

Legal Bulletin

A summary of developments in the law

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Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the April 2009 issue, please [click here](#).

Articles

Partial commencement of Securities and Futures (Amendment) Act 2009 on 20 April 2009

On 20 April 2009, a small part of the Securities and Futures (Amendment) Act 2009 (the “**SF(A) Act**”) came into force, amending the Securities and Futures Act (the “**SFA**”) to introduce the following changes.

Empowering MAS to prescribe/exclude products as/from “securities” or “futures contract”

With effect from 20 April 2009, the Monetary Authority of Singapore (the “**MAS**”) is empowered to:

- prescribe such other product or class of products as “securities” under the SFA; or
- exclude such other product/contract or class of products/contracts from the definition of “securities” or “futures contract” under the SFA,

(referred to as the “**MAS New Power**” in this article).

In exercise of the MAS New Power, the MAS has prescribed the following products as “securities” for the purposes of certain provisions in the SFA pursuant to the Securities and Futures (Prescribed Securities) Regulations 2009 that are effective from 20 April 2009:

- any debenture stock, bond, note and any other debt securities of a real estate investment trust (“**REIT**”) listed on the Singapore Exchange Securities Trading Limited (the “**SGX-ST**”) which is issued or proposed to be issued by a trustee on behalf of the REIT (the “**debentures of a listed REIT**”);
- any right, option or derivative in respect of any such debentures of a listed REIT;
- any right under a contract for differences or under any other contract the purpose or pretended purpose of which is to secure a profit or avoid a loss by reference to fluctuations in the value or price of any such debentures of a listed REIT, any group of such debentures of a listed REIT or any index of such debentures of a listed REIT.

Extending definition of “securities” for the purposes of Division 1, Part XIII of the SFA to interests in LPs or LLPs

The definition of “securities” for the purposes of Division 1, Part XIII of the SFA which provides for requirements on offers of shares and debentures was amended to also include “interests in a limited partnership or limited liability partnership formed in Singapore or elsewhere”.

Changes which are not in force

By way of background, the SF(A) Act was passed in Parliament on 19 January 2009 and will, apart from providing for the above changes, introduce a wide range of other major changes to the SFA. However, these other major changes (some of which are highlighted below) have yet to come into force:

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- introducing a continuing licensing regime for capital markets services (“CMS”) licence holders;
- introducing a new representative notification framework for representatives of CMS licence holders and exempt CMS licence holders;
- migrating the notification regime for substantial shareholders of a listed company under the Companies Act to the SFA;
- regulating the disclosure regime for interests of directors and CEOs of a listed company under the SFA;
- introducing a new concept of attributing liability for market misconduct offences committed by an employee to his employer;
- providing a new provision to make innocent third parties to a market misconduct offence disgorge the gains in which they have benefited from the offence.

Please [click here](#) for an article entitled “*Securities and Futures (Amendment) Bill 2009 and Financial Advisers (Amendment) Bill 2009 passed in Parliament on 19 January 2009*” featured in the Allen & Gledhill Financial Services Bulletin (January 2009) to read more about these other major changes.

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Singapore establishes legal framework for international interests in aircraft objects

The International Interests in Aircraft Equipment Act 2009 (the “Act”) will come into force with effect from 1 May 2009.

Once in force, the Act will implement the Convention on International Interests in Mobile Equipment (the “Convention”) and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment (the “Protocol”).

The Convention and the Protocol facilitate the creation and enforcement of security interests over aircraft and aircraft equipment in the Contracting States which now share a common legal framework in this regard. The aim of the Convention and the Protocol is to overcome the problem of obtaining secure and readily enforceable rights in aircraft and aircraft equipment as these are items of high value, yet are mobile and without any fixed location.

As a matter of background, the Act was first read in Parliament on 17 November 2008 and then passed on 19 January 2009. For more details, please [click here](#) to read an article entitled “*International Interests in Aircraft Equipment Bill 2009 passed in Parliament: Establishing a legal framework for international interests in aircraft objects*” that was featured in the Allen & Gledhill Legal Bulletin (January 2009) about the Act when it was passed in Parliament.

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Cases

Corporate & financial services

English Court of Appeal examines duties of directors nominated by shareholders in a joint venture company

Hawkes v Cuddy & Ors
[2009] EWCA Civ 291

The English Court of Appeal in *Hawkes v Cuddy & Ors* held that a director nominated by a shareholder in a joint venture company must act in the best interests of the joint venture company and must not let his duty to his nominator override his duty to the company unless there has been agreement between the shareholders of the joint venture company to that effect.

Neath Rugby Ltd (“**Neath**”) was a company with two issued shares, one held by the appellant, Geraint Hawkes (“**Hawkes**”), and the other by the respondent, Michael Cuddy (“**MC**”). MC’s share was in fact registered in the name of his wife, Mrs Cuddy. Neath had two directors, Hawkes and Mrs Cuddy who acted as a nominal director and received instructions from MC. Hawkes had day to day management and control of Neath.

Neath in turn was one of the two equal shareholders of Neath-Swansea Ospreys Limited (“**Osprey**”). The other shareholder of Osprey was Swansea Rugby Football Ltd (“**Swansea**”). Osprey had two directors, MC who was nominated by Neath and Blyth who was nominated by Swansea.

Neath and Osprey each owned a rugby team.

Hawkes claimed that MC had failed to safeguard Neath’s interests in the performance of his duties as the director of Osprey and brought the present action under section 459 of the UK Companies Act 1985 (subsequently section 994 of the UK Companies Act 2006) alleging that MC’s failure to do so had resulted in “the affairs of Neath being conducted in a manner that was unfairly prejudicial” to himself as a member of Neath.

Section 994 of the UK Companies Act 2006, which corresponds to section 216 of the Singapore Companies Act, allows a member of a company to petition for an order on the ground that the company’s “affairs” are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself). If the court is satisfied that such petition is well-founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.

The court at first instance, the English High Court, concluded that only the less serious allegations of unfair prejudice were established by Hawkes and granted relief pursuant to section 994 of the UK Companies Act 2006. Hawkes was not satisfied with the relief granted by the English High Court and appealed.

Hawkes was granted approval to appeal on the following issues:

- What duties did MC owe as a nominee director of Osprey to Neath (his appointor) and Osprey?

- What constituted the affairs of Neath (under section 994 of the UK Companies Act 2006) for the purposes of determining whether MC's conduct as a director of Osprey was to be regarded as the affairs of Neath?

Duties of MC as nominee director

It was common ground that MC, as a director of Osprey, was under a duty to act in the best interests of Osprey. The present appeal concerned the question whether the fact that MC was nominated by Neath to be a director of Osprey imposed additional duties on him which might affect his conduct of his office as a director of Osprey.

As a matter of general principles, the English Court of Appeal held that a director of a company who has been nominated to that office by a shareholder does not, of itself, impose any duty on the director owed to his nominator. The director may owe duties to his nominator if he is an employee or officer of the nominator, or by reason of a formal or informal agreement with his nominator, but such duties do not arise out of his nomination, but out of a separate agreement or office. Such duties cannot however, detract from his duty to the company of which he is a director when he is acting as such.

Agreeing with the Australian cases, the English Court of Appeal confirms that, an appointed director, without being in breach of his duties to the company, may however take the interests of his nominator into account, provided that his decisions as a director are in what he genuinely considers to be the best interests of the company.

In this case, the English Court of Appeal held that the duty owed by MC to Neath (his nominator) arose entirely by reason of an agreement between MC and Hawkes (acting on behalf of Neath) (the "**Hawkes and MC agreement**"). The court found that there was evidence that MC accepted that he was to "look after the Region and Neath's interests in the Region".

However, MC's duty, if any, to Neath (his nominator) could not override his duty owed to Osprey as a director of Osprey, unless it could be shown that the shareholders of Osprey had agreed that each of their nominee directors in Osprey had the right to pursue the interests of the respective shareholder in performing his duty as a director of Osprey without regard to the interests of Osprey.

On this point, relying on an English case, *Re Duomatic Ltd* [1967] 2 Ch 365, Hawkes' counsel submitted that MC and Blyth were primarily acting as representatives of the two joint venturers, Neath and Swansea, and as such could agree upon any course of action to be taken by Osprey, whether in its best interests or not. As representatives of the only two shareholders they had the right to take the company in any direction on which they could agree. In that context, MC had a duty to pursue Neath's interests without regard to the interests of Osprey. Insofar as he could obtain Blyth's agreement, there could be no question of his acting in breach of duty towards Osprey.

At root, this argument depended on establishing that MC and Blyth were appointed primarily to represent Neath and Swansea as shareholders rather than as directors and that each had general authority to act on behalf of his principal. In the case of MC, Hawkes' counsel submitted that the Hawkes and MC agreement had this effect. However, the English Court of Appeal disagreed and found that the Hawkes and MC agreement did not expressly cover this question. There was also no evidence that the board of Neath authorised MC to act as its agent for the purposes of negotiations with Swansea. The court also could not find any provisions of the shareholders' agreement between Neath and Swansea which supported the fact that Neath

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and Swansea could control the decisions of their nominee directors. So, the English Court of Appeal concluded that MC and Blyth were appointed to act as directors of Osprey without any general authority to act on behalf of Neath and Swansea respectively as shareholders when dealing with the affairs of Osprey.

In addition, as there was no evidence to suggest that Swansea, the other shareholder of Osprey, had agreed to any dilution of MC's fiduciary duties to Osprey as a director, the English Court of Appeal held that as a director of Osprey, MC was under a duty to act in the best interests of Osprey and his duty to Neath (his nominator) could not override his duty owed to Osprey as a director of Osprey.

What constituted "affairs" of Neath

In determining the issue of what constituted the "affairs" of Neath (under section 994 of the UK Companies Act 2006) for the purposes of determining whether MC's conduct as a director of Osprey was to be regarded as the affairs of Neath, the English Court of Appeal made a useful comment about what amounted to "affairs of a company". It was held that the "affairs" of a company should be liberally determined for the purposes of section 994 and should encompass not just the matters which actually come before its board for consideration but also matters which are capable of coming before the board for its consideration.

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English Court of Appeal holds directors who are controlling shareholders of companies may also be employees of company

Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & Anor [2009] EWCA Civ 280

In *Secretary of State for Business, Enterprise & Regulatory Reform v Neufeld & Anor*, the English Court of Appeal held that someone who is a shareholder and director of a company may also be an employee of the company under a contract of employment. Whether or not such a shareholder/director is an employee of the company is a question of fact for the court before which such issue arises.

In this case, two appeals were before the court and the only issue for the court's consideration was whether each of the respondents had been an "employee" of the respective failed companies. If they had, they enjoyed the UK statutory protection given to employees whose employer had become insolvent. The special feature of each case under appeal was that the respondent was the controlling shareholder and a director of the company. Hence, the issue was whether a controlling shareholder and director of a trading company could become an employee of that company under a contract of employment.

What is a contract of employment?

The Court of Appeal referred to relevant authorities and characterised a contract of employment as existing if the following three conditions are fulfilled:

- (a) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master.
- (b) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master.
- (c) The other provisions of the contract are consistent with its being a contract of service.

The court focused on the element of control and considered that it might be thought that the main conceptual barrier in the way of a "one man" company granting a valid employment contract to its "one man" would be that there could in practice be no relevant control of the putative employee so as to meet that particular condition of an employment contract.

Shareholder and director may also be employee

However, the Court of Appeal held that there is no reason in principle why someone who is a shareholder and director of a company cannot also be an employee of the company under a contract of employment. There is also no reason in principle why someone whose shareholding in the company gives him control of it - even total control - cannot be an employee. In short, a person whose economic interest in a company and its business means that he is in practice properly to be regarded as their "owner" can also be an employee of the company. It will, in particular, be no answer to his claim to be such an employee to argue that (a) the extent of his control of the company means that the control condition of a contract of employment cannot be satisfied, or (b) that the practical control he has over his own destiny, including that he cannot be dismissed from his employment except with his consent, has the effect in law that he cannot be an employee at all.

Approach in ascertaining the issue

The court held that whether or not such a shareholder/director is an employee of the company is a question of fact for the court or tribunal before which such issue arises. In any such case, two issues may arise. The first will be whether the putative contract is a genuine contract or a sham. The second will be whether, assuming it is a genuine contract, it amounts to a contract of employment (it might, for example, instead amount to a contract for services).

In cases involving an alleged sham, the court was of the view that there will almost invariably be what purports to be a formal written employment contract, or at least a board minute or a memorandum purporting to record or evidence the creation of such a contract. The task of the court will be to decide whether any such document amounts to a sham. Any such inquiry will usually require not just an investigation into the circumstances of the creation of the document but also into the parties' purported conduct under it, which will be likely to shed light on the genuineness or otherwise of the claimed contract. The fact that the putative employee has control over the company and the board, and so was instrumental in the creation of the very contract that he is asserting, will obviously be a relevant matter in the court's consideration of whether the contract is or is not a sham. It will usually be the feature that prompted the inquiry in the first place.

The court highlighted that an inquiry into what the parties have done under the purported contract may show a variety of things (i) that they did not act in accordance with the purported contract at all, which would support the conclusion that it was a sham, or (ii) that they did act in accordance with it,

which will support the opposite conclusion, or (iii) that although they acted in a way consistent with a genuine service contract arrangement, what they have done suggests the making of a variation of the terms of the original purported contract, or (iv) that there came a point when the parties ceased to conduct themselves in a way consistent with the purported contract or any variation of it, which may invite the conclusion that, although the contract was originally a genuine one, it has been impliedly discharged.

In a case in which no allegation of sham is raised, or where the claimant proves that no question of sham arises, the further question for the court will be whether the claimed contract amounts to a true contract of employment. Given that the critical question in cases such as those under appeal is whether the putative employee was an employee at the time of the company's insolvency, it will or may be necessary to inquire into what has been done under the claimed contract: there will or may therefore need to be the like inquiry as in cases in which an allegation of sham is made. In order for the employee to make good his case, it may well be insufficient merely to place reliance on a written contract made, say, five years earlier. The court will want to know that the claimed contract, perhaps as subsequently varied, was still in place at the time of the insolvency. In a case in which the alleged contract is not in writing, or is only in brief form, it is obvious that it will usually be necessary to inquire into how the parties have conducted themselves under it.

The court opined that in deciding whether a valid contract of employment was in existence, consideration will have to be given to the requisite conditions for the creation of such a contract and the court will want to be satisfied that the contract meets them. In some cases there will be a formal service agreement. Failing that, there may be a minute of a board meeting or a memorandum dealing with the matter. However, in many cases involving small companies, with their control being in the hands of perhaps just one or two director/shareholders, the handling of such matters may have been dealt with informally and it may be a difficult question as to whether or not the correct inference from the facts is that the putative employee was truly an employee. It will be relevant to consider how he has been paid. Has he been paid a salary, which points towards employment? Or merely by way of director's fees, which points away from it? In considering what the putative employee was actually *doing*, it will also be relevant to consider whether he was acting merely in his capacity as a director of the company, or as an employee.

With regard to the fact that the putative employee's shareholding in the company gave him control or even total control of the company, the court held that this factor control would not ordinarily be of any special relevance in deciding whether or not he has a valid employment contract. Nor will the fact that he had invested share capital in the company, or that he made loans to it or personally guaranteed its obligations, or that his personal investment in the company will stand to prosper in line with the company's prosperity, or that he has done any of the other things that the "owner" of a business will commonly do on its behalf. These considerations will ordinarily be irrelevant to whether or not a valid contract of employment had been created and so they could and should be ignored. They show an "owner" acting qua "owner", which is inevitable in such a company. However, they do not show that the "owner" cannot also be an employee.

On the facts of the present case, the court concluded that the respondents were each an employee of their respective companies.

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UK Privy Council on proper test for implication of term in an instrument

Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)
[2009] UKPC 11

In *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor (Belize)*, the UK Privy Council held that a company's articles of association, by necessary implication, should be read as providing that a director appointed by virtue of a specified shareholding ceased to hold office if there was no longer any holder of such a shareholding. The Privy Council's decision was based upon the scheme of the company's articles, and to a very limited extent, such background as was apparent from the memorandum of association. The Privy Council held that a term could not be implied on the basis of extrinsic facts which were known only to some of the people involved in the formation of the company.

The decision of the Privy Council is also instructive for laying down the test for ascertaining whether a term should be implied into an instrument. The Privy Council held that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It also considered that the various tests used by the courts in previous cases, such as the "business efficacy test" and the "officious bystander test", were merely alternative formulations of that question, and should not be treated as independent tests.

Facts of the case

Belize Telecommunications Ltd (the "**Company**") was formed to take over the undertaking of the Belize Telecommunications Authority. The purpose of the transfer was to enable the Government of Belize (the "**Government**") to sell all or part of its financial interest in the undertaking to private investors while retaining a degree of control. This purpose was reflected in the share structure and the rights conferred upon different classes of shareholders by the Company's articles of association (the "**articles**").

The authorised share capital comprised of one Special Rights Redeemable Preference Share (the "**special share**"), and ordinary share capital divided into two classes designated B and C. The special share was issued to the Government. The Company's articles gave the special shareholder power to require the Company to redeem and thereby extinguish the special share. The articles provided that there shall be eight directors. Two (designated B directors) were to be elected and may be removed by a majority of the B shareholders. Up to four (designated C directors) were to be elected and may be removed by a majority of the C shareholders. Up to two (designated Government Appointed Directors) were to be appointed and may be removed by the special shareholder.

It was contemplated that the Government, as special shareholder, would also retain a substantial economic interest through a holding of C ordinary shares. Additional powers were afforded to the special shareholder which provided that the holder of the special share shall, so long as it is the holder of C ordinary shares amounting to 37.5 per cent. or more of the issued share capital of the Company, be entitled to appoint or remove two of the designated C directors (the "**special C directors**").

Belize Telecom Ltd (“BT”), acquired from the Government the special share and a majority of the issued share capital. It purported to appoint all the directors of BT, including two special C directors. BT pledged the ordinary shares to the Government but defaulted on its obligations, upon which the Government took back a substantial number of the ordinary shares. The result was that BT was left with the special share and C shares amounting to less than 37.5 per cent. The question which then arose was whether the two special C directors appointed by BT remained members of the board.

Test for implication of terms

In a decision delivered by Lord Hoffmann, the Privy Council held that a court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. In determining the meaning of an instrument, the court considers the objective intention of the parties, i.e. the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed.

The Privy Council said that the proper test for the implication of a term into an instrument was whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. The Privy Council explained that the implication of a term was not an addition to the instrument; instead, it only spells out what the instrument means.

The Privy Council also discussed the “business efficacy test” and the “officious bystander test” which, in its opinion, were merely reformulations of the general test formulated by the Privy Council. Although the “business efficacy test” and the “officious bystander test” may be helpful to the court in determining what the instrument would reasonably be understood to mean, such tests were not different or additional tests and should not be treated as if they had a life of their own.

This decision is significant because the Privy Council expressed its view on the relationship between the “business efficacy test” and the “officious bystander test”, tests which previous courts have attempted to reconcile (see the discussion of the issue by Justice Andrew Phang Boon Leong in *Forefront Medical Tehcnology (Pte) Ltd v Modern-Pak Pte Ltd* [2006] 1 SLR 927, at [28] to [40]).

The decision is also significant because it attempts to explain the relationship between the process of implying a term and interpreting an instrument. The decision is an elaboration of views previously expressed by Lord Hoffmann extra-judicially that the implication of a term is an exercise in interpretation like any other, save that when the courts imply a term, the courts are engaged in interpreting the meaning of the instrument as a whole (and not merely the interpretation of a specific provision).

This decision is likely to be influential in future cases relating to the implication of terms and may eventually lead to a decrease in the court’s reliance on the “business efficacy test” and the “officious bystander test” which had previously dominated judicial thinking.

Implication of terms into Articles of Association

The Privy Council held unanimously that, by necessary implication, the articles should be read as providing that the two special C directors ceased to hold office when the special shareholder no longer had the 37.5 per cent.

shareholding which enabled him to appoint and remove the special C directors. The Privy Council arrived at its decision on the basis of the following reasons:

- Two things were apparent from the articles. First, the board had been constructed so that its membership would reflect the interests of the various participants in the company: the political interest of the Government, represented through its special share; the economic interest of the Government, represented by its holding of C shares. Secondly, the powers which the articles conferred upon the Government (or its successor as special shareholder) were carefully graduated according to its economic interest in the Company at the relevant time.
- The court held that it was necessary to imply a term that when the special share goes, the Government Appointed Directors go with it. It must follow that upon the redemption of the special share, the special C directors (who were appointed by virtue of the special share) would also cease to hold office.
- In the same vein, the same principle applied to the case when the special shareholder continued to exist, but no longer had the 37.5 per cent. shareholding which would have entitled him to appoint and remove the special C directors. In such a case too, the implication was required to ensure that the board reflects the appropriate shareholder interests in accordance with the scheme laid out in the articles.
- In the present case, the implication as to the composition of the board was not based on extrinsic evidence of which only a limited number of people would have known but upon the scheme of the articles themselves and, to a very limited extent, such background as was apparent from the memorandum of association and everyone in Belize would have known, namely that telecommunications had been a state monopoly and that the company was part of a scheme of privatisation.

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Dispute resolution

Singapore Court of Appeal holds that permission to appeal to Court of Appeal required for copyright action commenced in District Court

Virtual Map (Singapore) Pte Ltd v Singapore Land Authority
[2009] SGCA 2

In *Virtual Map (Singapore) Pte Ltd v Singapore Land Authority*, the Singapore Court of Appeal examined the application of section 34(2)(a) of the Supreme Court of Judicature Act (the “**SCJA**”) in relation to an action which was commenced in the District Court. Section 34(2)(a) of the SCJA provides that the permission of the Court of Appeal or a judge is required before any appeal can be made to the Court of Appeal if the amount or value of the subject-matter at trial is S\$250,000 or less. Under the Subordinate Courts Act, the civil jurisdiction of the District Court is capped at S\$250,000. In the present case, the Court of Appeal held that by accepting that the District Court has jurisdiction of the matter, a litigant is *estopped* from asserting that the monetary value of the said subject matter exceeded S\$250,000. Accordingly, pursuant to section 34(2)(a) of the SCJA,

permission of the Court of Appeal or judge is required before an appeal can be made to the Court of Appeal where the action was commenced in the District Court.

Virtual Map (Singapore) Pte Ltd (“**VM**”) filed a notice of appeal against the High Court’s decision that had affirmed the District Court’s ruling that VM’s online maps had infringed the copyright of the Singapore Land Authority’s (“**SLA**”) works. The SLA applied to strike out the notice of appeal on the basis that VM had not obtained the requisite permission to file the appeal pursuant to section 34(2)(a) of the SCJA (which provides that permission of the Court of Appeal or a judge is required if “the amount or value of the subject-matter at the trial is S\$250,000 ... or less”). The SLA argued that since the copyright suit had been commenced in the District Court (where the court’s civil jurisdiction was capped at S\$250,000), the value of the subject-matter at trial was less than S\$250,000. Accordingly section 34(2)(a) of the SCJA should be read together with the provisions of the Subordinate Courts Act which delineated the upper limit of the District Court’s civil jurisdiction, and that effect must be given to the Parliamentary intention behind section 34(2)(a) of the SCJA, that is to say, that there should only be one tier of appeal as of right.

VM, on the contrary, argued that the value exceeded S\$250,000, given that the subject matter included its maps which it had spent millions of dollars developing. Relying on *Hailisen Shipping Co Ltd v Pan-United Shipyard Pte Ltd* [2004] 1 SLR 148 (“**Hailisen Shipping Co Ltd**”), it argued, alternatively, that no specific monetary value could be placed on the subject matter at trial here and, accordingly, no permission was required.

The Court of Appeal struck out the notice of appeal. The court held that by accepting that the District Court had jurisdiction of the matter, VM was estopped from asserting that the monetary value of the subject matter at trial exceeded S\$250,000. The court further held that the subject-matter at trial in this case did have a monetary value that was fixed by the District Court’s jurisdiction, that is, a monetary value not exceeding S\$250,000. If VM considered its maps to be worth an amount in excess of the jurisdictional limit of the District Court, it should have applied to have the entire action transferred to the High Court. However, the court did caution that a litigant who unreasonably inflated his claim and commenced his action in the High Court (when it could very well have been commenced in the Subordinate Courts instead) may be penalised in costs.

The court then went on to examine *Hailisen Shipping Co Ltd* which involved an admiralty *in rem* action and held that that decision cannot be used as authority to found an argument that no permission of the court is required for an appeal to the Court of Appeal where the subject matter of the trial from which the appeal stems does not have a specific monetary value. Section 34(2)(a) of the SCJA had no application to admiralty actions commenced under the High Court (Admiralty Jurisdiction) Act, regardless of the monetary value of the subject matter. The court noted that, besides admiralty cases, there were other cases that would have to be commenced in the High Court, even though the monetary value of the claim fell below S\$250,000.

In accordance with the principle that there should be one tier of appeal as of right in civil actions, the court was of the view that unsuccessful litigants in such cases should not be entitled to appeal as of right to the Court of Appeal.

The court also held that, in any event, VM did not satisfy the test for granting a litigant leave to appeal.

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Singapore High Court examines applicability of different sets of SIAC rules to determine issue of governing regime for arbitration agreement

Car & Cars Pte Ltd v Volkswagen AG & Anor
[2009] SGHC 77

In the recent case of *Car & Cars Pte Ltd v Volkswagen AG & Anor*, one of the issues which the Singapore High Court had to determine was whether the Arbitration Act (the “AA”) or the International Arbitration Act (the “IAA”) was the governing regime for the arbitration agreement between the parties to the case.

The relevant arbitration agreement which the parties had agreed upon in the present case provided that “any disputes arising...shall be referred to arbitration...in accordance with the Rules of the Singapore International Arbitration Centre for the time being in force”.

At the point in time when the arbitration agreement was made, the Singapore International Arbitration Centre (the “SIAC”) had two sets of rules in place: the SIAC Domestic Arbitration Rules, 2nd Edition, 1 September 2002 (the “SIAC Domestic Arbitration Rules”) and the SIAC Rules, 2nd Edition, 22 October 1997 (the “SIAC Rules 1997”). The SIAC Rules 2007 has since repealed the SIAC Domestic Arbitration Rules and replaced the SIAC Rules 1997. The court had to determine which set of SIAC rules applied in order to decide whether the AA or the IAA was the governing regime of the arbitration agreement in question. The court’s determination of this issue was relevant to the second defendant’s application to stay all proceedings in the plaintiff’s action that related to itself, in favour of arbitration.

In Singapore, international arbitration is governed by the IAA and domestic arbitration is governed by the AA. The two legal regimes are mainly similar but one aspect in which they differ is in the extent of curial intervention the courts can exercise when faced with an application to stay court proceedings in the face of an arbitration agreement. Under the AA, the court has a discretion whether or not to stay proceedings in favour of arbitration. On the other hand, under the IAA, the court must stay proceedings in favour of arbitration as long as the arbitration agreement was not null and void, inoperative or incapable of being performed.

As mentioned above, the arbitration agreement between the parties provided that “any disputes arising...shall be referred to arbitration...in accordance with the Rules of the Singapore International Arbitration Centre for the time being in force”. The SIAC Domestic Arbitration Rules were repealed during the period after the arbitration agreement was made and when the matter was submitted to arbitration. Further, the SIAC Rules 2007 had replaced the SIAC Rules 1997.

The court held that where rules were mainly procedural, the rules in force at the time of commencement of arbitration will apply. In this case, the arbitration agreement referred to the SIAC rules for the time being in force. The parties did not contract to adopt the SIAC rules in force at the time of the contract. As such, the rules to be applied would be the rules in force at the time the matter was referred to arbitration, that is to say, the SIAC Rules 2007.

Further, the arbitration agreement did not expressly refer to the SIAC Domestic Arbitration Rules. The court held that pursuant to Article 2 of Schedule 1 of the SIAC Rules 2007, the SIAC Rules 2007 would apply to all other arbitration agreements which adopted SIAC rules and do not expressly

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refer to the SIAC Domestic Arbitration Rules. According to the court, if a party today wanted to incorporate the SIAC rules but retain domestic arbitration status, it must expressly refer to arbitration under “SIAC Domestic Arbitration Rules”. Alternatively, the parties may expressly adopt the SIAC Rules 2007 and expressly stipulate that the AA shall apply accordingly.

The parties in the present case did not expressly state that the AA would apply.

Therefore, the court ruled that the arbitration in the present case was governed by the SIAC Rules 2007 and the governing regime would be the IAA.

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Real estate

Singapore High Court interprets “proceeds of sale for his lot” in section 84A(7) and (8) of Land Titles (Strata) Act in relation to collective sale

Mohamed Amin bin Mohamed Taib & Ors v Lim Choon Thye & Ors
[2009] SGHC 48

The case of *Mohamed Amin bin Mohamed Taib & Ors v Lim Choon Thye & Ors* concerned a collective sale of units in a condominium development where two subsidiary proprietors failed in their objection to the collective sale on the basis that the sale would cause them to incur a financial loss as the proceeds of sale of their lot would be less than the price they paid for the lot. The decision of the Singapore High Court is instructive for its interpretation of the words “proceeds of sale for his lot” in sections 84A(7) and (8) of the Land Titles (Strata) Act (the “**LTSA**”).

Pursuant to section 84A(7) of the LTSA, the Strata Titles Board (the “**STB**”) may decline to approve an application for a collective sale if it is satisfied that any objector, being a subsidiary proprietor, will incur a financial loss. Section 84A(8) provides *inter alia* that a subsidiary proprietor shall be taken to have incurred a financial loss if the *proceeds of sale for his lot*, after such deduction as the STB may allow, are less than the price he paid for his lot.

On the facts of the case, the plaintiffs were appointed representatives of the subsidiary proprietors of the condominium development for the purposes of applying to the STB for its approval of the collective sale. The defendants, who were also subsidiary proprietors, objected to the collective sale. In particular, the 9th and 10th defendants raised objections on the basis that they would incur a financial loss as the proceeds of sale of their lot, after any deduction allowed by the STB, would be less than the price paid for it. They quantified their loss as being S\$93,935.75. In the light of the estimated financial loss, the Sale Committee approached the purchaser for an undertaking to make good the alleged financial loss. The purchaser furnished an undertaking to pay the 9th and 10th defendants the sum of S\$93,935.75.

An application to the STB (the “**STB application**”) was made and the STB found that the objections raised by the 9th and 10th defendants’ had been made out and accordingly dismissed the application. The plaintiffs appealed and asked the High Court for a declaration that the STB order be set aside and for the STB application remitted back to the STB for a continuation of the proceedings.

The issue in question was the true meaning of the “proceeds of sale for his lot”. Did this phrase refer specifically and only to the amount that an individual proprietor could expect to receive for his lot on the basis of the sale price mentioned in the sale and purchase agreement or could a wider meaning be derived from it?

The court held that it was clear from the relevant Parliamentary speeches that the main purpose of the provisions relating to collective sale in the LTSA was to make it easier for collective sales to go through in order to promote better utilisation of scarce land resources in Singapore and also urban redevelopment.

The court held that the proper and purposive interpretation of “proceeds of sale for his lot” under section 84A(8) would be that this phrase referred to the moneys which the defendants would receive for their lot upon the completion of the collective sale. Such an interpretation would allow the STB to take into account all offers of compensation and therefore reach a more equitable result which would also promote the objective of the LTSA. There was no reason why “proceeds of sale” should be limited to simply looking at the purchase price set out in the sale and purchase agreement. Adopting the wider interpretation would further the legislative purpose of the LTSA by taking into account efforts to make good the financial loss of individual subsidiary proprietors and to ensure that no individual subsidiary proprietor would be prejudiced by the collective sale.

If the objecting subsidiary proprietor would still suffer a financial loss despite the compensation sum offered, then the STB would have to dismiss the application and none of the other subsidiary proprietors could complain about this. On the other hand, if the objecting subsidiary proprietor’s financial loss would be fully met by the compensation sum, then there would be no basis to continue to object to the en-bloc sale. As the LTSA is structured, it does not require that all the subsidiary proprietors should make a profit from the en-bloc sale. It only mandates that no one should make a financial loss. This is plain from section 84A(8)(b) which provides that it is not a financial loss if any subsidiary proprietor makes less profit from the sale of his lot than the others do.

Adopting such an interpretation meant that the STB would be entitled to consider not only the sale and purchase agreement but also the undertaking in deciding whether or not the 9th and 10th defendants had suffered financial loss under the LTSA. The court was of the view that the STB was wrong in law to decide that it could not look at the undertaking simply because it was extrinsic to the sale and purchase agreement.

For these reasons, the court concluded that the STB had made an error of law when it dismissed the application. Accordingly, the order of the STB was set aside and the STB application remitted back to the STB for a continuation of the proceedings.

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General

Employment

Singapore High Court explains employer's duty to provide safe system of work distinct from the way work actually carried out by employees

Lu Bang Song v Teambuild Construction Pte Ltd & Anor and Another Appeal [2009] SGHC 49

The decision of the Singapore High Court in *Lu Bang Song v Teambuild Construction Pte Ltd & Anor and Another Appeal* is instructive for the court's outline of an employer's duty to provide a safe system of work. The court explained that a safe system of work put in place by employers is distinct from the way work is actually carried out by the employees. A safe system of work must anticipate as many safety pitfalls as possible. However, it does not follow that just because an accident has occurred, there is a lack of a safe system of work.

The case involved two connected appeals brought against the decision of the District Judge (the "DJ") in relation to a claim for damages for personal injuries which arose out of an industrial accident. The DJ found the plaintiff, the injured employee ("Lu"), 20 per cent. liable for the accident and the defendants (the "Employers"), 80 per cent. liable. Both parties appealed to the High Court.

Safe system of work

The issue before the court was whether the Employers had provided sufficient supervision and manpower for the work involved, and, more generally, a safe system of work. In this regard, the court explained that a safe *system* of work put in place by employers, is something quite distinct from the way work is *actually* carried out by the employees. A safe system of work must anticipate as many safety pitfalls as possible. However, it does not follow that just because an accident has occurred, there is a lack of a safe system of work. It must be recognised that even the most carefully devised system of work will be unable to prevent mishaps arising from human error, carelessness or foolhardy acts. This is because every system would require individuals, upon whom the various tasks are assigned, to carry out their tasks diligently. If an employee in that system should carry out his task negligently and as a result a third party or a co-employee is injured, the employer would be liable to the injured employee under the principle of vicarious liability.

Duty to provide a safe system of work

With regard to an employer's duty to his employees to maintain a safe and/or proper system of work and to provide effective supervision, the court noted that the Singapore courts have given that duty an expansive reading.

In particular, an employer owes a duty to devise a safe system of work that, as far as possible, reduces the effects of workmen's carelessness. This duty is crystallised into two facets: the existence of the system itself, and the supervision required in ensuring compliance with the system. On the facts of the present case, there was such a system of work in place, and sufficient care had been taken to ensure that there was indeed compliance.

It is not a deficiency of the system of work if individual elements of that system, e.g. foremen and signalmen, should fail to discharge their duties with care. However, if that failure of an employee should cause injury, the employer would be vicariously liable to the injured for the negligence of his employee.

Employer not obliged to give instructions on every aspect of work

In the present case, the court found that there was nothing inherently difficult or dangerous about the work. A system of work was in place. Lu failed to comply with it. He was the creator of his own misfortune. It was not the law that an employer must give instructions on every aspect of his work. Recognition must be given to the worker's ability to be able to carry out some work himself relying on his own experience and judgment. Here, Lu had over 20 years' experience in the construction industry. He had also been briefed specifically during his safety orientation course that before he did any particular task, he should ask himself whether it was safe to perform that task. He had also admitted that he had been told that if he came across any unsafe conditions at work, he should stop work and notify his superiors.

The court held that the allegations of negligence against the Employers had not been proven. Neither were the allegations against the Lu's co-workers established.

Accordingly, the court dismissed Lu's appeal and allowed the Employers' cross-appeal.

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In brief

MAS issues Guidelines on Fair Dealing - Board and Senior Management Responsibilities for Delivering Fair Dealing Outcomes to Customers

On 3 April 2009, the Monetary Authority of Singapore issued the Guidelines on Fair Dealing - Board and Senior Management Responsibilities for Delivering Fair Dealing Outcomes to Customers to promote fair dealing by financial institutions when they conduct business with their customers.

Please [click here](#) to read an article about this development in the April 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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MAS issues circular on goods and services tax remission on prescribed expenses for prescribed funds managed by prescribed fund managers in Singapore

It was announced in the Singapore Budget Statement 2009 that in order to help promote fund management and administration services in Singapore, a new goods and services tax (“**GST**”) remission will be introduced to allow prescribed funds that are managed by a prescribed fund manager in Singapore to claim a substantial portion of their input GST on prescribed expenses. On 3 April 2009, the Monetary Authority of Singapore issued a circular (Circular No. FDD Cir 02/2009) to provide details on this.

Please [click here](#) to read an article about this development in the April 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX implements three initiatives to develop its options market

On 6 April 2009, the Singapore Exchange Limited implemented three initiatives to develop its options market.

These are:

- Enhanced SGX Nikkei 225 Index Options and SGX MSCI Taiwan Index Options contracts;
- Launch of SGX MSCI Singapore Index Options; and
- Internet-based electronic trade registration system named “eNLT” (Electronic Negotiated Large Trades).

Please [click here](#) to read an article about this development in the April 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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News

Acquisition of shares in Airfoil Technologies International - Singapore Pte Ltd

GE Pacific Private Limited (“**GE Pacific**”) has acquired the 51 per cent. stake of Teleflex Holding Singapore Pte Ltd in Airfoil Technologies International - Singapore Pte Ltd (“**ATI-S**”) for US\$300 million. ATI-S is now wholly owned by GE Pacific.

GE Pacific was advised by, *inter alia*, Allen & Gledhill LLP Partner Michele Foo and Senior Associate Leon Ng.

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Acquisition of shares in Straits Bulk & Industrial Pty Ltd

Lints Limited (“**Lints**”), a wholly owned subsidiary of PTT International Company Limited (“**PTTI**”), entered into a sale and purchase agreement for the acquisition of 60 per cent. of the issued shares in the capital of an Australian incorporated entity, Straits Bulk & Industrial Pty Ltd, which in turn holds 47.1 per cent. of the issued shares in the capital of Straits Asia Resources Limited (“**SAR**”). Upon completion of the acquisition, Lints will be required to make a mandatory conditional cash offer for all of SAR’s shares, other than those already owned, controlled or agreed to be acquired by Lints.

Advising PTTI and Lints are Allen & Gledhill LLP Partners Prawiro Widjaja and Song Su-Min and Associate Tabitha Saw.

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Launch of Allen & Gledhill’s Restructuring & Insolvency Master Class Series

In May 2009, the Corporate Restructuring & Insolvency Practice of Allen & Gledhill LLP will be launching the Restructuring & Insolvency Master Class Series comprising four focused sessions which explore legal and practical considerations in the scenario of a Company in financial distress. Our Partners from Banking, Corporate Mergers & Acquisitions and Litigation & Dispute Resolution will bring you through the key stages of a Company’s challenging journey from default to rehabilitation or enforcement.

All sessions will be held at **Allen & Gledhill LLP Auditorium**, 30/F One Marina Boulevard from 12:30pm to 2.00pm. Light lunch will be served.

- **Stage I: Legal and Practical Considerations in a Bank Default Situation**
Wednesday, 6 May 2009
- **Stage II: Exploring the Possibility of the Company Raising Additional Funds**
Tuesday, 12 May 2009
- **Stage III: Rehabilitation of the Business of the Company**
Tuesday, 26 May 2009
- **Stage IV: Remedies and Enforcement of Security**
Tuesday, 2 June 2009

If you would like to attend any of the above sessions, please [click here](#) for the registration form and e-mail the completed form to events@allenandgledhill.com. For more details of the sessions, please visit the Allen & Gledhill website (www.allenandgledhill.com) under Seminars & Events or [click here](#).

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