

Legal Bulletin

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Allen & Gledhill LLP also publishes the monthly Financial Services Bulletin. To view the January 2012 issue, please click [here](#).

This recent development was first highlighted in the Allen & Gledhill Competition Law Alert of 29 December 2011. If you would like to be on our competition and antitrust related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

Articles

Competition

CCS clears proposed acquisition of assets relating to hard disk drive business after Phase 2 review

On 29 November 2011, the Competition Commission of Singapore (the “**CCS**”) issued a clearance decision relating to the acquisition (the “**Acquisition**”) by Seagate Technology Public Limited Company (“**Seagate**”) of certain assets of the hard disk drive (“**HDD**”) business of Samsung Electronics Co., Ltd (“**Samsung**”) (collectively the “**Parties**”). The CCS released the Grounds of Decision in December 2011.

After the preliminary assessment (Phase 1 review), the CCS could not determine whether the Acquisition would present any competition concerns. Accordingly, the CCS carried out a more detailed assessment of the matter (Phase 2 review). The CCS contacted the Parties’ competitors, customers and original equipment manufacturers (“**OEMs**”) who use HDDs, and met with various government agencies to discuss the HDD industry in Singapore. Daren Shiau, Head of the Allen & Gledhill Competition & Antitrust practice, notes that the CCS had spoken to overseas competition authorities in assessing this global Acquisition. This, he says, is consistent with the CCS’ practice of dialogue with international competition regulators though, as demonstrated, the CCS makes its decisions on competition law matters independently, and is not bound by the decisions of other authorities.

The relevant good is the HDD for sale to OEMs and original design manufacturers (“**ODMs**”) for use in computer systems, subsystems or consumer electronic devices and for sale to OEMs, ODMs and retailers for sale for mobile, enterprise, desktop and consumer end-uses. Elsa Chen, Principal Economist of the Allen & Gledhill Competition & Antitrust practice, notes that the CCS had considered the dynamic nature of the market, in particular, the increasing competition between solid state drives (“**SSDs**”) and HDDs, but formed the view that SSDs are not a demand-side substitute for HDDs at the current time given differences in price and product attributes.

In the end, after the Phase 2 review, the CCS concluded that the Acquisition would not infringe section 54 of the Competition Act.

Background

The merger control regime prescribed under the Competition Act came into force on 1 July 2007. Merger parties are required to undertake self-assessments to determine if notifications should be made in accordance with the relevant CCS guidelines and with reference to its decided cases. Since the start of the regime, the CCS has received 29 merger control notifications. The CCS has cleared 24 of the 29 notifications. Some of the notifications have been withdrawn by the merger parties. The CCS has also exercised its powers to issue Provisional Decisions to prohibit mergers.

Reference materials

Please click [here](#) to view the table of notified mergers on the CCS website www.ccs.gov.sg. To read the Grounds of Decision for this Acquisition, please click [here](#).

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Corporate

ACRA issues guidance for directors regarding financial statements during uncertain economic environment

In view of the current Eurozone debt crisis and the uncertain economic environment in major economies around the world, the Accounting and Corporate Regulatory Authority (the “ACRA”) has on 3 January 2012 issued its inaugural Financial Reporting Practice Guidance (the “Guidance”) to remind directors of the risks of misstatements and/or non-disclosures in financial statements during the current environment, keeping in mind the information needs of shareholders in these uncertain times.

The Guidance highlights that the Companies Act requires directors of every company incorporated in Singapore to present financial statements that comply with Singapore Financial Reporting Standards (the “SFRS”) and reflect a true and fair view of the profit and loss, as well as the state of affairs of the company as at the end of the period to which it relates. Directors must therefore be vigilant when reviewing financial statements prepared by management.

The Guidance prompts directors to be aware of and focus their attention on those SFRS that require significant management judgments and estimations in the uncertain economic environment.

Reference materials

To read the Guidance from the ACRA’s website www.acra.gov.sg, please click [here](#).

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Dispute Resolution

Singapore Court of Appeal considers challenge to validity of leave to appeal based on lack of *locus standi*

Ang Tin Yong v Ang Boon Chye & Anor [2011] SGCA 60

The Singapore Court of Appeal in *Ang Tin Yong v Ang Boon Chye & Anor* considered the significance of a deed under which the respondents retired from a partnership and thereafter sought the enforcement of an Assistant Registrar’s order in relation to disclosure of the partnership’s financial statements.

Background

The parties were in a partnership operating a food centre business (the “partnership”). After the partnership was found to have underreported income to the Inland Revenue Authority of Singapore (the “IRAS”), resulting in all the partners being additionally assessed, the respondents brought a suit in the High Court to seek from the appellant, *inter alia*, an account and inquiry of all partnership transactions and a payment of their share of partnership profits and interest on the paid tax. The respondents were successful before the High Court, with the court finding that the respondents were unaware of the appellant’s underreporting to the IRAS and ordered that an account be taken of all partnership transactions for a stipulated period of five years.

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The respondents then applied for an order requiring the appellant to lodge an account for the ordered time period, and to give the respondents access to all the relevant documents. This order was granted by an Assistant Registrar (the “**AR’s order**”) on 1 December 2008. By 2010, the appellant had not complied with the AR’s order and the respondents sought leave to apply for a committal order against the appellant (the “**Leave Application**”).

In response to the Leave Application, the appellants contended, *inter alia*, that the respondents did not have standing to enforce the AR’s order because they had retired from the partnership a year prior to making the Leave Application, by executing a retirement deed with the other partners (the “**Deed**”) under which the respondents would be deemed to have retired from the partnership on 31 July 2009. The respondents’ shares and interest in the partnership had been assigned to the continuing partners, including the appellant.

The High Court found in favour of the respondents, granting them leave to commence contempt proceedings against the appellant for his failure to comply with the AR’s order. The Judge held that even though the respondents had no more interest in the partnership accounts, the fact remained that the appellant had not complied with the AR’s order. The Judge found that the respondents’ retirement from the partnership did not release the appellant from his obligation to provide accounts as ordered and did not extinguish the respondents’ right to take action on the failure to comply with the AR’s order.

The appellant appealed against the Judge’s decision. One of the issues that the Court of Appeal was asked to determine was whether the respondents’ retirement from the partnership meant that they no longer had the *locus standi* to obtain leave to enforce the AR’s order.

What was the effect of the Deed?

The Court of Appeal found that the object of the Deed was to effect a clean break of the partnership relationship between the continuing partners and the outgoing partners, noting that this construction was in keeping with business common sense and its commercial purposes. The court also scrutinised the wording of the Deed and found that the Deed provided that upon receipt of payment of S\$150,000 by each of the respondents, the respondents would have no more rights of interest in the partnership accounts or assets. It would therefore follow that whatever interest the respondents would have had in pursuing the AR’s order would have been subsumed under the settlement set out in the Deed.

The Court of Appeal noted that the duty to disclose and render accounts of partnership transactions arises out of the fiduciary relationship which exists between partners. An order for an account of partnership transactions is a relief sought between partners. When the AR’s order was made, the respondents would have been entitled to enforce the AR’s order by way of an application for committal. However, upon retiring from the partnership and assigning all their rights and interest in it for consideration as set out in the Deed, the respondents would have had no more interest in the partnership accounts. Consequently, the respondents would not have any more interest in enforcing the AR’s order. The Court of Appeal further held that it was an implied term of the Deed that the AR’s order would be extinguished upon execution of the Deed.

Judgment

The Court of Appeal allowed the appeal and the leave to enforce the AR’s order as granted by the High Court was set aside.

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Singapore Court of Appeal considers procedural issues relating to pleading of inconsistent causes of action in the alternative

Ng Chee Weng v Lim Jit Ming Bryan & Anor [2011] SGCA 62

The Singapore Court of Appeal decision of *Ng Chee Weng v Lim Jit Ming Bryan & Anor* concerns an application to amend a statement of claim (the “**SOC**”) which involved both an alleged settlement agreement and an action based on trust. The pleading of inconsistent causes of action in the alternative raised difficult procedural issues which the Court of Appeal addressed.

Earlier proceedings

When the appellant in this case first commenced his action against the first and second respondents, he alleged in the original SOC that the first respondent held some shares on trust for him and wanted to claim the dividends declared on the shares amounting to about S\$8.88 million (the “**dividend claim**”).

The SOC also contained certain paragraphs that referred to settlement discussions between the appellant and the respondent but stopped short at alleging that there was indeed a concluded settlement between the parties. The respondent then sought successfully to strike out these paragraphs on the basis that the discussions were “without prejudice” (“**WP**”) communications that were privileged from disclosure.

The appellant then appealed to the Court of Appeal against the decision of the High Court judge in striking out the paragraphs. During the course of this appeal, the appellant put forward amendments to the SOC (the “**First Proposed Amendment**”) to plead a claim to enforce a settlement agreement (the “**settlement claim**”) as an alternative claim to the original cause of action. The critical change in the First Proposed Amendment was that the appellant now alleged that settlement negotiations had in fact concluded in a settlement agreement under which the respondent agreed to pay the appellant S\$4.5 million.

The Court of Appeal dismissed the appeal and disallowed the First Proposed Amendment but subsequently issued an addendum which expressly stated that the dismissal of this appeal would not preclude the appellant from making further amendments (although not in the exact same form as the First Proposed Amendment).

Present proceedings

Having procured the Court of Appeal’s clarification that he would not be precluded from applying to make further amendments to the SOC, the appellant did just that, and applied to amend his SOC for a second time (the “**Second Proposed Amendment**”). In the Second Proposed Amendment, the appellant pleaded the settlement claim as his primary claim and the dividend claim as an alternative claim if the court found that there was no settlement agreement.

The Second Proposed Amendment was disallowed by both the Assistant Registrar (the “**AR**”) and the High Court judge on appeal.

The appellant therefore appealed to the Court of Appeal.

Issues on appeal

The Court of Appeal reversed the decisions of both the AR and the High Court, and in doing so, addressed the following main issues:

- Whether the appellant could plead in the alternative in the manner set out in the Second Proposed Amendment (the “**First Issue**”)
- Whether the appellant was precluded from amending his pleadings because he had elected otherwise, or because, for some other reason, allowing the amendment would result in injustice to the respondent (the “**Second Issue**”)
- Whether the appeal ought, in any event, to fail as the Second Proposed Amendment disclosed no reasonable cause of action, or, alternatively, was an abuse of the process of court (the “**Third Issue**”)

First issue: Alternative pleadings

The Court of Appeal held that the appellant would not be precluded from pleading the inconsistent causes of action in the alternative, as long as the facts were not mixed up and were stated separately in order to demonstrate on what facts each alternative relief was based. The court found that this was exactly what the appellant had done in the Second Proposed Amendment.

The Singapore Rules of Court are silent on the issue of whether inconsistent alternatives could be pleaded. Hence the common law rules on alternative pleadings continue to apply in Singapore.

In this regard, the Court of Appeal affirmed the position that a party has the right to plead inconsistent rights in the alternative, if such alternatives do not offend common sense and justice. The Court of Appeal also stated that, in pleading alternative causes of action which are inconsistent, the facts should not be mixed up and should be stated separately in order to demonstrate on what facts each alternative relief is based.

Second issue: Election, lack of consideration, WP and policy objections

The respondent also raised several objections to the Second Proposed Amendment. Arising from this, the Court of Appeal made interesting observations on the issues of election and WP evidence.

The respondent’s key objection was on the issue of election. The respondent argued that the appellant must elect which claim to pursue and should not be allowed to sue on both claims at the same time. The respondent further argued that the appellant had originally chosen to pursue the dividend claim, and the appellant had to stand by his election and could no longer pursue the settlement claim. The Court of Appeal disagreed with the respondent. The need for election would not arise yet because the question of whether or not there was a settlement agreement to breach has not yet been decided by the court.

The Court of Appeal rightly observed that, as a matter of logic, the existence of a settlement agreement must necessarily precede a determination of whether either party breached the settlement. The innocent party should apply for the question of whether or not a settlement agreement exists to be tried as a preliminary issue. If the court determines that there was indeed a settlement agreement, and one party is in repudiatory breach of the settlement, the other (innocent) party will then be put to an election as to

whether to affirm or to terminate the settlement agreement instead. On the other hand, if the court determines that there was no settlement agreement arrived at between the parties, the original cause of action is not affected.

The court went on to state that in future cases, and for the avoidance of doubt, if the existence of a settlement agreement is in question, it should generally be determined as a preliminary issue. Either party could make such an application. Where no application to such effect is made, but the pleadings disclose that such an issue exists, the court could, on its own motion, make a direction to determine the question as a preliminary issue.

The respondent also argued that the appellant was using the Second Proposed Amendment as a backdoor to bring in WP evidence that was struck out by the Court of Appeal in the earlier appeal. The Court of Appeal did not agree.

The *general* rule is that WP evidence is not admissible in trial - this arises from the public policy requirement that allows parties to negotiate freely to reach a settlement of the dispute without fear that such matters could then be used to influence the court at trial if the settlement is not achieved. The Court of Appeal however also made clear that it is a well-established law that the WP rule is not absolute and there are exceptions. In this particular case, the Court of Appeal pointed out that WP evidence is admissible at trial to prove the existence of a settlement agreement.

In practical terms, the trial judge would first determine the existence of the settlement agreement with reference to the WP evidence, before going on to determine the main cause of action. The Court of Appeal stated that, if the trial judge who has become cognisant of such WP evidence feels that he or she is unable to exclude such evidence from his or her mind in the trial of the main cause of action, he or she can recuse himself or herself and have another judge conduct the trial of the main cause of action.

Third issue: Striking out

On the third issue, the starting point for the Court of Appeal was to consider the law on striking out, in particular, Order 18 Rule 19 of the Rules of Court. Essentially, Order 18 Rule 19 of the Rules of Court provides that the court may strike out or amend any pleading on the basis of any of the following grounds:

- discloses no reasonable cause of action or defence, as the case may be
- scandalous, frivolous or vexatious
- prejudices, embarrasses or delays the fair trial of the action
- an abuse of the process of the court

The Court of Appeal did not find any of the grounds to be applicable to the Second Proposed Amendment.

Conclusion

The Court of Appeal's decision in this case raised and dealt with several difficult issues of procedure.

Significantly, it affirms the right of a claimant to plead alternative, inconsistent causes of action. In such cases, it is common for the defendant to challenge and to attempt to strike out the pleadings. The Court of Appeal's decision serves as a useful clarification as to how such inconsistent causes of action ought to be properly pleaded.

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There should also no longer be any doubt that WP evidence can, in some exceptional circumstances, be adduced as evidence in court. Parties engaging in WP discussions should do well to bear this in mind and adjust their conduct in settlement negotiations accordingly.

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Singapore High Court considers appeal against bifurcation of trial

Zhang Yijun & Ors v ING Asia Private Bank Ltd [2011] SGHC 231

The Singapore High Court in *Zhang Yijun & Ors v ING Asia Private Bank Ltd* considered when the bifurcation of a trial is appropriate.

Bifurcation of a trial occurs when the trial of the matter is “separated”, such that the trial Judge hears and decides on certain issues, before dealing with the remaining issues. Normally, bifurcation involves the trial Judge hearing and deciding on the issues relating to liability first before hearing and deciding on the issues relating to the quantum of damages.

The defendant bank (now known as Bank of Singapore Ltd) (“**BOS**”) appealed the decision of an Assistant Registrar allowing the plaintiffs’ application for the matter at issue to be bifurcated. The plaintiffs had sought the issue of liability to be tried before the High Court, with the assessment of damages, should liability be established, to be subsequently determined by the Assistant Registrar. The action involved five accounts maintained with BOS and the causes of action were based on, *inter alia*, misrepresentation and breaches of BOS’s duties as banker.

The trial date was determined via pre-trial conference on 15 September 2011 on the basis that the action be heard in its entirety. The date of the exchange of the affidavits had also been set down and expert reports had already been exchanged. A day after the pre-trial conference, the plaintiffs applied to have the trial bifurcated.

Appeal against bifurcation

BOS argued before the High Court that the bifurcation order made by the Assistant Registrar should not have been made as special reasons for the necessity of bifurcation should be shown and no such reasons were made out here.

The plaintiffs had argued, in applying for the bifurcation order, that time and costs would be saved by bifurcating the action. BOS refuted this, saying that bifurcation would instead lead to more time and costs being incurred as one of the plaintiff’s experts resided in Australia and as the expert was due to testify on both liability and quantum of damages and may therefore be required to make two trips to Singapore.

Judgment

The court noted that directions had already been given at the pre-trial conference where the trial dates and the number of days required for the trial were agreed. The parties having settled on the number of days required for trial, and the trial dates, any subsequent change would require good reasons.

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In the present case, the cause of action and the quantum of damages were closely connected and it would therefore be reasonable that the action is tried together by the same judge. The evidence may show that some disputed transactions were clearly made, some clearly not made and some made for reasons not supported by the claims. Some may result in loss and damage and others not. The court also noted that related matters - such as the assessment of a witness's credibility - would be relevant to both the issue of liability and the issue of quantum of damages. With regard to the determination of loss and damages to be made by an Assistant Registrar, the court noted that allowing this would enable the right of appeal to be exercised twice (to the High Court and then to the Court of Appeal) for that one issue. The court emphasised that this was one of the reasons why a party seeking bifurcation should present good reasons for such an application.

The court found that the plaintiffs had failed to demonstrate any special reason to justify the bifurcation of the action and that the argument of saving time and costs was a poor one, particularly as expert reports had already been prepared and exchanged. The argument also ignored the time and costs involved in convening a second trial to determine quantum of damages. There would be a duplication of effort for the parties as well as an increase in cost, time and effort if a bifurcation in this sort of action were allowed.

In the premises, the court allowed the appeal, setting aside the order for bifurcation.

Allen & Gledhill LLP Partner Tham Wei Chern represented the successful bank.

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Tax

Income Tax Act amended with effect from various dates to implement Budget 2011 changes

Changes have been made to the Income Tax Act effective from various dates to give legal effect to the income tax changes announced in the 2011 Budget Statement. Other changes are also made to the Income Tax Act following a regular review of the income tax system.

The following are some of the key changes.

Budget 2011 changes

- **Enhancement of the Productivity and Innovation Credit ("PIC") Scheme from year of assessment ("YA") 2011 and subsequent YAs:** The quantum of PIC deduction is increased to 400% of qualifying expenditure (up from 250% currently), for the first S\$400,000 spent on each qualifying activity (up from S\$300,000 currently).
- **Corporate tax rebate for YA 2011:** One-off corporate income tax rebate of 20% (subject to a cap of S\$10,000), or one-off cash grant to small and medium-sized companies based on 5% of the company's revenue for YA 2011 (subject to a cap of S\$5,000).
- **Foreign Tax Credit Pooling system from YA 2012 and subsequent YAs:** Businesses may pool their tax credits for foreign tax suffered on their foreign incomes with the new Foreign Tax Credit Pooling system.

- **New Maritime Sector Incentive from 1 June 2011:** Existing maritime tax incentives are streamlined under a new umbrella incentive - the Maritime Sector Incentive. The umbrella scheme also improves on existing shipping-related incentives by covering more shipping-related support services and new entrants into the industry.
- **250% deduction on qualifying donations until 31 December 2015:** The tax deduction of 250% for donations made to institutions of a public character (IPCs), the Government, approved persons and prescribed educational or research institutions will be extended for another five years to 31 December 2015.

Non-Budget 2011 changes

- **More time to file appeal from 20 December 2011:** The timeframe for filing appeals with the Income Tax Board of Review has been extended from 7 days to 30 days.
- **Exchange of information (“EOI”) arrangements from 20 December 2011:** To meet Singapore’s commitments towards the international EOI standard, an exchange of information via separate EOI arrangements will be permitted, where necessary. Previously, EOI could only be done through Avoidance of Double Taxation Arrangements.

Reference materials

An article about these changes when the Income Tax (Amendment) Bill 2011 was passed in Parliament was featured in a previous issue of the Allen & Gledhill Legal Bulletin (December 2011). To read the article entitled “*Parliament passes Income Tax (Amendment) Bill 2011: Implementing Budget 2011 changes*”, please click [here](#).

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Goods and Services Tax Act amended with effect from 1 January 2012 to implement Budget 2011 changes

Changes have been made to the Goods and Services Tax Act with effect from 1 January 2012 to give legislative force to the goods and services tax (“**GST**”) initiatives announced in Budget Statement 2011, as well as amendments arising from an ongoing review of the GST system.

Some of the key changes are highlighted below.

- **GST measures for the marine industry:** There is now a new scheme for “approved marine customers” to buy or rent zero-rated goods for use or installation on internationally-bound commercial ships. Previously, suppliers of such goods had to maintain documentary proof of the export of the goods for GST zero-rating. Now, suppliers can zero-rate the supply of goods to these pre-approved customers without the need to maintain export documentation.
- **GST measures for the biomedical industry:** The existing Approved Contract Manufacturer and Trader (“**ACMT**”) Scheme has been enhanced and extended to qualifying biomedical contract manufacturers. The scheme allows local contract manufacturers to disregard services rendered to their overseas clients for the purpose of GST, even if the treated or processed goods are delivered locally in Singapore. The

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scheme will be further enhanced to allow approved contract manufacturers (including those in the biomedical sector) to disregard GST on services rendered on failed or excess production, and to recover GST on local purchases of goods used in the contract manufacturing process.

- **New zero-rating relief for supplies related to goods kept in approved warehouses:** A new zero-rating relief is introduced for specified services made to overseas persons and performed on specified goods kept in approved warehouses in Singapore. This new relief encourages overseas persons to store high value goods such as art, antiques and gold in specialised storage facilities in Singapore, and purchase related services such as auction, insurance and valuation in respect of the stored goods. The GST zero-rating extends to the renting of storage units used to store such high value goods.
- **Goods imported for overseas persons:** There will be an expansion of the scope for recovery GST on goods imported on behalf of overseas persons.

Reference materials

An article about these changes when the Goods and Services (Amendment) Bill 2011 was passed in Parliament was featured in a previous issue of the Allen & Gledhill Legal Bulletin (December 2011). To read the article entitled "*Parliament passes Goods and Services Tax (Amendment) Bill 2011: Implementing Budget 2011 changes*", please click [here](#).

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Stamp Duties Act amended with effect from various dates to implement Budget 2011 changes

The Stamp Duties Act has been amended with effect from various dates to give effect to measures announced in the Singapore Government's 2011 Budget Statement, as well as changes arising from the periodic review of the stamp duty system.

The following are some of the key changes the Bill seeks to make.

Budget 2011 changes

- With effect from 19 February 2011, provision is made for stamp duty relief for instruments relating to the conversion of a private company to a limited liability partnership ("LLPs").
- Most fixed and nominal stamp duties of S\$2 and S\$10 on documents executed on or after 19 February 2011 have been removed.

Non-Budget 2011 changes

- The procedure for granting stamp duty relief for share acquisitions made in the course of mergers and acquisitions has been fine-tuned. Changes, which are deemed to have come into force on 1 April 2010, have been made to align conditions for stamp duty relief, such as the qualifying period, more closely to the conditions in the income tax allowance for qualifying M&As.

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- Effective from 1 January 2012, more clarity and flexibility for the remission of stamp duties have been provided for the Minister for Finance (the “**Minister**”) to waive conditions for any relief, remission or exemption of stamp duty.

Reference materials

An article about these changes when the Stamp Duties (Amendment) Bill 2011 was passed in Parliament was featured in a previous issue of the Allen & Gledhill Legal Bulletin (December 2011). To read the article entitled “*Parliament passes Stamp Duties (Amendment) Act 2011: Implementing Budget 2011 changes*”, please click [here](#).

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General

Parliament introduces Evidence (Amendment) Bill 2012: Legal professional privilege for in-house counsel, opinion evidence, computer output, hearsay

The Evidence (Amendment) Bill 2012 (the “**Bill**”) was read the first time in Parliament on 16 January 2012. The Bill seeks to extend legal professional privilege to in-house counsel, to give the courts greater discretion to admit expert opinion evidence, to align the rules for admission of computer output evidence with those governing other forms of evidence, and broaden and align the categories of admissible hearsay evidence for both criminal and civil proceedings.

The Evidence Act (the “**Act**”) provides the framework of rules for the types of evidence that can be admitted as evidence during court proceedings. The amendments are to ensure the Act’s continued relevance.

The Ministry of Law (the “**MinLaw**”) conducted a public consultation (the “**consultation**”) on these proposed amendments from 30 September 2011 to 30 October 2011. Feedback received during the consultation period has been taken into account in the present Bill.

Legal professional privilege

The Bill seeks to extend legal professional privilege to in-house counsel. This amendment will increase Singapore’s attractiveness as a location for multinational companies’ in-house legal departments and enhance Singapore’s stature as a hub for legal and commercial services.

Feedback was received during the consultation that such privilege should not be contingent on whether a legal counsel is called to the Singapore Bar or qualified in another jurisdiction, but whether he was employed in the capacity of legal counsel and whether the communication in question relates to matters of legal advice. This feedback has been adopted in the present Bill with the proposed amendments stipulating that in-house counsel may enjoy privilege so long as they are employed for the purpose of giving legal advice and the communication for which privilege is claimed relates to matters of legal advice.

Such privilege would also apply to public officers working as legal counsel in public agencies such as the Attorney-General Chambers, government ministries or statutory boards.

Opinion evidence

The Bill proposes expanding the current categories of admissible expert opinion evidence as set out in the Act, to allow the court to admit such evidence as long as it would be able to derive assistance from them. The court similarly has the discretion to exclude expert opinion evidence in the interests of justice.

Computer output

The Act currently imposes more stringent requirements for the admission of computer output evidence than other types of evidence. The Bill seeks to repeal the existing sections in the Act that impose computer output-specific requirements, and thereby allow such evidence to be subject to the same rules of admission as all other types of evidence.

Hearsay

The Bill proposes to amend the Act to broaden the scope of the existing hearsay exceptions and introduce various new exceptions. The Bill also seeks to align the civil and criminal evidential rules on hearsay evidence to ensure that the same exceptions apply to both types of proceedings.

The courts will also be given an overriding discretion to exclude hearsay evidence in the interests of justice. A party seeking to rely on hearsay evidence will also generally have to give notice in advance of the use of such evidence.

Other amendments

The Bill also proposes to remove section 157(d) of the Act, which permits the credit of a rape victim to be impeached by proof that she is of a “generally immoral” character.

Reference materials

An article on the MinLaw consultation entitled “*MinLaw conducts public consultation on proposed changes to Evidence Act: Legal professional privilege for in-house counsel, opinion evidence, computer output, hearsay*” was featured in the October 2011 issue of the Legal Bulletin. To read the article, please click [here](#).

Please click on the links below to access material relevant to the proposed amendments to the Act available on the Singapore Parliament website www.parliament.gov.sg and the MinLaw website, www.minlaw.gov.sg:

- [Evidence \(Amendment\) Bill 2012](#)
- [MinLaw press release on proposed amendments to the Evidence Act](#)
- [Responses to feedback received from the public consultation](#)

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English Court of Appeal orders rectification of contract for common mistake

Daventry District Council v Daventry & District Housing Limited
[2011] EWCA Civ 1153

In *Daventry District Council v Daventry & District Housing Limited*, the English Court of Appeal, by a majority of two (Toulson LJ and Neuberger MR) to one (Etherton LJ), allowed a contract to be rectified on the basis of common mistake.

The Court of Appeal applied the principles for rectification set out by Lord Hoffmann in *Chartbrook Ltd v Persimmon Homes Ltd* [2009] 1 AC 1101. In *Chartbrook*, Lord Hoffman affirmed that the requirements for rectification for common mistake were as stated by Gibson LJ in *Swainland Builders Ltd v Freehold Properties Ltd* [2002] 2 EGLR 71: the party seeking rectification must show that (1) the parties had a common continuing intention in respect of a particular matter in the instrument to be rectified, (2) there was an outward expression of accord, (3) the intention continued at the time of the execution of the instrument sought to be rectified, and (4) by mistake, the instrument did not reflect that common intention. Lord Hoffmann had also clarified in *Chartbrook* that the required “common continuing intention” must be outwardly manifested and that an uncommunicated subjective belief is irrelevant.

Facts

This case relates to public housing property originally owned and managed by a district council in the UK. The property and their management were to be transferred from Daventry District Council (“DDC”) to a private company, Daventry & District Housing Limited (“DDH”). Both parties were represented by solicitors.

One of the sticking points during the transfer negotiations was the issue of which party would fund a deficit in the pensions of employees who were to be transferred from DDC to DDH. The final contract which was signed by the parties on 5 November 2007 (the “**Contract**”) included a clause (“**clause 14.10.3**”) which clearly provided that DDC would pay the pension deficit.

DDC subsequently applied to court to rectify the Contract so that it would provide for DDH (instead of DDC) to fund the pension deficit. Rectification of the Contract was sought on the ground of unilateral mistake and common mistake as DDC alleged that the Contract did not reflect the parties’ intentions.

The following key facts are important for an understanding of the case:

- Before signing the Contract, the parties had signed a formal non-binding document recording the parties’ agreement in principle on 11 October 2007 (the “**Prior Accord**”). The terms of the Prior Accord were, however, ambiguous.
- DDC’s chief negotiator, DDH’s chief negotiator and DDH’s board had different understandings of the effect of the Prior Accord and the Contract. DDC’s chief negotiator believed that the parties had reached an agreement in principle for DDH to pay the pension deficit. DDH’s chief negotiator was aware that DDC’s chief negotiator believed this to be the effect of the Prior Accord. However, although DDH’s board believed that DDC would be funding the pension deficit, DDH’s chief negotiator did not disabuse DDH’s board of this belief.

- Subsequent to the Prior Accord, as the Contract was being drafted. DDH's funders suggested the inclusion of clause 14.10.3, which clearly provided that DDC would pay the pension deficit. In agreeing to the inclusion clause 14.10.3, DDC's chief negotiator did not appreciate that clause 14.10.3 imposed the burden of funding the pension deficit on DDC. DDC's solicitors, who were unaware of the understanding of DDC's chief negotiator in respect of the Prior Accord, did not realise that clause 14.10.3 deviated from the chief negotiator's understanding of the Prior Accord.

The first instance judge dismissed DDC's claim for rectification of the Contract.

Decision on appeal

Shared mistaken belief

The majority of the Court of Appeal considered that the parties did not mutually agree to vary the non-binding Prior Accord. The majority considered that in preparing the Contract, DDC and the DDH board both believed that they were giving effect to the parties' understanding in the Prior Accord. DDC and the DDH board therefore shared a mistaken belief that the Contract was consistent with the Prior Accord, albeit their reasons for sharing that mistaken belief were diametrically opposite:

- DDC did not appreciate the effect of the proposed inclusion of clause 14.10.3 in the Contract. DDC believed (rightly) that the commercial agreement embodied in the Prior Accord was that DDH should pay the pension deficit, and believed (wrongly) that the effect of the Contract was that DDH should pay the pension deficit.
- The DDH Board misunderstood the agreement in principle recorded in the Prior Accord. The DDH board believed (wrongly) that the commercial agreement embodied in the Prior Accord was that DDC should pay the pension deficit, and believed (rightly) that the Contract was that DDC should pay the pension.

Common continuing intention

Rectification will only be allowed if the contract as executed does not reflect the parties' common continuing intention.

In a dissenting judgment, Etherton LJ held that DDH had, by proposing the inclusion of clause 14.10.3 in the Contract, communicated DDH's intention to impose the burden of the pension deficit on DDC. DDH had made apparent to DDC that DDH had changed its mind and intended to enter into the Contract on terms different from the Prior Accord. His Lordship commented that rectification of the Contract would force on DDH a contract which it never intended to make on the basis of DDC's uncommunicated subjective intention to maintain the agreement in principle embodied in the Prior Accord. It was DDC's oversight, in expressly assenting to the inclusion of clause 14.10.3 in the Contract, which was the cause of DDC's misfortune.

On the other hand, the majority of the Court of Appeal (Toulson LJ and Neuberger MR) considered that DDC's and DDH's shared mistaken belief as to the conformity of the Contract with the Prior Accord existed at the time of the execution of the Contract, and allowed for rectification on the ground of common mistake.

If you would like to discuss the impact of this case on your business, please contact:

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The majority of the Court of Appeal also seemed to take into account the fact that DDH's chief negotiator was aware that DDC's chief negotiator understood the agreement in principle to be that DDH would be liable for the funding of the pension deficit and that DDC therefore had no intention to renege from the Prior Accord. However, DDH's chief negotiator allowed DDH's board to believe that the Prior Accord reflected the parties' understanding that DDC would be responsible for the pension deficit while, at the same time, failing to suggest this interpretation to DDC's chief negotiator. Neuberger MR observed that DDH's chief negotiator was primarily responsible for the misunderstanding that arose.

DDC's failure to appreciate the effect of the Contract (that DDC would pay for the pension deficit) was also apparent from the commercial unreality of the transaction. DDC had agreed on a reduced price for the transfer of DDC's assets which reflected DDC's belief that DDH would pay for the pension deficit. When DDC agreed to the inclusion of clause 14.10.3 in the Contract, DDC did not revise the price to reflect that DDC would bear responsibility for the pension deficit. The inclusion of clause 14.10.3 in the Contract without a change in the purchase price would have resulted in a windfall for DDH.

Observations

The case of *Daventry* is instructive for the Court of Appeal's analysis of when and whether a common intention of the parties can be said to be "continuing" or "existing" at the time of the execution of the contractual instrument sought to be rectified.

The case also illustrates the difficulties in persuading the Court to rectify a contract on the ground of common mistake. Although the majority of the Court of Appeal allowed rectification, both the trial judge and the minority judge reached a different result. As the common continuing intention, which is a prerequisite for rectification, must be objectively manifested despite not being reflected in the eventual contractual instrument, rectification is likely only to be allowed in exceptional circumstances and only after detailed examination of the evidence relating to the negotiations between the parties.

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News

Wilmar International Limited's US\$5 billion Guaranteed Medium Term Note Programme

Wilmar International Limited ("**WIL**") has established a US\$5 billion Guaranteed Medium Term Note Programme (the "**Programme**"), under which WIL, or such additional issuers that may accede as issuers to the Programme, may from time to time issue notes, including perpetual notes (the "**Notes**"). The obligations of each Issuer (other than WIL) under the Notes will be unconditionally and irrevocably guaranteed by WIL.

Advising WIL as to Singapore law are Allen & Gledhill LLP Partners Margaret Chin and Glenn David Foo and Associate Samuel Lee.

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Additional Murabaha Facilities to finance the acquisition of five properties in Singapore

The Hongkong and Shanghai Banking Corporation Limited, Malayan Banking Berhad, Singapore Branch and United Overseas Bank Limited (the "**Participants**") and HSBC Institutional Trust Services Ltd (the "**REIT Trustee**") (in its capacity as trustee of the Sabana Shari'ah Compliant Industrial Real Estate Investment Trust) ("**Sabana REIT**") entered into an amendment agreement to make available to the REIT Trustee additional commodity murabaha facilities of approximately S\$144 million to finance the acquisition of five properties by Sabana REIT post-IPO listing.

Advising the Participants are Allen & Gledhill LLP Partner Suhaimi Zainul-Abidin and Senior Associates Eugene Phua and Daniel Law.

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Ascott REIT MTN (Euro) Pte. Ltd.'s US\$2 billion Euro-Medium Term Note Programme

Ascott REIT MTN (Euro) Pte. Ltd. (the "**Issuer**"), a wholly-owned subsidiary of DBS Trustee Limited (in its capacity as trustee of the Ascott Residence Trust) (the "**Guarantor**"), established a US\$2 billion Euro-Medium Term Note Programme (the "**Programme**"). The Issuer may from time to time issue notes to be unconditionally and irrevocably guaranteed by the Guarantor.

Standard Chartered Bank has been appointed as Arranger and Dealer and DBS Bank Ltd. has been appointed as Dealer for the Programme (the "**Dealers**").

Advising the Dealers as to Singapore law are Allen & Gledhill LLP Partner Tan Tze Gay and Associate Wu Zhaoqi.

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Mapletree Industrial Trust's acquisition and financing of JTC industrial properties

Mapletree Industrial Trust has acquired a portfolio of industrial properties (the "**Properties**") for over S\$400 million from JTC Corporation ("**JTC**") under a JTC divestment exercise by way of tender.

The Properties comprised five industrial estates with approximately 450 tenancies.

Advising Mapletree Industrial Trust on the acquisition of the Properties are Allen & Gledhill LLP Partners Ho Kin San, Ernest Teo and Senior Associate Renita Sophia Crasta.

Advising Mapletree Industrial Trust on the financing of the Properties is Allen & Gledhill LLP Partner Kok Chee Wai and Senior Associate Eugene Phua.

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RM695.2 million initial public offering of Pavillion REIT

Pavillion REIT Management Sdn Bhd, as manager of Pavillion REIT (the "**Manager**"), has completed an initial public offering of 790 million units on Bursa Malaysia Securities Berhad raising gross proceeds of approximately RM695.2 million. The proceeds are to part finance Pavillion REIT's acquisition of Pavillion Kuala Lumpur Mall and Pavillion Tower, which has an aggregate appraised value of approximately RM3.5 billion.

Advising the Manager as transaction counsel and international legal adviser are Allen & Gledhill LLP Partners Jerry Koh, Chen Lee Won, Chua Bor Jern and Teh Hoe Yue.

Advising the Manager as legal adviser as to Malaysia law are Partners Lim Teong Sit, Zandra Tan and Lee Yee Ling from Rahmat Lim & Partners.

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DBS Bank Ltd.'s US\$5 billion US Commercial Paper Programme

DBS Bank Ltd. ("**DBS**") has established a US\$5 billion Commercial Paper Programme (the "**Programme**"), under which DBS may issue commercial paper notes.

Goldman, Sachs & Co., Barclays Capital Inc., Citigroup Global Markets Inc., J.P. Morgan Securities LLC and Merrill Lynch, Pierce, Fenner & Smith Incorporated have been appointed as the Dealers of the Programme.

Advising DBS as to Singapore law are Allen & Gledhill LLP Partners Glenn Foo and Bernie Lee and Associate Wu Zhaoqi.

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Allen & Gledhill LLP announces admission of new Partners

Allen & Gledhill LLP is pleased to announce the admission of four new Partners with effect from 1 January 2012.

For more information, please click [here](#).

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Allen & Gledhill LLP (UEN/Registration No. T07LL0925F) is registered in Singapore under the Limited Liability Partnerships Act (Chapter 163A) with limited liability. A list of the Partners and their professional qualifications may be inspected at the address specified above. Contact particulars of the Partners may be found on the Allen & Gledhill LLP website www.allenandgledhill.com