warren Buffett, has two classes of shares. Its Class B shares have 1/200th of the votes of its Class A shares.

> **“ The company would still be able to seek funds from the public without the Class A shareholders giving up control of their company ”**

Social media giant, Facebook, has two classes of shares - Class A shares issued to members of the public, and Class B shares held by Mark Zuckerberg and other insiders of Facebook. The Class B shares carry 10 votes each, whilst the Class A shares carry 1 vote each.

ADDING MORE TO THE MIX

Innovation did not stop at dual class shares. In fact, certain stock exchanges allow companies to issue more than two classes of shares.

Alphabet Inc (Google's parent company), which is listed on the National Association of Securities Dealers Automated Quotations Exchange (NASDAQ), has issued triple class shares, namely Class A shares (bearing 1 vote each and issued to members of the public), Class B shares (bearing 10 votes each and issued to the company's management and early investors) and Class C shares (bearing no votes and issued to employees of the company).

Snap Inc's listing on the New York Stock Exchange (NYSE) was particularly noteworthy. Apart from the fact that it issued triple class shares, the company pushed the envelope further by issuing Class A *non-voting shares* to the public. Class B shares, which carry 1 vote each, were issued to the management and early investors, whereas Class C shares, which carry 10 votes each,

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were issued to the company's co-founders, Evan Spiegel and Bobby Murphy. Control therefore lies only in the hands of Snap Inc's co-founders, the management and early investors.

DUAL SENTIMENTS ON DUAL CLASS SHARES

The jury is still out on whether the dual class share structure is beneficial. There are compelling arguments on both sides.

The advocates of the dual class share structure argue that the structure ensures that executives are able to focus on long term plans and that the retention of control within a select group of people allows for strong leadership.

It also encourages technology companies and family-owned companies to take the companies public and enjoy funding from the capital markets. It is a win-win situation for small investors who do not have any interest in managing a company, but wish to enjoy the profits of such company.

On a more jurisprudential aspect, proponents of the dual class share structure argue that based on the doctrine of freedom of contract, parties should be free to decide on the terms of their investment, even if it means that the investors do not have equal voting rights in respect of their shares.

> **"The jury is still out on whether the dual class share structure is beneficial"**

There are also valid arguments against the dual class share structure. On a base level, it can be argued that the dual class share structure is undemocratic. It is only fair that if you invest in 50% of the shares of the company, you should control 50% of the management as well. The public investors are given unequal treatment in that they bear the brunt of the economic risk without enjoying management control of the company.

Additionally, the dual class share structure perpetuates control of the company in a small group of investors and may result in complacency and reduce accountability by an entrenched management. If the investors who control the company are capable, the company and the public investors would benefit. However, if they are incompetent, the public investors would not be able to step in to change the direction of the company as they lack the voting power to do so.

This could also lead to a problem in family-controlled companies, which is known as the "*idiot heir problem*". Should the shares with control be bequeathed to incompetent heirs, the company will then be managed by incompetent leaders and the public shareholders would not be in a position to oust such heirs. These "*idiot heirs*" may also be prone to abuse their power in the company.

An interesting development in recent years is the attempt by activist investors in the United States to compel companies having dual class shares, such as Ford Motor Company, to convert their dual class shares into a single class of shares. Although these attempts have been unsuccessful, this development reflects the growing trend of investor activism in the United States.

REGULATING DUAL CLASS SHARE LISTINGS

The NYSE, NASDAQ, the Hong Kong Stock Exchange (HKEX) and the Singapore Stock Exchange (SGX) are among the stock exchanges that allow for the listing of dual or multiple class shares. However, these exchanges acknowledge that such structures need to be regulated for the benefit and protection of investors.

The NYSE and NASDAQ (the latter being the leading listing destination for technology companies) both have uniform rules prohibiting the reduction of voting rights of existing shares and the issuance of a new class of superior voting shares. They also allow listed companies to have more than two classes of shares.

Companies with dual class shares are allowed to list on the HKEX only if they are "*innovative companies*". The rationale for dual class shares must be justified. Examples of innovative companies provided in the HKEX's guidance are as follows: (i) the company's success is attributable to the application of new technologies, innovations, and/or a new business model, to its core business; (ii) research and development is a significant contributor to the company's expected value and constitutes a major activity and expense; (iii) the company's success is attributable to its unique features and/or intellectual property; and/or (iv) the company has an outsized market capitalisation / intangible asset value relative to its tangible asset value.

The HKEX also requires a minimum market capitalisation of HK$40 billion or alternatively, HK$10 billion if the company has achieved a revenue of at least HK$1 billion in its most recent audited financial year. It does not permit the shares with enhanced voting rights to be listed and limits the ratio of such rights to a maximum of 10 times the voting rights attached to ordinary shares. Further, future equity capital raisings must not increase the proportion of shares with enhanced voting rights to ordinary shares.

The HKEX seeks to protect the interests of investors by stipulating that each share (irrespective of class) shall have 1 vote for reserved matters, namely amendments to the constitution, variation of class rights, appointment or removal of independent directors

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A PERSONAL WRONG OR A CORPORATE WRONG?

Lee Shih and Joyce Lim discuss a Singapore case on shareholder opperession

In the recent case of *Ho Yew Kong v Sakae Holdings Ltd* [2018] SGCA 33 ("*Sakae Holdings*"), the Singapore Court of Appeal had the opportunity to clarify the distinction between personal wrongs committed against shareholders of a company and corporate wrongs against the company. This distinction directly relates to the question of whether the appropriate relief in each respective scenario would be by way of an oppression action or a statutory derivative action.

The Singapore Court of Appeal set out a framework to determine whether an aggrieved shareholder could maintain an oppression action or ought to have pursued a statutory derivative action instead.

A FINE LINE BETWEEN THE TWO WRONGS

Under section 216 of the Singapore Companies Act ("Section 216"), aggrieved shareholders can initiate an oppression action in their own names to protect themselves from being unfairly prejudiced by majority shareholders. A successful oppression action would most often result in personal remedies for the aggrieved shareholder. Section 216 is very similar to Malaysia's oppression remedy under section 346 of the Companies Act 2016 ("CA 2016").

On the other hand, the statutory derivative action under section 216A of the Singapore Companies Act ("Section 216A") enables an aggrieved shareholder to bring an action in the company's name. The derivative action is to right the wrongs done to the company, where those in control of the company had caused harm or breached their duties to the company. The derivative action would only ultimately result in remedies to benefit the company. Section 216A is very similar to Malaysia's statutory derivative action provisions found in sections 345, and 347 to 350 of CA 2016.

In simple terms, it could be said that claims for reliefs which are solely for personal wrongs committed against shareholders should be brought by way of an oppression action, whereas corporate wrongs committed against the company should be remedied by way of a statutory derivative action.

This distinction may be challenging to apply in practice. This is because it is common for acts which are alleged to be oppressive to an individual minority shareholder, to concurrently also constitute a wrong to the company. The difficulty in making this distinction was at the heart of the appeal before the Singapore Court of Appeal.

BRIEF FACTS

In *Sakae Holdings*, the plaintiff, Sakae Holdings Ltd ("Sakae"), was a 24.69% shareholder in Griffin Real Estate Investments Holdings Pte Ltd ("Company"). The remaining 75.31% shares in the Company were held by Gryphon Real Estate Investment Corporation Pte Ltd ("GREIC"), an investment holding company whose shareholders included one Andy Ong and his two associates.

Under a joint venture agreement ("JVA") between the Company, Sakae and GREIC, the Company was intended to be the joint venture vehicle through which both Sakae and GREIC would invest in units at Bugis Cube, a shopping mall in Singapore. Sakae left the management of the Company to Andy Ong.

In 2013, Sakae filed an oppression action under Section 216 against Andy Ong, his associates, and various companies owned and controlled by him ("ERC Group") ("Defendants"). The action was filed on the basis that the Defendants had engaged in acts that were oppressive to Sakae as a minority shareholder of the Company.

The alleged oppressive conducts consisted of seven transactions entered into by the Company with the ERC Group, including, among others, loan, lease, consultancy and project management arrangements ("Impugned Transactions"). Sakae contended that the Impugned Transactions diverted the Company's assets to the ERC Group without its knowledge.

DECISION OF THE HIGH COURT

The Defendants' main defence was that Sakae's claims were essentially claims in respect of corporate wrongs. As such, they could not, as a matter of law, be brought against the Defendants in an oppression action. The Defendants argued that the proper plaintiff in this case was the Company, and any loss asserted by Sakae was merely reflective of the loss sustained by the Company.

The High Court found in favour of Sakae and held that Sakae's oppression action was properly constituted under Section 216. The unlawfulness of an errant director's conduct could be evidence in support of the claim that he had conducted the company's affairs in disregard of the plaintiff's interests as a minority shareholder.

The High Court granted Sakae's primary relief of winding up. In addition, the High Court granted orders against the errant directors to repay company monies that they had taken from or caused to be paid out by the company in breach of their fiduciary duties. However, the High Court held that it could not make payment orders against third parties who might have received monies from the company pursuant to the directors' breaches.

DECISION OF THE COURT OF APPEAL

The Court of Appeal upheld the High Court's decision that Sakae's claims pertain to personal wrongs committed against it and hence the oppression action was properly constituted. However, the Court of Appeal cautioned against too readily granting a corporate relief in an oppression action. It held that an oppression action under Section 216 should generally not be permitted where the essential or sole remedy sought is a remedy for the company.

The Court of Appeal acknowledged that the distinction between a personal wrong and a corporate wrong would not always be clear.

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The Court of Appeal emphasised the need to identify the essential remedy sought by a plaintiff. The Court of Appeal went on to hold that a plaintiff who sought an essential remedy directed at bringing an end to an oppressive conduct would likely be permitted to pursue its claim by way of an oppression action, even if, as part of that essential remedy, it also sought remedies in favour of the company.

Further, a court would also have to examine if the essential remedy sought is in fact directed to the real injury which the plaintiff suffers as a shareholder, and whether the real injury suffered by the plaintiff as a shareholder is distinct from, and not merely incidental to, the injury suffered by the company.

Insofar as an oppression action under Section 216 could give rise to a risk of double recovery or prejudice to the creditors or shareholders of the company concerned, the Court of Appeal held that these concerns could be dealt with by the suitable crafting of court orders. The Court of Appeal laid out an analytical framework to distinguish between an oppression action for personal wrongs and a derivative action which was more appropriate for corporate wrongs.

THE COURT OF APPEAL'S ANALYTICAL FRAMEWORK

The Court of Appeal considered jurisprudence from the UK, Hong Kong, Australia and Canada and set out an analytical framework to guide the courts in making this distinction. This framework consists of two limbs, i.e. injury and remedy:

(i) Injury
(a) What is the real injury that the plaintiff seeks to vindicate?
(b) Is the injury distinct from the injury to the company and does it amount to commercial unfairness against the plaintiff?

(ii) Remedy
(a) What is the essential remedy that is being sought and is it a remedy that meaningfully vindicates the real injury that the plaintiff has suffered?
(b) Is it a remedy that can only be obtained under Section 216?

1st limb of framework: Injury

The Court of Appeal held that the real injury which Sakae sought to vindicate were (i) the injury to its investment in the Company; and (ii) the breach of its legitimate expectations as to the Company's affairs and how its financial investment in the Company would be managed.

In doing so, the Court of Appeal took cognizance of the fact that the High Court judge considered each of the Impugned Transactions to assess how Sakae was personally affected by them.

While the Defendants' conduct also constituted a wrong against the Company, it separately amounted to a distinct personal wrong against Sakae as a minority shareholder. The Court of Appeal also held that the Impugned Transactions occasioned serious commercial unfairness to Sakae.

2nd limb of framework: Remedy

Sakae prayed for either a winding up of the Company or a buyout of its shares in the Company. In essence, the essential remedy sought by Sakae was to exit the joint venture with as little loss as possible and thereby meaningfully remedy the real injury that it had suffered. Further, both remedies were available only in an action under Section 216. Any benefit that accrues to the Company would be purely incidental to the essential remedy which Sakae seeks.

Although Sakae prayed for restitutionary orders, the Court of Appeal held that these orders did not constitute the essential remedy sought. Rather, the orders were necessary to ensure a fair value exit for Sakae.

Given the above, the Court of Appeal found that Sakae's oppression claims were properly pursued by way of an oppression action as opposed to a statutory derivative action. It was not an abuse of process.

EFFECT OF ALTERNATIVE REMEDIES

Finally, the Court of Appeal also dismissed the Defendants' alternative defences. Firstly, one argument raised was that the JVA already provided a share buy-out mechanism if one of the shareholders committed a material breach. The Court of Appeal held that in law, an alternative remedy may preclude recourse to an oppression claim if that remedy was both adequate and appropriate to bring to an end the matters complained of. Here, it was unrealistic and lacking in commercial sense to expect the aggrieved shareholder to expend money to purchase shares in the company in which it had been oppressed.

Secondly, the Court of Appeal also rejected the argument that Sakae should be confined to the arbitration mechanism under the JVA. The parties to the JVA were Sakae, GREIC and the Company. The oppression action was based on the pattern of oppressive conduct orchestrated primarily by Andy Ong and one of the other Defendants. Both these individuals were not parties to the JVA and Sakae's dispute would fall outside the ambit of the arbitration clause. The nature of the acts that Sakae complained of were held to be oppressive to Sakae even without regard to the JVA.

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PRIVACY PIRACY

Jillian and Grace share five things organisations should consider in respect of data privacy risks

Before the Information Age, it was difficult to determine whether people were who they said they were. With the dawn of the Information Age, it is easier to look up information on people and yet, ironically, it is still difficult to determine whether people are who they say they are.

One of the first known major data breach incidents occurred in 2004, when an employee reportedly stole and sold his employer's list of 92 million customers. Fast forward to year 2018, and reports of major data breach, security, or cyber-attack incidents that risk millions of individuals' data appear to be a weekly affair. Such incidents are more perilous now, given that most of our data are digitised and most of our transactions are conducted online. With the amount of personal data traversing the Internet, any miscreant would find it easy to assume a false identity. Generally, victims are only aware that they are a casualty of a data breach incident when they fall victim to scam calls or fraudulent transactions.

For organisations, the costs of such incidents are escalating. The IBM-sponsored 13th Annual Cost of a Data Breach study conducted by Ponemon Institute reported that the global average cost of a data breach is approximately USD3.86 million.[1] The cost of a data breach incident varies depending on the organisation, but the study reports that the top three cost-reducing factors include use of encryption software, an efficient incident response team, and good business continuity management.

> "the best method to minimise the cost of data breach incidents is to practice good governance"

PREVENTION IS THE CURE

Regardless of organisation size, the best method to minimise the cost of data breach incidents is to practice good governance.

Under the Personal Data Protection Act 2010 ("PDPA"), there is an obligation on data users to take practical steps to protect personal data from any loss or misuse, by having regard to certain prescribed matters such as the nature of the data and the place or location where the data is stored. The Security Standards issued pursuant to the Personal Data Protection Standards under the PDPA also sets out detailed measures that a data user should implement in order to protect personal data. The Personal Data Protection Regulations 2013 also mandate the development and implementation of internal security policies that comply with the Security Standards.

In addition to the PDPA, organisations that are licensed or authorised by specific regulatory authorities may have to ensure that their system frameworks meet certain thresholds.

Other than statutory and regulatory requirements, organisations should also consider if they have a contractual obligation to implement security software or controls, bearing in mind the contractual term, implementation costs versus response costs, and the type, scope, circumstances, and purposes of the processing of data.

In any event, organisations should consider a risk-based approach to security, i.e. analysing potential threats and vulnerabilities on all systems on a regular basis. The use of encryption software as well as preventive and detective ICT controls customised for the organisation would be more useful in reducing the risk of stolen data being abused; after all, a chain is only as strong as its weakest link. A case study published by the SANS Institute highlighted that reliance on mandated compliance guidelines failed to protect retail giant, Target Corporation, from its data breach incident in 2013.[2]

Organisations should develop a governance process or an incident response plan and checklist. Matters to be included in such processes or plans include timelines to escalate the incident, reporting channels at every level of the organisation, members of the core incident response team who will make the decision as to whether external reporting or notification is necessary, employee awareness about what to flag for investigation, and ensuring that there is a record or audit trail of actions taken pre- and post-incidents.

> "organisations should consider a risk-based approach to security"

On the same note, while an organisation may have already developed a robust process or plan, the process or plan should be independently reviewed every so often to ensure that they are keeping with the times and are still effective. For such processes and plans to be viable, they must be updated regularly and their importance drilled into all employees in the organisation. It is vital that organisations ensure that their employees practice the strategies so that they become second nature. Time is of the essence when responding to data breach incidents, and the more one practices and understands the strategies, the better the organisation will be at responding to incidents.

At the core of it, regulatory authorities appear to accept that there is a human element in data breach incidents, i.e. no system is foolproof if a person intends to circumvent the system. However, organisations have the obligation of deterring potentially nefarious plans by having in place a strong deterring mechanism, including ensuring that access to data is on a 'need-to-know' basis, making it difficult to copy data illegally, obtaining confidentiality undertakings with specific obligations from employees and service providers, and taking swift action

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against employees and service providers who have breached the organisations' policy in relation to management of data.

So what does one do when the organisation's security system didn't hack it?

SUIT UP

As a first step, establish an incident response team overseen by a party independent of the business unit where the breach occurred. The composition of team members would vary according to the organisation, type of incident, and potential data at risk. The core team may include members from the legal, technology, operations, finance, or human resource departments.

Generally, the team should include at least one officer (whether C-suite or otherwise) with decision-making powers. This is critical as the team's purpose is to mitigate any damage arising from the incident and to do so, time is of the essence; there may be limited time to deliberate decisions in respect of action plans.

AVENGERS ASSEMBLE!

The organisation should also consider if assistance from external resources is required. For example, a forensic IT expert may be required to secure and preserve evidence or a public relations company may be helpful in managing the potential negative publicity that the organisation is likely to receive.

It may be pragmatic to retain external legal counsel to maintain legal privilege and confidentiality over the investigation. Legal privilege provides the organisation the choice to decide whether to disclose or produce privileged documents in legal proceedings or to regulators or other parties. It is unclear whether the Malaysian courts would extend legal privilege where only in-house counsel have been involved; thus, it may be prudent to retain external legal counsel until such time the law is clarified.

Experienced external legal counsel would also be able to advise the organisation on how to approach the regulators, law enforcement agencies, and forensic experts.

STOP, DROP, AND ROLL

The objective for the incident response team is to stop or mitigate any continuing or additional loss or damage, and to restore services or the security of the organisations' system. The team would also have to determine what data has been put at risk and to what extent, how or why the incident had occurred, and whether there are any mitigation actions that can be taken to reduce the risk to the data.

The organisation may require the assistance of experts to stop data loss or re-establish the security of the organisation's systems. For example, forensic experts may be required to preserve evidence from devices, surveillance tapes and servers. Until the advice from such experts have been obtained, it would be preferable if the status quo is maintained, e.g. one should refrain from accessing files on the affected device, disengaging the device from the affected network, and turning off affected systems.

Generally, such efforts may be more efficient if guided by a chronology of events, which can be updated with the discovery of each new event or fact. It is also good practice to keep a detailed record of the response efforts for two reasons: (i) if evidence is required in court, the detailed record of actions taken would prove that the evidence put forth was not altered, destroyed, lost, or in any other way rendered inadmissible; and (ii) it could be used to improve incident response workflows.

MEA CULPA

With respect to internal escalation, most organisations have a policy dictating how and when such incidents should be escalated to relevant senior management personnel and ultimately, the board of directors.

If a crime has been committed, e.g. theft or robbery, consider the content of the report to the law enforcement agencies carefully. The report should be sufficiently clear for law enforcement officers to discharge their duties, but should also be mindful of any secrecy or confidentiality obligations on the part of the organisation. Care should be taken to ensure that the report does not cast aspersions unless there is just cause, or one may face a defamation claim.

As for regulatory reporting requirements, organisations should first determine which are the relevant authorities or applicable legislation or regulations governing the organisation. For example, financial service providers including takaful operators, operators of payment systems, and money brokers are required to report data breach incidents to the Central Bank of Malaysia, and consultants, suppliers and service providers who maintain, use or otherwise have access to the Ministry of Health's ICT assets may be required to report breaches to the Ministry. Multinational organisations should also consider whether there is a multi-jurisdictional domino effect if a data breach incident happens in one of the jurisdictions that the organisations operate in; some jurisdictions or highly-regulated industries impose reporting or notification obligations on the multinational organisations despite the data breach incident having occurred in another jurisdiction or to a separate entity.

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THE CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL

Sharon Chong provides an overview of the application of the Convention and the Aircraft Protocol in Malaysia

The Convention on International Interests in Mobile Equipment ("Convention"), commonly referred to as the Cape Town Convention, is an international treaty intended to standardise transactions involving movable property. The Convention creates international standards for registration of contracts of sale, security interests and leases and provides legal remedies for default in financing agreements, including repossession and the effect of bankruptcy/insolvency laws. There are three protocols to the Convention which are specific to three types of movable equipment – aircraft equipment, railway equipment and space assets.

The Convention and its supporting Protocols have five basic objectives:

- to provide for the creation of international interests which will be recognised in all Contracting States;
- to provide the creditor with a range of basic default remedies and a means of obtaining speedy interim relief pending final determination of its claim;
- to establish an electronic international register for the registration of international interests which will give notice to third parties and provide for the order of priority of such interests;
- to ensure that the specific needs of an industry are met through the various Protocols; and
- to give prospective creditors greater confidence when extending credit to borrowers.

On 2 November 2005, Malaysia deposited her instruments of accession to the Convention and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment ("Aircraft Protocol"). As such, the Convention and the Aircraft Protocol entered into force as far as Malaysia is concerned on 1 March 2006. The International Interests in Mobile Equipment (Aircraft) Act 2006 ("Act") which was enacted to implement the Convention and Aircraft Protocol came into force on 19 October 2006.

Based on a visit to the website of the United Nations International Institute for the Unification of Private Law (UNIDROIT) on 23 August 2018, the European Union and 73 Contracting States have become parties to the Convention and the Aircraft Protocol.

APPLICATION OF THE CONVENTION AND AIRCRAFT PROTOCOL

Pursuant to section 2(1) of the Act, the Convention and the Aircraft Protocol have the force of law in Malaysia only in respect of "aircraft objects" which, as defined in the Aircraft Protocol, means "airframes, aircraft engines and helicopters" (each as further defined in the said Protocol).

The Convention applies when, at the time of the conclusion of the agreement creating or providing for an "international interest", the debtor is situated in a Contracting State. For the purposes of the Convention, the debtor is situated in any Contracting State under the law of which it is incorporated or formed; where it has its registered office or statutory seat; where it has its centre of administration; or where it has its place of business. The creditor is not required to be situated in a Contracting State for the Convention to apply.

WHAT ARE INTERNATIONAL INTERESTS?

An "international interest" means an interest in a uniquely identifiable aircraft object (a) granted by a chargor under a security agreement; (b) vested in a person who is the conditional seller under a title reservation agreement; or (c) vested in a person who is the lessor under a leasing agreement.

International interests must comply with certain formal requirements, including the requirement that the agreement creating or providing for the interest must (a) be in writing; (b) relate to an object of which the chargor, conditional seller or lessor has power to dispose; (c) enable the object to be identified in conformity with the relevant protocol; and (d) in the case of a security agreement, enable the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

WHAT IS THE INTERNATIONAL REGISTRY?

The International Registry of Mobile Assets ("International Registry") is an electronic registry established under the Convention and the Aircraft Protocol. The International Registry operates 24 hours a day for seven days a week, and provides for the electronic registration and the protection of international interests which are recognised by all Contracting States, with priority being determined on a "*first-to-file*" basis.

The registration of interest in an aircraft object serves as a notification and is considered to be best practice for owners, creditors, debtors, lessors, lessees, agents and others in protecting their financial interest in such an asset. Searches may be conducted at the International Registry against an aircraft object to determine what registrations have been made and their relative priority.

PRIORITY OF INTERESTS

A registered interest has priority over any other interest subsequently registered and over an unregistered interest. The priority of competing interests or rights may be varied by an agreement between the holders of those interests.

NON-CONSENSUAL RIGHTS OR INTERESTS

Malaysia has declared that the following "non-consensual rights or interests" are to have priority over registered international

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interests in respect of an aircraft object: (a) liens in favour of airline employees for unpaid wages after a default is declared by the airline under a contract to finance or lease an aircraft object, whether in or outside insolvency proceedings; (b) liens or other rights of a Malaysian authority relating to taxes or other unpaid charges arising from or related to the use of the aircraft object by the owner or operator of the object since the time of default by that owner or operator under a contract to finance or lease that aircraft object; and (c) liens in favour of repairers of an aircraft object in their possession.

DEFAULT REMEDIES

The Convention provides for default remedies which are available in respect of registered international interests. The debtor and the creditor may at any time agree in writing as to the events that constitute a default or otherwise give rise to the rights and remedies. If there is no agreement between the parties, "*default*" means a default which substantially deprives the creditor of what it is entitled to expect under the agreement. The standard default remedies provided by the Convention to a chargee of an aircraft object under a security agreement are to (a) take possession or control of the aircraft object; (b) sell or grant a lease of the aircraft object; and (c) collect or receive any income or profits arising from the management or use of the aircraft object.

Further default remedies available are the de-registration of the aircraft object and the export and physical transfer of the aircraft object from the territory in which it is situated. The Convention requires the registry authority in a Contracting State to honour a request for de-registration and export if the request is properly submitted by the authorised party named in a recorded irrevocable de-registration and export request authorisation (IDERAS). If required by the registry authority, the authorised party must certify that all registered interests ranking in priority to that of the creditor in whose favour the authorisation has been issued have been discharged or that the holders of such interests have consented to the de-registration and export.

Malaysia has declared that any and all remedies available to a creditor under the Convention may be exercised without court action and without leave of the court, unless the Convention expressly provides otherwise.

INTERIM RELIEF

A creditor who adduces evidence of default by the debtor may, pending final determination of its claim, obtain from a court "*speedy relief*" in the form of one or more of the following orders as the creditor requests:

(i) preservation of the object and its value;
(ii) possession, control or custody of the aircraft object;
(iii) immobilisation of the aircraft object;
(iv) lease or management of the aircraft object and the income thereof; and
(v) sale and application of proceeds from the aircraft object.

In the context of the above, a "*speedy relief*" means within 10 working days in respect of the remedies specified in (i), (ii) and (iii) above, and 30 working days in respect of the remedies specified in (iv) and (v) above, from the date of filing of the application for relief.

Further, the court may impose such terms as it considers necessary to protect the debtor or other persons with an interest in the aircraft object.

DISCHARGE OF REGISTRATIONS

Where the obligations secured by a registered security interest or the obligations giving rise to a registered non-consensual right or interest have been discharged, the holder of such interest will be required to discharge the registration of its interest without undue delay after a written demand is issued by the debtor.

INSOLVENCY REGIME

In insolvency proceedings against the debtor, an international interest is effective if registered prior to the commencement of the insolvency proceedings. This means that the property interest will be recognised and the creditor will have a claim against the asset for the obligations to be discharged.

Malaysia has declared that Alternative A of Article XI of the Protocol shall apply. Under Alternative A, upon the occurrence of an insolvency-related event, the insolvency administrator or the debtor is required to give possession of the aircraft object to the creditor no later than the earlier of: (a) the end of the waiting period of 40 working days; and (b) the date on which the creditor would ordinarily be entitled to possession of the aircraft object.

However, if by the time specified above, the insolvency administrator or debtor has cured all defaults other than a default constituted by the opening of insolvency proceedings and has agreed to perform all future obligations under the agreement, the insolvency administrator or debtor may retain possession of the aircraft object.

In the meantime, the insolvency administrator or the debtor must preserve the aircraft object and maintain it and its value in accordance with the agreement and the creditor shall be entitled to apply for any other forms of interim relief available under the applicable law.

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SALE BY TENDER: WHEN DOES A CONTRACT ARISE?

Nathalie Ker explores the Court of Appeal's approach to a sale by tender

It is common practice for receivers or liquidators selling the assets of a company to conduct a sale by tender, issuing an Information Memorandum and inviting tenders from various parties. In such a situation, when does acceptance take place and when is a contract formed?

The Court of Appeal delved into these issues in the recent case of *Emas Kiara Sdn Bhd v Michael Joseph Monteiro & Ors; Farcoll Estate Sdn Bhd & Ors (Interveners)* [2018] 8 CLJ 17 ("*Emas Kiara v Monteiro*"). The Court applied the principles of formation of contract to the issue as to whether a contract existed between the Appellant, Emas Kiara Sdn Bhd ("Emas Kiara"), and the 1st and 2nd Respondents who were receivers and managers ("R&M") of the 3rd Respondent, Lembah Beringin Sdn Bhd ("Lembah Beringin").

BACKGROUND FACTS

Lembah Beringin had created a debenture in favour of RHB Bank Berhad ("RHB") as security for banking facilities granted by RHB to Lembah Beringin. Among the properties charged under the debenture were almost 1400 acres of land ("the Properties"). After Lembah Beringin defaulted on the banking facilities, RHB appointed the R&M in respect of Lembah Beringin.

> **" a 'process contract' concerns the way the tender exercise is to be carried out "**

On 5 May 2011, the R&M advertised in the newspapers seeking expressions of interest from the public to purchase the Properties. The R&M prepared an Information Memorandum ("IM") which was made available to interested bidders.

Emas Kiara submitted an initial tender offer of RM60.08 million on 3 June 2011, increasing this to RM83.8 million on 17 June 2011. A competing tender of RM50 million (later increased to RM84 million) was submitted by two of the eight other parties who were the interveners in the present case ("Interveners").

The R&M subsequently met with Emas Kiara on 28 September 2011 to discuss 13 additional terms. On 3 October 2011, Emas Kiara wrote to the R&M stating that they were agreeable to the proposed terms. The next day, i.e. 4 October 2011, Emas Kiara sent a further letter to the R&M clarifying their letter dated 3 October 2011.

The R&M prepared a letter dated 14 October 2011 in response to Emas Kiara's two letters. However, this letter was not sent until 18 October 2011. The R&M further wrote a separate letter dated 17 October 2011 to Emas Kiara which was faxed and sent on 18 October 2011. Emas Kiara, assuming that the R&M had accepted their offer by way of the letter dated 17 October 2011, paid the balance amount making up the deposit. The letter dated 17 October 2011 stated as follows:

"Having completed our evaluation, we are pleased to inform that the Receivers and Managers (R&M) are agreeable to accept your offer to purchase the Company's properties (Lands) in the Information Memorandum dated 5 May 2011 (IM) for RM83.8 million, subject to the amongst others, as agreed, the salient conditions stated herein below …"

The R&M then set out four conditions in relation to sale on an '*as is where is*' and '*en bloc*' basis, timelines for execution of the Sale and Purchase Agreement ("SPA") and settlement of the purchase price and the forfeiture of deposit in certain circumstances.

The parties then exchanged correspondence to finalise the draft SPA. However, disagreements arose between the parties on the terms and conditions to be included in the SPA. On 6 December 2011, the R&M informed Emas Kiara of their decision to cease further negotiations.

Emas Kiara subsequently sued the R&M for breach of contract, claiming specific performance based on the terms and conditions in its letter dated 17 June 2011 read together with the IM and its letter dated 4 October 2011. The R&M counterclaimed for damages for wrongful lodgement of a caveat by Emas Kiara over the Properties.

The High Court held in favour of the R&M. It held that there was no agreement between the parties as the 'acceptance' by way of the R&M's letter dated 17 October 2011 had been in respect of the offer in Emas Kiara's letter dated 17 June 2011. The High Court Judge found that there could not have been an acceptance as the offer in Emas Kiara's letter dated 17 June 2011 had been superseded by its letter dated 4 October 2011. Interestingly, the High Court further stated that the terms of the IM constituted a 'process contract' which governed the manner in which sale and purchase of the Properties would be carried out. Emas Kiara appealed to the Court of Appeal.

THE JUDGMENT OF THE COURT OF APPEAL

According to the Court of Appeal, the central issue to be decided was whether there was a concluded contract between Emas Kiara and the R&M for the sale of the Properties upon which Emas Kiara could launch its claim for specific performance. The Court held that it must apply an objective test when scrutinising all the evidence to determine whether there was *consensus ad idem*, i.e. a 'meeting of the minds', between the parties.

The Court of Appeal held that the High Court had failed to properly apply the objective test to the material facts of the case as it had considered each of the letters, meetings and other correspondence between the parties in isolation, without regard to the context in which the documents were made and exchanged. The Court of Appeal stated that until there was an express rejection or necessary inference of rejection of Emas

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Kiara's offer, it was not open to the High Court to construe the letters as superseding each other, one overtaking the other.

The Information Memorandum and the 'Process Contract'

The Court first examined the IM, holding that even though the IM was not itself a contractual document, it contained material information on, among others, the intention of the R&M; the Properties; how the expressions of interest, offers and negotiations would be conducted and the related timelines and formats to be used; the powers and rights of the R&M and of the interested parties; and the conditions of sale. The Court stated that the IM formed the basis of a 'process contract'.

The concept of a 'process contract' was dealt with briefly by the Court of Appeal. Mary Lim JCA stated that the principle evolved to protect the integrity of the bidding process in tender exercises. The learned Court of Appeal Judge explained that a 'process contract' concerns the way the tender exercise is to be carried out and that there is a duty of good faith and an implied obligation on those who invite tenders to only accept conforming tenders.

The Court made the following key observations on the clauses in the IM:

(i) Clause 1.6 expressly warned that the R&M reserved the right not to accept the highest or any of the offers submitted;
(ii) Clause 1.7 stated that the acceptance and timing of acceptance of any offer would be at the R&M's sole discretion;
(iii) Clause 7.0 spelt out 'a considerable number' of terms and conditions which were required to be incorporated in the SPA;
(iv) Clause 8 stipulated that anyone interested in participating in the sale is required to make an offer together with the payment of an earnest deposit in the form of a cashier's order/bankers draft of 5% of the offer price, and the offer must be in the offer form prescribed in the IM; and
(v) Clause 8.4 indicated that a formal SPA incorporating the terms and conditions of sale stipulated in the IM must be drawn up.

Was there a Concluded Contract?

Next, the Court examined the relevant correspondence between the parties to determine if there had been a concluded contract. The initial offer of RM60.08 million was made by Emas Kiara by way of its letter dated 3 June 2011. The R&M, by way of letters dated 8 June 2011 and 13 June 2011, requested that Emas Kiara increase its offer price and cautioned that any additional terms and conditions proposed that contravened those in the IM may disqualify Emas Kiara from participating in the sale.

The Court devoted particular attention to the correspondence referred to in the R&M's letter dated 17 October 2011, i.e. Emas Kiara's letter dated 17 June 2011 and an email from the R&M dated 30 September 2011. The letter dated 17 June 2011 from Emas Kiara set out its revised offer of RM83.8 million and enclosed the additional earnest deposit, together with the completed offer form in the format prepared by the R&M. The email dated 30 September 2011 from the R&M to Emas Kiara referred to the meeting held on 28 September 2011 and attached the 13 additional terms, stating that Emas Kiara should reply in writing by 3 October 2011 on whether they were agreeable to offer similar terms.

The Court held that Emas Kiara's letter of offer dated 17 June 2011, completed in accordance with the requirements in the IM, formed the underlying bedrock of any contract between the parties. Further, the Court observed that from the correspondence, Emas Kiara's offer was never rejected or disqualified - this indicated that the offer did not contravene the essential terms and conditions of the IM. Thus, until retracted or rejected, the offer of 17 June 2011 made by Emas Kiara remained valid and available for acceptance by the R&M. It was held that each of the letters related to each other and must be read with Emas Kiara's said letter of offer and that the subsequent letters dated 3 October 2011 and 4 October 2011 were merely correspondence clarifying the offer.

Thus, the Court answered the central question in the affirmative. There was a concluded contract as the 'three Cs' were present: certainty of subject matter and contracting parties, consideration, and *consensus ad idem*.

The Issue of Consensus Ad Idem

Focusing on the point of *consensus ad idem*, Mary Lim JCA further analysed the terms used by the R&M in its letter dated 17 October 2011. The learned Court of Appeal Judge stated that the use of the words "accept" and "agreeable" evinced an intention on the part of the R&M to accept Emas Kiara's offer of 17 June 2011. Moreover, the R&M had made it clear in its letter dated 17 October 2011 that the letter was written after completing its evaluation of tender bids, in particular, Emas Kiara's offer.

The Court agreed with Emas Kiara's argument that for the terms of the letter dated 17 October 2011 to constitute a counter-offer, there must be a time frame for Emas Kiara to respond. This was in view of the circumstances and the existence of other bids. Moreover, the R&M had consistently stipulated time periods in its previous letters, indicating the finality of its acceptance in its letter dated 17 October 2011.

The Court held that the 13 additional terms that the R&M sought to insert were not salient terms as they were not stipulated in the

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KNOW YOUR RIGHTS AS A RATEPAYER

Vijay Raj explains the law pertaining to rates imposed by local authoritiess

INTRODUCTION

Rates are a type of tax imposed by local authorities in Malaysia. It is commonly referred to by its Malay name, *cukai taksiran*. In Peninsular Malaysia, the power to impose rates is found in Part XV of the Local Government Act 1976 ("Act"), specifically Section 127.

Section 2 of the Act defines a "local authority" to be, *inter alia*, any City Council, Municipal Council or District Council, as the case may be. Section 39(a) of the Act recognises rates to be one of the sources of revenue for local authorities, and as can be imagined, local authorities would need adequate funds to discharge their wide-ranging duties and responsibilities such as carrying out sanitary services, managing markets, maintaining lavatories, preventing the spread of diseases and providing suitable burial grounds and crematoria.

Generally speaking, the amount of rates payable by a person to a local authority would depend on the value of the lands and buildings, if any, held by the person within the administrative area of the local authority concerned. The term used in the Act to refer to a rateable land and its buildings is "*holding*". Every land held under a separate document of title and all buildings thereon is regarded as a separate holding. In the case of subdivided buildings, the holding comprises every parcel and the common property. The Federal Court had recently, that is on 26 April 2018, held that a local authority does not have the power to impose rates upon a mere occupier of lands who did not own or hold the lands under a document of title. The occupation in the said case arose by virtue of the occupier's underground pipelines that crossed, *inter alia*, State land or lands whose owners could not be traced.

Certain holdings or parts thereof may be exempted from the payment of rates or may be charged rates that are reduced, as may be the case in respect of holdings that are used for religious worship, public schools, charitable or recreational purposes and not for pecuniary profit: Sections 134-135 of the Act.

BASIS OF ASSESSING RATES

Section 130 of the Act provides the basis for computing rates. Rates may be assessed either upon the "annual value" or "improved value" of a holding. Broadly speaking, Section 2 of the Act defines "annual value" to be the estimated gross annual rent at which the holding might reasonably be expected to let from year to year, with the landlord paying the expenses of repair, insurance, maintenance or upkeep and all public rates and taxes. On the other hand, "improved value" refers to the market value of the holding in question. In *Majlis Perbandaran Seberang Perai v Tenaga Nasional Berhad* [2005] 1 MLJ 1, the Federal Court held that power generation units within a power station, including the generating plant and machinery, should not be taken into account when determining the annual value of the relevant holding. It would therefore be important to understand the nature of the holding that is subject to rates, so as to exclude from its value items that should not be taken into account under the law. Although this task may seem straightforward, it can be demanding for holdings such as large factories and production or processing plants.

Section 130(2) of the Act provides that if rates are assessed upon the annual value of holdings, such rates shall not exceed 35% of the annual value of those holdings. In contrast, if rates are assessed upon the improved value of holdings, Section 130(3) of the Act provides that such rates shall not exceed 5% of the said value. The rates imposed by a local authority may only endure for a period not exceeding twelve months and it is required to be paid half-yearly in advance: Section 133 of the Act.

THE VALUATION LIST

Before a local authority is able to impose rates, it must first prepare a list, known under the Act as a "*Valuation List*", of all holdings within its administrative area that are not exempted from the payment of rates. The Valuation List must identify each and every such holding, its owner and (if known) its occupier, as well as its annual value or improved value: Section 137 of the Act. Section 137(3) requires local authorities to prepare a new Valuation List once every five years or within such extended period as the State Authority may determine. However, it is often the case that the 5-year time period is not followed. At times, the same Valuation List can continue to apply for ten to twenty years or longer. As the preparation of a new Valuation List would entail considerable time, effort and cost, it is perhaps not surprising for Valuation Lists to continue to apply for far longer than the envisaged 5-year period. Instead, local authorities tend to prefer to amend existing Valuation Lists as and when circumstances justify. In this regard, Section 137(2) of the Act specifically provides that a Valuation List together with the amendments to it shall remain in force until superseded by a new Valuation List.

The power to amend a Valuation List is found in Section 144 of the Act and may be exercised if one of the grounds set out under subsection (1) of that provision is established. For example, a local authority may amend a Valuation List where by reason of a mistake, oversight or fraud, the name of any person or the particulars of any rateable holding is omitted from the Valuation List, or any rateable holding has been insufficiently valued. Amendments may also be justified if the value of a holding has increased by reason of any new building being erected, modified or altered after the preparation of the Valuation List in question.

As the power to amend a Valuation List is the more common method of keeping a Valuation List current, it would be important for ratepayers to understand their rights of objection in order to avoid being subject to excessive rates as a result of such amendments, particularly where the value of a rateable holding is large as in the case of petroleum refineries, hydroelectric dams, factories, plants, gas pipelines, etc. Additionally, a successful challenge to a proposed unwarranted or excessive increase in the annual value or improved value of a large holding will result in savings on an annual basis, rather than a saving which is one-off.

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The scope for savings should not be underestimated because the holding in question may often be such that its market value or annual value cannot be ascertained through sale or rental transactions involving comparable holdings. For example, the market value of a petroleum refinery is likely to be difficult if not impossible to ascertain through an attempt to shortlist sales of petroleum refineries that are comparable in terms of size and capacity. The paucity of such comparable transactions may be due to there being no other comparable refinery existing within Malaysia, or because of the lack of purchasers interested in refineries. In such circumstances, other approaches to or methods of valuation have to be applied and it is in these instances that scope for large differences of opinion regarding values may exist. Under the Malaysian Valuation Standards, there are three primary approaches to valuation that are recognised, namely the Comparison Approach (discussed above), the Income Approach and the Cost Approach. Additionally, under the Income Approach, there are subsets known as the Investment Method, the Residual Method, the Profits Method and the Discounted Cash Flow Method.

An example of an approach to valuation which can potentially assist when there are insufficient comparable transactions (under the Comparison Approach) is the Cost Approach mentioned above. The Cost Approach involves the process of ascertaining the value of a property by reference to the cost of constructing a similar property. Even so, the exercise may not be straightforward. For example, a factory may have been built many years before the date of valuation, hence there may be no similar factories built since then for the purpose of gauging the current cost of constructing a similar factory. This issue not only raises matters of valuation, but is intertwined with questions of law. As courts need to be satisfied that valuations are correct and consistent with principles of law, it would be important for valuation reports to be well-reasoned, substantiated and presented in a manner that can be understood without undue effort. Experts who prepare valuation reports should also be prepared to answer questions regarding their report under cross-examination in court.

PROCEDURE FOR AMENDING A VALUATION LIST

The procedure for amending a Valuation List can be found in Sections 144(2)-144(6) of the Act. Before a local authority can exercise its power to amend a Valuation List, it has to first give 30 days' notice of the amendment to all persons interested in it. Any person aggrieved by the proposed amendment on any of the grounds set out in Section 142(1) of the Act may make an objection in writing to the local authority not less than 10 days before the amendment is made. The usual grounds of objection are that the holding in question is valued beyond its rateable value and that the holding sought to be charged with rates is not rateable. The new rate resulting from an amendment to a Valuation List becomes payable from the commencement of the next half year or such earlier date as the local authority may determine: Section 144(6) of the Act.

In two recent cases that were argued at the High Court, the local authorities that were involved attempted to retrospectively charge the new rates resulting from their amendments to the applicable Valuations Lists through reliance placed on, *inter alia*, the said provision (Section 144(6) of the Act) and a Court of Appeal decision which they contended permitted rates to be charged retrospectively. However, the High Court decided in favour of the ratepayer, holding that local authorities do not have the power to charge rates retrospectively.

APPEALS

Any person who is dissatisfied with the decision made by a local authority in respect of his objection may appeal to the High Court. However, it is important to bear in mind that the time limited for an appeal to the High Court is only 14 days. It is therefore imperative for the ratepayer to be vigilant of the local authority's decision regarding his objections and to act promptly against it if the decision is unacceptable. Notwithstanding the right of appeal to the High Court, the ratepayer must nevertheless pay the local authority the amount of rate appealed against prior to the commencement of the appeal. The appeal procedure is set out in Section 145 of the Act. In the event the High Court decides in favour of the ratepayer, the excess amount paid to the local authority may either be set off against future rates due to the local authority or refunded to the ratepayer.

CONSEQUENCES OF FAILURE TO PAY RATES

The local authority may, in order to recover the arrears of rates, attach and sell by public auction the moveable properties belonging to the owner or occupier liable to pay the arrears, and in certain circumstances, the local authority may even commence legal proceedings to attach and sell the holding or holdings in respect of which the arrear has accrued. The provisions of the Act relating to the recovery of rates in arrears are Sections 146-156.

CONCLUSION

There appears to be a lack of awareness among ratepayers about their rights and this is probably due to the amount of rates payable in most cases being low. However, as discussed earlier, the potential savings annually from a successful challenge to rates that appear excessive can be large in holdings that are high in value and it is imperative to be alert so that an appropriate objection can be raised within the relatively short time frames prescribed under the Act.

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TOO LITTLE, TOO LATE?

Ooi Chih-wen discusses the proposed new section 6A of the Limitation Act 1953

On 4 April 2018, the Limitation (Amendment) Act 2018 ("Act") was passed by the Malaysian Parliament. The Act was subsequently granted Royal Assent by the Yang di-Pertuan Agong and gazetted on 27 April 2018 and 4 May 2018 respectively, and will come into force on a date to be appointed by the Minister.

The objectives of the Act are to:

(1) postpone the commencement of the limitation period when a person is under a disability at the time the cause of action accrued; and

(2) extend the limitation period in cases of negligence not involving personal injury and the damage was not discoverable prior to the expiry of the statutory limitation period.

This article focuses on section 6A of the Act which addresses the latter.

As Sarawak and Sabah have their own legislation on limitation, the legislatures of those States will have to consider whether there is a need to amend their laws to be consistent with section 6A.

"In tortious claims, the limitation period starts when a plaintiff suffers damage ... regardless of when the plaintiff discovers such damage"

THE LIMITATIONS OF THE LIMITATION ACT 1953

Section 6(1)(a) of the Limitation Act 1953 ("Limitation Act") provides that any action must be brought within six years from when a cause of action accrued. In tortious claims, the limitation period starts when a plaintiff suffers damage. The 6-year limitation period applies regardless of when the plaintiff discovers such damage. This position has been affirmed by the Court of Appeal in *AmBank (M) Bhd v Abdul Aziz Hassan & Ors* [2010] 3 MLJ 784. When presented with the argument of postponing or extending the statutory limitation period for negligence claims based on the discovery of the damage, the Court of Appeal held that section 6(1)(a) of the Limitation Act should be interpreted in a literal manner. Further, the Court of Appeal ruled that the notion of postponing or extending limitation to include the element of discovery is not provided for in the Limitation Act or in any other Malaysian law.

The approach in *Abdul Aziz* may seem unfair, particularly in cases of latent defects. In relation to construction works, latent defects are defects that are not immediately apparent upon inspection; sometimes such defects are only discovered after six years. This is amply illustrated in the English case of *Pirelli General Cable Works Ltd v Oscar Faber & Partners (A Firm)* [1983] 2 AC 1, wherein the defendant engineers designed a chimney for the plaintiff's factory, the construction of which was completed in July 1969. Although cracks started appearing on the top of the chimney by April 1970, the plaintiff only became aware of the defect in November 1977 which was at that point two years after the 6-year limitation period. The House of Lords dismissed the plaintiff's claim for damages, holding that the claim was time barred. The injustice caused in *Pirelli* led to the passing of the Latent Damage Act 1986 in the United Kingdom, a statute recognising latent defects and allowing for the extension of the limitation period in such cases.

The Malaysian Courts have since come to acknowledge the deficiency of *Abdul Aziz*. Harmindar Singh Dhaliwal J (as he then was) commented in *Sharikat Ying Mui Sdn Bhd v Hoh Kiang Po* [2015] MLJU 621, that:

"Despite the evident injustice that would arise in cases of latent damage, our law in the form of *s. 29* of the *Limitation Act 1953, only recognizes postponement of the limitation period in cases of fraud, concealment or mistake. There are of course other provisions but none of which concern situations where a plaintiff may not have known or with reasonable diligence had discovered that he has a cause of action. This deficiency is in my view a matter for Parliament and the time is perhaps overdue for a review of the limitation laws in keeping with the developments in other common law jurisdictions."*

"The approach in Abdul Aziz may seem unfair, particularly in cases of latent defects"

SAVED BY THE ACT

Perhaps it is long overdue, but the Act arguably redresses the perceived injustice of *Abdul Aziz* by the introduction of section 6A.

It must first be noted that the 6-year limitation period remains the starting point. Section 6A only applies to actions brought **after** the expiration of the said six years, and where the claim is for damages for negligence not involving personal injury. Further, such action must be brought within three years from the "*starting date*" and is subject to a longstop of 15 years. In this respect, the Act is similar to the corresponding legislation in the United Kingdom and Singapore.

The expression "*starting date*", as defined in section 6A(4)(a), means "*the earliest date on which the plaintiff or any person in whom the cause of action was vested before him first had both the knowledge required ... and a right to bring such action.*"

Accordingly, the commencement of the limitation period hinges

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on when a person first had knowledge. Section 6A(4)(b) provides that a person is deemed to have the requisite knowledge when he knows of:

(1) the material facts about the damage for which damages are claimed; and

(2) other facts relevant to the action, including: (i) that the damage is attributable in whole or in part to the alleged negligence; (ii) the identity of the defendant; and (iii) where it is alleged that the act or omission was by a third party, the identity of the third party and the additional facts supporting the action against the defendant.

A plaintiff is deemed to have knowledge of facts which he, or any person in whom the cause of action was vested before him, might be reasonably expected to have acquired from facts observable or ascertainable by him, or with the help of appropriate expert advice which is reasonable for him to seek.

MORE OR LESS THAN IT SEEMS?

Read on its own, section 6A of the Act appears to be wide enough to cover all instances of negligence. However, is that necessarily the case?

The explanatory statement in the Bill initially states that the provision is intended "*to enable a person to take action founded in negligence not involving personal injuries by allowing an extended limitation period of three years from the date of knowledge of the person having the cause of action.*" However, it then goes on to explain that the provision "*considers negligence cases involving latent damage in construction cases, where the damage was not discoverable through general inspection …*" (*emphasis added*).

It appears from the above that Parliament intends for section 6A to apply only to latent damage in construction cases. There are two factors in support of this contention. Firstly, according to the Minister's statement in the Hansard of 4 April 2018, section 6A "*would permit a plaintiff to take action based on negligence involving latent damage in construction cases by extending the limitation period by three years …*" Secondly, all four illustrations provided in section 6A to describe the operation of certain sub-sections are premised on construction cases.

However, the English courts have not restricted the application of section 14A of the UK's Limitation Act 1980 (the equivalent of section 6A) to construction cases. In *Haward and others v Fawcetts (a firm)* [2006] 3 All ER 497, the House of Lords applied section 14A to a claim against an accounting firm for negligent investment advice but found that the plaintiff had discovered the damage before the statutory limitation period expired.

Similarly, in *Blakemores LDP (in administration) v Scott and others* [2015] EWCA Civ 999, the English Court of Appeal applied section 14A in a professional negligence claim against solicitors.

It remains to be seen whether the Malaysian courts will apply section 6A to negligence cases that do not involve latent defects in construction cases.

BEATEN TO THE PUNCH?

Prior to the introduction of the Act, the Court of Appeal in *AmBank (M) Bhd v Kamariyah bt Hamdan & Anor* [2013] 5 MLJ 448 attempted to remedy the injustice caused by the strict interpretation of section 6(1)(a) of the Limitation Act in *Abdul Aziz* by introducing the "*discoverability rule*". Jeffrey Tan JCA (as he then was) considered the Canadian case of *Central Trust Co v Rafuse* [1986] 2 SCR 147 and observed:

"*… the Supreme Court of Canada pronounced 'that the judgment of the majority in Kamloops laid down a general rule that a cause of action arises for purposes of a limitation period when the material facts on which it is based have been discovered or ought to have been discovered by the plaintiff by the exercise of reasonable diligence … There is no principled reason, in my opinion, for distinguishing in this regard between an action for injury to property and an action for the recovery of purely financial loss caused by professional negligence …' … Likewise, in the instant case, the appellant … could not have discovered whatever negligence on the part of the respondent by the exercise of any reasonable diligence …*"

His Lordship ruled that limitation should run from the date damage was discovered or ought to have been discovered. When invited to consider *Abdul Aziz*, the learned judge held, "*… we must respectfully decline to defer to the ruling that time would run regardless of whether damage was or could be discovered.*"

An example of the "*discoverability rule*" being considered in a case involving latent defects would be *The Ara Joint Management Body v Mammoth Land & Development Sdn Bhd* [2017] MLJU 631. The case involved latent defects discovered in the buildings and compound of The Ara Bangsar development. Construction was completed in 2007 but the alleged defects were only discovered sometime in 2014. The plaintiff, the joint management body of the development, brought an action on behalf of the residents against the developer for latent defects in October 2016, some 9 years after the construction had been completed. The developer, relying on *Abdul Aziz*, applied to strike out the case on grounds that the claim was time-barred. The plaintiff, on the other hand, argued that the "*discoverability rule*" should be adopted. Lee Swee Seng J, in dismissing the

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THE NEW INTELLECTUAL PROPERTY KID

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Malaysia, namely the Music Authors' Copyright Protection Bhd (MACP), Public Performance Malaysia Sdn Bhd (PPM), Recording Performers Malaysia Berhad (RPM) and Performers Rights and Interest Society of Malaysia Berhad (PRISM). All four bodies worked in silos and that often resulted in confusion as to who to contact. In an attempt to streamline the licensing body, the Music Rights Malaysia Bhd ("MRM") was launched as the sole licensing body for collective music royalty collection activities in Malaysia. However, MRM still does not publish any information to help identify the copyright owner. MRM also does not cover copyright works other than music.

The Blockchain-based solution

The proposed solution is to implement a Blockchain-based ledger where copyright owners can log in details of their works and other relevant details such as the composer, producer and publisher, to enhance the efficiency of royalty and rights management. Some Blockchain start-ups such as one known as *Binded* have already explored the possibility of protecting each copyright record on the Blockchain with a unique fingerprint, or in technical terms, a "cryptographic hash", which will contain the details of the copyright owner. All these records will be kept and secured on the Blockchain.

This idea of the unique fingerprint or cryptographic hash can also be expanded to help creators prove that they created the content. As an illustration, when the creator uploads a work to the Blockchain secured database, it will be time stamped and be linked to the creator's private key on the Blockchain. Therefore, it can be used as proof of the identity of the content owner using the private key which is unique to each individual and also proof of the time stamp. Just recently, the Hangzhou Internet Court, in an online copyright infringement suit accepted the authenticity of screenshots that were preserved by a third-party platform which uses Blockchain technology. The Judge in that case went into an in-depth analysis of the Blockchain technology and found that it was reliable and effective for evidence preservation.

CONCLUSION

Blockchain continues to hold the attention of the world, and it appears that the possibilities are endless with it. Whether the Blockchain ultimately lives up to its expectation or not, it is clear that the Blockchain technology is a catalyst that can revolutionise the protection of intellectual property rights. It would be an area of great interest to businesses keen to improve protection of their intellectual property rights.

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THE INEQUALITY OF DUAL CLASS SHARES

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and auditors, and winding-up of the company.

Although the HKEX listing rules do not expressly permit companies to have more than two classes of shares, it appears that multi-class share structures may be permitted on a case-by-case basis.

SGX allows dual class share listing for companies with a minimum market capitalisation of SGD300 million. The enhanced voting rights are capped at 10 votes per share. Similar to the HKEX, SGX also safeguards the interests of investors by ensuring that each share (regardless of class) has 1 vote for specified matters, such as appointment and removal of directors and auditors, variation of rights, reverse takeovers and winding-up or delisting of the company. Additionally, there is a requirement for the multi-vote shares to have sunset clauses, i.e. that they will automatically convert into ordinary shares in circumstances which the company must stipulate at the time of its initial public offering.

WHAT ABOUT MALAYSIA?

Bursa Malaysia has confirmed that there are no current plans to facilitate the listing of dual class shares (*The Star*, 12 August 2017).

If Bursa Malaysia intends to follow suit in allowing for the listing of dual class shares, numerous amendments would need to be made to its listing requirements. It is likely that the Companies Act 2016 would need to be amended as Section 71(1)(c) stipulates that each share shall have one vote on a poll.

Further, Bursa Malaysia would have to consider whether to introduce measures to protect the interests of the public investors while ensuring that its regulatory regime remains attractive and competitive as compared to those of other stock exchanges.

CONCLUSION

Dual class share structures seem to be the way forward to attract more listings, notwithstanding the numerous arguments against it. It will be up to the stock exchanges to provide a balanced regulatory regime which is enticing enough for companies to list their dual class share structure on, and at the same time safeguard the interests of the public who intend to invest in the same.

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A PERSONAL WRONG OR A CORPORATE WRONG?

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CONCLUSION

The provisions in Malaysia and Singapore on oppression actions and statutory derivative actions are very similar. The decision in *Sakae Holdings* will undoubtedly be of use to Malaysian courts and legal practitioners alike. The analytical framework will assist in providing a checklist for determining the mode in which a complaint relating to the conduct of the controllers of a company ought to be pursued, that is, whether by way of a statutory derivative action or an oppression action.

Malaysia has considered this distinction between an oppression action and a derivative action. In the case of *Koh Jui Hiong @ Koa Jui Heong & Ors v Ki Tak Sang @ Kee Tak Sang and another appeal* [2014] 3 MLJ 10, the Federal Court warned of the limits of an oppression action. The reliefs sought in the oppression action must be with a view to remedying the matters complained of. The derivative action elements should be an incident of the matters complained of. Hence, it would be an abuse of the oppression action where the nature of the complaint was misconduct rather than mismanagement.

More recently, the Federal Court in *Rinota Construction Sdn Bhd v Mascon Rinota Sdn Bhd & Ors* [2018] 1 MLJ 141 held that the oppression action was correctly initiated. It was not necessary for the shareholder to bring a derivative action. The Federal Court highlighted that the case bore all the hallmarks of an oppression action and none of the hallmarks of a derivative action. This included the fact that in a derivative action, the relief is sought on behalf of a company for the benefit of that company e.g. to return to the company funds misappropriated from it. In that case, the shareholder was seeking remedies for assets misappropriated by the majority shareholders. Hence, initiating the oppression action was appropriate.

Finally, it is interesting that the Singapore Court of Appeal departed from the Federal Court decision of *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ors and another appeal* [2013] 2 MLJ 297. The Federal Court held that breaches of a shareholders' agreement could not be a basis for an oppression action as they did not relate to the affairs of the company. The Singapore Court of Appeal disagreed. There are many situations where a shareholders' agreement would in fact specifically concern the affairs of the company. In this case, the JVA did spell out the business of the Company and the proceedings of the directors' meetings. Further, the Singapore Court of Appeal reiterated that when determining commercial unfairness for oppression, it is to be assessed against the understanding between the shareholders. This understanding would include both informal understandings as well as formal agreements. A shareholders' agreement is a clear example of the understanding on which commercial unfairness is to be assessed.

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PRIVACY PIRACY

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Currently, there is no statutory obligation to report or notify data breach incidents to the Commissioner under the PDPA. However, in early August 2018, the Department of Personal Data Protection issued a public consultation paper on the implementation of mandatory data breach notification under the PDPA. The consultation paper indicates that the Department intends to do so by imposing conditions to certificates of registration by the end of 2018. It must be noted that not all data users are required to obtain certificates of registration from the Commissioner; it is uncertain whether the mandatory data breach notification obligation will affect all data users or only data users subject to the registration requirements.

The consultation paper sets out, among others, the requirement to notify the Commissioner within 72 hours of becoming aware of the data breach incident and to provide details about the data at risk, actions that have been taken or will be taken to mitigate the risks to the data, details of notifications to affected individuals and details of the organisation's training programs on data protection.

Organisations must also consider whether they have contractual obligations to notify data breach incidents. Even if there are no contractual obligations to notify, organisations should consider whether there is a duty of care under the law of tort to notify potential victims and advise them of measures they could take to mitigate risks.

SEQUITUR

James Altucher was quoted as saying "honesty is the fastest way to prevent a mistake from turning into a failure".

In the event of data breach incidents, organisations should avoid hiding the situation or delaying the reporting of the same. An omission or failure to act may be considered, in the best-case scenario, negligence but in the worst case, an aggravating factor as the organisation had been 'wilfully blind', both possibly leading to personal liability on the part of the directors or officers of the organisation.

In this Information Age, it is simply a matter of time before information of the data breach incident becomes available. Delays or omissions will likely result in additional costs and reputational damage.

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Endnotes:

[1] https://www.ibm.com/security/data-breach

[2] https://www.sans.org/reading-room/whitepapers/casestudies/case-study-critical-controls-prevented-target-breach-35412

CAPE TOWN CONVENTION AND AIRCRAFT PROTOCOL

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In the event that the creditor wishes to procure the de-registration of the aircraft and procure the export and physical transfer of the aircraft object, the registry authority and the administrative authorities in a Contracting State shall expeditiously co-operate with and assist the creditor in the exercise of such remedies within five working days after the date on which the creditor notifies such authorities that it is entitled to procure those remedies in accordance with the Convention.

ADVANTAGES TO AIRCRAFT FINANCIERS/LESSORS

The merits of the Convention and the Aircraft Protocol are as follows:

(1) they bring speed, certainty and cost savings to the process of repossession, de-registration and export of aircraft objects on a default by, or an insolvency of, the debtor, particularly where the aircraft object is in a country whose legal system may otherwise not be creditor-friendly.

(2) they protect the creditors' security interests in aircraft objects by providing for the registration of international interests in such objects through a single web-based International Registry that is accessible 24 hours a day, seven days a week; and

(3) they subject international interests to a simple priority regime whose main principles are that registered interests take priority over unregistered interests and earlier registrations prevail over later registrations and provide flexibility for parties to vary the priority as between themselves by registering subordination arrangements at the International Registry.

It is to be noted that there is at least one known case, namely *GAFS-P Labuan Limited v Eaglexpress Air Charter Sdn Bhd* (KLHC OS No. WA-24NCC-240-06/2016 (unreported)) where the Malaysian Courts directed the lessee to redeliver possession of an Airbus 330-200 to the lessor who held an international interest in the aircraft object.

In light of the above, aircraft financiers and lessors of aircraft objects should consider subjecting their interests in aircraft objects to the regime established under the Convention and the Aircraft Protocol.

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SALE BY TENDER: WHEN DOES A CONTRACT ARISE?

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letter dated 17 October 2011; the salient terms were the terms already found in the IM. Further, the four conditions set out in the letter dated 17 October 2011 were consistent with those found in the IM. Thus, there had already been agreement on the three primary matters: (i) the terms and conditions as found in the IM; (ii) the signing of a formal SPA and the timing of the signing; and (iii) the agreement to pay the earnest deposit. It was held that such agreement was adequate for the formation of a contract.

Based on the above points, the Court held that an agreement had come into place and the parties were merely working out the finer details for inclusion in the SPA. The Court added that the fact that the parties subsequently failed to agree on these details did not mean that no agreement had been reached.

However, as the R&M had subsequently entered into eight SPAs with the Interveners in relation to the Properties in settlement of a civil suit filed by the Interveners, the Court held that the appropriate remedy was an award of damages for the loss of use of monies paid to the R&M by Emas Kiara. The Court further dismissed the R&M's counterclaim for compensation for the removal of the caveat as there was no loss proved.

COMMENTS

Emas Kiara v Monteiro provides valuable lessons for receivers and managers and liquidators in the sale of assets by way of tender. The Court of Appeal identified the building blocks of a contract in such a situation, namely (i) the information memorandum which sets out the salient terms to be incorporated in the contract; (ii) the offer made in accordance with the terms of the information memorandum; and (iii) the correspondence between the parties as to the acceptance or rejection of the offer made.

Receivers and managers and liquidators must exercise care with the use of terms in responding to an offer, especially if they do not intend to accept an offer or wish to make their acceptance conditional on terms which have not yet been agreed between the parties. The Court will look at the entire course of negotiations in considering whether there has been a concluded contract.

This case is currently on appeal in the Federal Court. It remains to be seen whether the Federal Court will adopt the reasoning and approach of the Court of Appeal.

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TOO LITTLE, TOO LATE?

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developer's striking-out application, opined that the issue as to whether the developer would be estopped from raising the defence of limitation would be fact-centric and was a matter to be determined at trial.

The principle enunciated in *Kamariyah* has been applied in several other cases, which include negligence against a financial institution and its officer (*CIMB Bank Bhd v Lee Kim Kee & Ors and another appeal* [2018] 3 MLJ 72 (CA)), negligence of a solicitors' firm (*Export-Import Bank of Malaysia Bhd v Hisham Sobri & Kadir* [2018] 6 CLJ 82 (HC) where the court applied the tests in both *Abdul Aziz* and *Kamariyah*), negligence of a civil and structural engineer (*CB Land Sdn Bhd v Perunding Hashim & Neh Sdn Bhd* [2016] 6 MLJ 320 (CA)) and the tort of conversion (*Peninsular Concord Sdn Bhd v Syarikat Bekalan Air Selangor* [2015] 3 CLJ 682 (HC)).

CONCLUSION

Given the introduction of section 6A, one must question whether *Kamariyah* and its wide-ranging effect should remain good law or should be overruled.

It should be noted that *Central Trust Co v Rafuse* is no longer good authority in Canada. The case was decided by the Supreme Court of Canada in 1986 and remained good law in the province of Nova Scotia until 2014 when the Limitation of Actions Act of Nova Scotia was passed. Section 8 of the said Act provides that any action, negligence or otherwise may not be brought two years after the date the action was discovered and fifteen years from the date the act or omission on which the action is based on occurred.

Upon section 6A coming into effect, there will be three tests to determine limitation for negligence not amounting to personal injury, namely *Abdul Aziz*, *Kamariyah* and section 6A. Will the new statutory provision override both *Abdul Aziz* and *Kamariyah* and apply to all claims for damages for negligence not involving personal injury, or will it only apply to construction cases involving latent damage and thereby subsist alongside section 6(1)(a) of the Act? If it is the latter, it remains to be seen whether *Abdul Aziz* or *Kamariyah* will ultimately prevail in the interpretation of section 6(1)(a).

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PROJECT ID

On 22 September 2018, a team of our lawyers comprising Richard Khoo, Trishelea Sandosam, Ooi Chih-wen, Joyce Lim, Tan Wei Liang, Lam Rui Rong, Tiang Wen En and Rachel Chiah, conducted a workshop on Communication Skills for Form Two students of Sekolah Pendamaran Jaya in Klang. The workshop was part of "*Project ID: Impianku Destinasiku*", a career aspiration and leadership programme.

Presentations on verbal and non-verbal communications were followed by breakout sessions where the students created and presented stories and participated in mock interviews. The workshop was attended by 32 students who participated enthusiatically in the programme and showed great creativity in their presentations.

It was a meaningful way to spend a Saturday and our lawyers had a wonderful time getting to know the students.

LEGAL INSIGHTS

A SKRINE NEWSLETTER

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

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