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Legal Bulletin

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These recent developments were highlighted in the Allen & Gledhill KnowledgeShare Alert of 9 March 2009. If you would like to be on our financial services related or general electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

SGX-ST Listing Rules revised with effect from 24 March 2009 to facilitate fund raising and strengthen corporate governance of listed issuers

On 24 March 2009, a range of changes were introduced to the Listing Manual (the "**Listing Manual**") of the Singapore Exchange Securities Trading Limited (the "**SGX-ST**") to allow the listing of life science companies without financial track record, facilitate fund raising exercises and at the same time strengthen the corporate governance of companies listed on the Mainboard of the SGX-ST (the "**listed issuers**"). The Listing Manual will also be fine-tuned to address some current issues faced by real estate investment trusts ("**REITs**") and business trusts ("**BTs**") in complying with the Listing Manual.

According to the Singapore Exchange Limited (the "**SGX**"), these new changes incorporated feedback and suggestions from the industry received in response to a public consultation conducted by the SGX in July/August 2008 on the revision of the Listing Manual (the "**Consultation**"). Not all changes that were proposed in the Consultation will be implemented on 24 March 2009; for example, the SGX has indicated that the proposal to introduce the concepts of blind pool funds, public securities funds and private securities funds as additional listing alternatives will be effected later.

Key amendments made to the Listing Manual on 24 March 2009 are highlighted below.

Allowing listing of life science companies without financial track record

A life science company which cannot meet the current listing criteria requiring it to have a financial track record (the "**LSC**") may be listed on the Mainboard of the SGX-ST if it fulfils, among other things, the following conditions:

(a) Has successfully raised funds from high net worth individuals and entities (institutional investors, accredited investors and relevant persons as contemplated under sections 274 and 275 of the Securities and Futures Act) not less than six months before its listing application;

(b) Will use the proceeds of the initial public offering (the "**IPO**") to bring identified products to commercialisation;

(c) Has a three-year record of operations in laboratory research and development (details must be submitted to the SGX to demonstrate this);

(d) Has available working capital that is sufficient for its present requirements and for at least 12 months after listing.

The LSC is still expected to satisfy the current market capitalisation requirement and other listing requirements.

As part of the continuing listing requirements, the LSC must make a quarterly announcement on the use of funds/cash for the quarter and a projection on the use of funds/cash for the next immediate quarter. Details on this additional continuing listing requirement for an LSC is provided in new Listing Rule 705(6) of the Listing Manual.

Facilitating fund raising exercises

Revised IPO distribution requirements

The Listing Manual requires an issuer applying for listing of its equity securities on the Mainboard of the SGX-ST to have a minimum number of public shareholders. The IPO distribution requirements will be revised as follows:

(a) For a primary listing, the minimum number of public shareholders is reduced from 1,000 to 500;

(b) For a secondary listing, the minimum number of public shareholders worldwide is reduced from 2,000 to 500; and

(c) For a secondary listing where the SGX-ST and the primary home exchange do not have an established framework and arrangement to facilitate the movement of shares between the jurisdictions, the minimum number of public shareholders in Singapore is 500 or worldwide is 1,000.

Removal of limit on capital structure

Before the amendment, Rule 825 of the Listing Manual limits the number of new shares arising from the exercise/conversion of outstanding company warrants or other convertible securities to 50 per cent. of the total number of issued shares of a listed issuer (excluding treasury shares).

The cap on the issue of warrants and other convertible securities in Rule 825 has been removed and replaced by a requirement for the listed issuer to include the following details in the shareholders' circular for the approval of an issue of company warrants or convertible securities:

(a) Recommendations of the board of directors of the listed issuer on the issue; and

(b) The basis for their recommendations.

Strengthening corporate governance

Disclosure of details relating to profit guarantees or profit forecasts

Under the revised Listing Manual, a listed issuer must disclose the following details when it accepts a profit guarantee or profit forecast from a vendor of assets or businesses in a transaction that the listed issuer is required by the Listing Manual to announce:

(a) Its board of directors' views in accepting the profit guarantee or the profit forecast and the factors taken into consideration and basis for such a view;

(b) The principal assumptions including commercial bases and assumptions upon which the quantum of profit guarantee or the profit forecast is based;

(c) The manner and amount of compensation to be paid by the vendor in the event that the profit guarantee or the profit forecast is not met and the conditions precedent, if any and the detailed basis for such a compensation; and

(d) The safeguards put in place to ensure the listed issuer's right of recourse in the event that the profit guarantee or the profit forecast is not met, if any.

Where the profit guarantee or profit forecast is provided in a transaction that is required to be approved by the shareholders of the listed issuer, the listed issuer must also disclose in the shareholders' circular (together with the above information in the announcement):

(a) A confirmation from the auditors of the business or assets to be acquired that they have reviewed the bases and assumptions, accounting policies and calculations for the profit guarantee or the profit forecast, and their opinion on these matters; and

(b) A statement by the financial advisor to the listed issuer as to whether the transaction is on normal commercial terms and is not prejudicial to the interest of the listed issuer and its shareholders.

Further, the listed issuer is required to make immediate announcement (containing the prescribed details) via SGXNET where the profit guarantee or profit forecast has not been met.

Additional disclosures for issues of shares, company warrants, convertible securities for cash and rights issues

Previously, a listed issuer which intended to issue shares, company warrants or other convertible securities for cash was required to announce the issue promptly, stating the following information:

(a) Terms of the issue;

(b) Purpose of the issue; and

(c) Amount of proceeds proposed to be raised from the issue.

With effect from 24 March 2009, the following (where applicable) must also be announced together with the above information:

(a) Intended use of the proceeds raised on a percentage allocation basis (which could be expressed as a range if the exact allocation has not been determined);

(b) If a placement agent is appointed for the issue, its identity;

(c) If a placement agent is not appointed for the issue or where the placement agent is subject to any restrictions placed by the listed issuer regarding the identities of and/or the allocation to the placees, (i) identities of the placees and the number of shares placed to each of them, (ii) details on how the placees were identified and the rationale for placing to them, and (iii) the restrictions imposed on the placement agent by the listed issuer regarding the identities of and/or the allocation to the placees, where applicable.

Similarly, a listed issuer making a rights issue is also required to announce the amount of proceeds proposed to be raised from the rights issue and the intended use of the proceeds raised on a percentage allocation basis (which could be expressed as a range if the exact allocation has not been determined) in addition to the current requirement to disclose price, terms and purpose of the issue.

Disclosure of use of proceeds

There is a new continuing listing requirement to disclose the use of proceeds from fund raising exercises as and when such funds are materially disbursed and whether such a use is in accordance with the intended use and percentage allocated in the listed issuer's prospectus or announcement. If there is any material deviation from the stated use of proceeds, the reasons for such deviation must be announced.

Disclosure of waivers granted by SGX-ST

Under the revised Listing Manual, a listed issuer which has obtained a waiver by the SGX-ST from complying with a listing rule is required to announce, as soon as practicable, the waiver, together with its reasons for seeking the waiver and the conditions (if any) upon which the waiver is granted.

Change in principal business subject to SGX-ST's approval

The revised Listing Manual provides that the SGX-ST reserves the right to subject a listed issuer's change in principal business to the SGX-ST's approval if it is of the view that the integrity of the market may be adversely affected or it is in the public interest to do so.

Specifically, the SGX-ST's approval will be required if a listed issuer that had originally qualified for a listing of its equity securities intends to set up an investment fund or undertake any businesses in investment fund management which in aggregate, exceeds 50 per cent. of the listed issuer's net asset value. The approval must be obtained before the listed issuer takes any steps to undertake such a business, whether through a transaction or a series of transactions.

Disqualification of directors

From 24 March 2009, a director of a listed issuer must immediately resign if he is disqualified from acting as a director in any jurisdiction for reasons other than on technical grounds. An announcement of the resignation must also be made in the prescribed form.

Changes concerning REITs/BTs

Unitholders' approval required for disposal of property by REITs and property trusts exceeding prescribed threshold

The revised Listing Manual clarifies that unitholders' approval is not required for a disposal of properties by a REIT/property trust because it is regarded as a transaction in the ordinary course of business, provided that the relative figures as computed on the bases set out in Rule 1006 of the Listing Manual do not exceed 50 per cent. based on the aggregate value of all disposals in the last 12 months. If any of the relative figures calculated under Rule 1006 on an aggregate basis is 50 per cent. or more, unitholders' approval must be sought.

Issuing convertible securities without unitholders' approval

A REIT will be allowed to issue convertible securities without prior specific unitholders' approval in a general meeting subject to its complying with the requirements set out in revised Rule 887 of the Listing Manual.

Basis of computation of discount of placement issue

The basis of computation of the discount for a placement issue in the case of REITs and BTs is now spelt out in new Rule 811(5) of the Listing Manual.

"Interested person", "associate" and "connected persons" defined in context of REITs and BTs

There are new specific definitions of "interested person", "associate" and "connected persons" in the revised Listing Manual which are applicable to a REIT or BT.

Other changes

Allowing placement to substantial shareholders

The revised Listing Manual allows placements to substantial shareholders of a listed issuer provided that certain conditions set out in revised Rule 812(3) are met (including a condition that such substantial shareholders do not have control or influence over the listed issuer in connection with its day-to-day affairs and the terms of the placement).

Aligning minimum issue price for reverse takeovers with that for IPOs

Rule 241 of the Listing Manual prescribes a minimum issue price of S$0.20 for IPOs. To ensure that an issuer seeking a listing on the SGX-ST via a reverse takeover ("**RTO**") is subject to the same admission standards, the minimum initial price of S$0.20 requirement has been extended to RTOs.

Extension of time for newly listed issuer to comply with requirement for financial reporting and holding of AGM

If the date of listing of a listed issuer and the deadline for it to report its financial results or hold its annual general meeting ("**AGM**") is less than 30 days, the revised Listing Manual expressly provides that the listed issuer will have an extension of 30 days from the relevant deadline to report its financial results or hold its AGM subject to it satisfying the conditions prescribed in revised Rule 705(4) or new Rule 707(3) (as the case may be).

Useful references

For more details on the above development, please click on the titles of the following documents that are posted on the SGX website at **www.sgx.com**:

(a) **Full texts of Listing Manual Amendments - Effective 24 March 2009**

(b) **SGX's press release dated 3 March 2009**

For a background on the above changes, please **click here** for an article entitled "*SGX issues consultation paper on proposed new rules in Listing Manual to allow new listings and rule amendments to enhance disclosure*" that was featured in a previous issue of the Allen & Gledhill Financial Services Bulletin (July 2008). The article provides a summary of the Consultation.

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Consumer Protection (Fair Trading) (Amendment) Act 2008 in force from 15 April 2009: Consumer protection extended to financial products and services and other changes

With effect from 15 April 2009, protection under the Consumer Protection (Fair Trading) Act (the "**CPFTA**") will be extended to certain financial products and services as a result of amendments to the CPFTA.

The CPFTA will also be amended to bring about the following general changes to the consumer protection regime:

- the CPFTA prescribed limit for claims brought by consumers for unfair practice will be raised from S$20,000 to S$30,000 to take into account larger consumer transactions; and
- the limitation period for actions for unfair practice under the CPFTA will be extended from one year to two years.

Inclusion of financial products and financial services

With effect from 15 April 2009, the provisions of the CPFTA will be extended to the financial products and services regulated under legislation administered by the Monetary Authority of Singapore (the "**MAS**"), the Commodity Trading Act, and such other written law as the Minister for Trade and Industry (the "**Minister**") may prescribe.

Legislation administered by the MAS include the following statutes which are currently excluded from the ambit of the CPFTA:

- Banking Act
- Finance Companies Act
- Financial Advisers Act
- Insurance Act
- Monetary Authority of Singapore Act
- Money-changing and Remittance Businesses Act
- Securities and Futures Act

Following this change, consumers will have the option of seeking redress and civil remedies under the CPFTA for unfair practices by financial institutions. The CPFTA covers aspects of unconscionable conduct (such as harsh, oppressive or excessively one-sided terms of agreement, and exerting undue pressure or undue influence on a consumer) that are not covered by the legislation administered by the MAS.

Consumer protection under the CPFTA is expected to be extended to cover financial products and services regulated under the Moneylenders Act and Pawnbrokers Act later in 2009 and 2010 respectively.

What are "financial products" and "financial services"?

Definitions of "financial product" and "financial services" will be introduced in the CPFTA.

The term "**financial product**" includes any arrangements, transactions or contracts regulated or supplied by a person regulated under any written law administered by the MAS, the Commodity Trading Act, or such other written law as the Minister may by order prescribe.

The term "**financial services**" includes any services regulated or supplied by a person regulated under any written law administered by the MAS, the Commodity Trading Act, or such other written law as the Minister may by order prescribe.

For the purposes of the definitions of "financial product" and "financial services", a reference to a person regulated under a written law includes a person exempted from being licensed, approved or regulated under that written law.

Special considerations for supplies of financial products and services

In line with the extension of the CPFTA to financial products and services, the Consumer Protection (Fair Trading) (Regulated Financial Products and Services) Regulations 2009 will come into force on 15 April 2009 and will clarify the following issues:

- A court may take into account the inherent risks of the financial products or services supplied in determining whether there is unfair practice;

- In relation to insurance contracts, a supplier of an insurance contract should not be taken to have engaged in an unfair practice by reason only that the insurance contract includes terms that clearly define or circumscribe the insured risk or the insurer's liability;

- Where multiple actions for unfair practice are brought by a consumer based on substantially the same facts, the amount of the claim for each of these actions will be aggregated for the purpose of applying the prescribed limit under the CPFTA;

- The dispute resolution scheme provided by the Financial Industry Disputes Resolution Centre Limited (the "**FIDReC**") is specified as the dispute resolution scheme for cases involving suppliers of MAS-regulated financial products and services who are FIDReC members. In this regard, the CPFTA will provide that where a consumer brings an action for unfair practice, the court will consider whether the consumer had made a reasonable effort to resolve the dispute with the supplier through the FIDReC; and

- Excluding financial products and services regulated by the MAS from the provisions of the CPFTA which empower specified bodies to seek voluntary compliance agreements, declarations and injunctions against suppliers.

Changes in relation to cancellation period

There are a number of changes relating to the cancellation period and these are reflected in the Consumer Protection (Fair Trading) (Cancellation of Contracts) Regulations 2009, which will come into force on 15 April 2009:

- A direct sales contract may be cancelled within five days (currently three days) after the day on which it is entered into (the "**cancellation period**");

- The cancellation period now applies to direct sales contracts that are entered into during an unsolicited visit that occurs after an initial contact at the supplier's temporary premises at a trade fair, exhibition or promotional event, where the supplier indicates his willingness to visit the consumer; and

- The cancellation period does not apply to financial products and services regulated by laws administered by the MAS where those laws provide for a longer cancellation period.

Unsolicited goods or services and goods or services supplied on a free trial basis

The Consumer Protection (Fair Trading) (Opt-Out Practices) Regulations 2009 (the "**Opt-Out Regulations**"), which will also come into force on 15 April 2009, allow the consumer to treat unsolicited goods or services as an unconditional gift unless the consumer has expressly acknowledged in writing his intention to accept and pay for the goods or services.

Where goods or services are supplied on a free trial basis, the Opt-Out Regulations require the supplier to give the consumer a reminder notice within a specified period before the end of the free trial period. The consumer will be allowed to claim a refund of payments made if the supplier fails to give the consumer a reminder notice and the consumer does not, after the supply of goods or services commences, expressly acknowledge to the supplier in writing his intention to accept or pay for the goods or services.

Useful references

For more information about this development, please click on the titles of the following articles which were featured in previous issues of the Allen & Gledhill Financial Services Bulletin:

- **Consumer Protection (Fair Trading) (Amendment) Bill 2008 passed in Parliament: Extending application to certain financial products and services** (September 2008)

- **Parliament introduces Consumer Protection (Fair Trading) (Amendment) Bill 2008: Extending application to certain financial products and services** (July 2008)

- **MTI public consultation on changes to Consumer Protection (Fair Trading) Act: Additional changes in the pipeline** (March 2008)

- **MTI public consultation on extending the Consumer Protection (Fair Trading) Act to certain financial products and services** (October 2007)

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IRAS circular provides guidance on voluntary disclosure and waiver or reduction of penalties

The Inland Revenue Authority of Singapore (the "**IRAS**") issued an e-Tax guide entitled "IRAS Voluntary Disclosure Program" (the "**Circular**") on 8 March 2009.

The IRAS Voluntary Disclosure Program (the "**VDP**") seeks to provide taxpayers with an incentive to voluntarily disclose errors made in their income tax or goods and services tax ("**GST**") returns or omissions in other tax matters, such as a failure to report or pay withholding taxes. Under the VDP, a taxpayer who makes a voluntary disclosure and qualifies under the conditions of the VDP may be subject to substantially reduced penalties.

There are five key conditions to note under the VDP:

(a) The disclosure made must be timely and self-initiated in the sense that it cannot be made after the taxpayer has received a query from the IRAS relevant to the matter disclosed or after he has received notification of any audit or investigation by the IRAS.

(b) The disclosure made must be factually accurate and complete.

(c) The taxpayer must demonstrate a willingness to fully cooperate with the IRAS to rectify the error or omission that is the subject matter of the disclosure made.

(d) The taxpayer must demonstrate a willingness to make payment arrangements for any additional taxes or penalties payable as a result of the disclosure made.

(e) The IRAS must not come to a conclusion that the taxpayer may have had a wilful intention to evade taxes. The VDP does not extend to any deliberate underreporting of income or taxes.

If the above conditions are satisfied, a taxpayer making a voluntary disclosure may be subject to substantially reduced penalties under the VDP, details of which are as follows:

(a) If the voluntary disclosure is made within one year of the statutory filing date of the relevant tax return or notice of withholding tax that is the subject matter of the disclosure made, the IRAS will waive any penalty applicable. This applies to any penalty for the submission of an incorrect return as well as any penalty for the late payment of tax.

(b) If the voluntary disclosure is made after the one year "grace period", the IRAS will impose a reduced penalty of five per cent. per annum of the tax undercharged in the case of income tax, and five per cent. of the tax underpaid in the case of GST or withholding tax.

It should be noted that the above waiver or reduction of penalties is discretionary and is only available once to each taxpayer. The Circular provides that a taxpayer who qualifies under the VDP should implement effective controls to prevent any recurrence of similar errors or omissions. However, it is unclear why waiver or reduction of penalties should not be available if the same taxpayer subsequently makes a voluntary disclosure of an error or omission of a different nature.

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The VDP clearly shows the willingness of the IRAS to impose substantially lower penalties in cases of voluntary disclosure and where the conditions listed above are met. The Circular is welcomed as it provides clear guidance on the circumstances under which the IRAS would treat the disclosure as having been made on a voluntary basis and the penalties applicable in such cases.

Please **click here** to read the Circular, which is also available from the IRAS website **www.iras.gov.sg**

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These recent developments were highlighted in the Allen & Gledhill Tax Update of 26 February 2009. If you would like to be on our tax related electronic communications mailing list, please e-mail us at publications@allenandgledhill.com

IRAS issues supplementary circular on transfer pricing guidelines for related party loans and related party services

The Inland Revenue Authority of Singapore (the "**IRAS**") issued a Supplementary e-Tax Guide entitled "Transfer Pricing Guidelines for Related Party Loans and Related Party Services" (the "**Supplementary Circular**") on 23 February 2009.

The Supplementary Circular is issued following a public consultation exercise held by the IRAS between 21 October 2008 and 20 November 2008 in respect of a draft version of the Supplementary Circular.

The Supplementary Circular together with the IRAS' response to feedback received from the public consultation provide further guidance and clarification on the application of the arm's length principle to related party loans and related party services.

Related party loans

The IRAS takes the view that the arm's length principle should be applied to transactions and arrangements between related parties, including related party loans.

Loans between related entities, including loans arising from trade debts or unpaid sums without any written loan agreement, should generally bear an arm's length rate of interest, i.e. the interest rate that would be charged to provide funds to unrelated borrowers. The position of the IRAS is that the comparable uncontrolled price method is the preferred method for determining arm's length pricing for related party loans, although taxpayers may rely on another method if they feel this is more appropriate. They should then maintain documentation to justify the method chosen.

As practical guidance, the IRAS has suggested relying on a suitable reference rate such as SIBOR, LIBOR or prime rates offered by banks, and subsequently making adjustments to such rates based on the comparability analysis undertaken in determining what would be an arm's length rate of interest.

All relevant facts and circumstances relating to the loan should be considered when performing a comparability analysis, including the following:

(a) nature and purpose of the loan;

(b) market conditions at the time the loan is granted;

(c) principal amount, duration and terms of the loan;

(d) currency in which the loan is denominated;

(e) whether the exchange risks are borne by the lender or borrower;

(f) security offered by the borrower;

(g) guarantees involved in the loan;

(h) credit standing of the borrower; and

(i) interest rate prevailing at the location of the lender or borrower for comparable loans between unrelated parties.

Currently, the IRAS does not strictly require loans between two domestic related entities to bear arm's length rates of interest. Instead, the IRAS may restrict any interest deduction claimed by the domestic entity lending the funds. The IRAS has indicated that it will continue with this practice but only where both the lending and the borrowing entities are domestic entities and the lender is not in the business of borrowing and lending funds.

Cross-border loans between related entities are required to be on an arm's length basis from 1 January 2011.

Related party services

The arm's length principle also applies to the provision of services between related parties. Taxpayers who provide services to related parties should be able to demonstrate that their pricing of the services meets the arm's length standard.

However, to reduce compliance and administrative costs where the services provided are "routine support services", the IRAS is prepared to accept a 5 per cent. mark-up on costs as a reasonable arm's length charge, provided that the same services are not also provided to unrelated parties. The list of services that are currently accepted by the IRAS as "routine support services" is found in Annex A of the Supplementary Circular.

No mark-up is required where services are provided on a cost pooling basis, for example, where group companies share the costs of a group service provider providing routine support services to themselves. The services must not also be provided to unrelated parties and the provision of the services must not be the principal activity of the group service provider.

Where a group service provider arranges for services to be provided by a third-party service provider to related parties, and merely acts as a paying agent to the third-party service provider without enhancing the value of the service provided by the third-party service provider, no mark-up on costs is required to be charged by the group service provider as it is merely passing on the costs of the services to its related entities. These costs may be charged without a mark-up only if the related entities receiving the services are contractually liable to pay the costs of the services to the third-party service provider.

In the light of the above clarifications by the IRAS on transfer pricing, business entities may wish to review any existing cross-border loan arrangements or service agreements between its group entities.

Please **click here** to read the Supplementary Circular, which can also be accessed from the IRAS website **www.iras.gov.sg**

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MOF announces endorsement by Singapore of OECD Standard for exchange of information through DTAs

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On 6 March 2009, the Ministry of Finance (the "**MOF**") issued a press statement announcing that Singapore is endorsing the Organisation for Economic Co-operation and Development (OECD) Standard (the "**Standard**") for the effective exchange of information through Avoidance of Double Taxation Agreements ("**DTAs**"). It is expected that draft legislative amendments will be introduced in the middle of 2009 to implement the Standard.

Once implemented, Singapore will be in the position to extend further cooperation on information exchange through its DTAs. Singapore will assist on *bona fide* request for information, not information fishing.

For further information, please **click here** for the MOF press statement, which is also available from the MOF website **www.mof.gov.sg**.

For additional reading on OECD, please visit the website at **www.oecd.org**

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Insurance (Amendment) Act 2009 partially in force from 1 March 2009: Enabling inclusion of life insurance policies in trust structures

The Insurance (Amendment) Act 2009 (the "**Amendment Act**") came into operation partially on 1 March 2009.

Pursuant to the partial commencement of the Amendment Act, the insurable interest requirement in the Insurance Act (the "**Act**") relating to life insurance policies has been clarified.

What has yet to come into force is the new statutory framework to be introduced in the Act for the nomination of beneficiaries under a life policy or accident and health policy which is effected by the policy owner on his own life.

Insurable interest requirement

To facilitate the inclusion of life insurance policies in trust structures, the Act is amended with effect from 1 March 2009 to enable a life policy insuring the life of a settlor or beneficiary of a trust to be effected by the trustee of the trust, if certain conditions are satisfied. Previously, as a trustee was deemed not to have an insurable interest in the settlor and beneficiaries of a trust, the requirement of insurable interest prevented life insurance policies from being issued in respect of trusts. Individuals were therefore unable to include such policies in their trusts.

Nomination of beneficiaries framework

As mentioned above, the new nomination of beneficiaries framework has not come into force yet.

New sections 49L to 49M in the Act will introduce a new framework for nomination of beneficiaries in respect of insurance policy proceeds. Under the new framework which has yet to come into force, insurance policy owners may choose whether or not to make nominations. If they choose to nominate, they then have the option of making either a revocable or an irrevocable (trust) nomination. Nominations may be made at any time. Only life and accident and health policies with death benefits will be eligible for nomination as only such policies have a savings and investment element for which nominations will be meaningful. The new framework will not apply retrospectively.

Annuities purchased under the Central Provident Fund ("**CPF**") Minimum Sum Scheme will be carved-out from the nomination framework altogether to enable the CPF Board to retain full control over the disbursement of proceeds from such policies. On the other hand, annuities purchased under the Minimum Sum Plus Scheme will be deemed no different from any other insurance policy as they are paid for with cash.

An article about the Amendment Act when it was passed in Parliament was featured in a previous issue of the Financial Services Bulletin (January 2009). To read the article entitled "*Insurance (Amendment) Bill 2009 passed in Parliament: New statutory framework for nomination of beneficiaries under life policies*", please **click here**

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Parliament passes Human Organ Transplant (Amendment) Bill 2009: Allowing payment for living donors

On 24 March 2009, the Human Organ Transplant (Amendment) Bill 2009 (the "**Bill**") was passed in Parliament. The Bill has not come into force yet.

The Bill was introduced in Parliament following a public consultation exercise which was conducted by the Ministry of Health (the "**MOH**") in November/December 2008. Please **click here** to read an article about the Bill when it was first introduced, which was featured in a previous issue of the Allen & Gledhill Legal Bulletin (January 2009).

The Bill will amend the Human Organ Transplant Act (the "**HOTA**") to provide for the following:

- Comprehensive reimbursement, in money or money's worth, of costs, expenses and loss of earnings reasonably incurred by altruistic living organ donors will be allowed. The provision of reasonable costs or expenses of short-term or long-term medical care or insurance protection which is or may reasonably be necessary as a result of the donation of the organ by an altruistic living donor will also be allowed. Payment will be made by the organ recipient.

- The upper age limit for cadaveric organ donation will be lifted. Currently, organs may not be removed from the body of a deceased person who is above 60 years of age for the purpose of transplantation. However, those who opted out of HOTA before this amendment will continue to be excluded even when they turn 60, unless they have withdrawn their objections.

- The upper age limit of 60 years for patients to be placed on the transplant waiting list will be removed.

- Paired living donor organ transplant arrangements will be permitted.

- Increasing the penalties for organ trading syndicates and middlemen. A person convicted of such offences may be liable to a maximum fine of S$100,000 or a maximum term of imprisonment of 10 years, or both.

Please **click here** to read the full text of the Bill, which is also available on the Parliament website **www.parliament.gov.sg**

Minister for Health, Mr Khaw Boon Wan (the "**Minister**"), in delivering his Closing Speech in Parliament, addressed the more controversial issue of payment for living donors. There are concerns that this amendment may lead to organ trading. In response, the Minister reiterated that the Bill does not legalise organ trading and that it is not compulsory under the Bill to reimburse living donors. The amendment merely allows organ recipients, if they wish, to make some payment to cover the financial losses incurred by their donors. The Minister assures that the MOH has a working system which prevents organ trading and this will be further strengthened as follows:

- There is a system for donor evaluation and selection to ensure that only healthy and suitable donors are selected. The MOH is working with an expert committee to formalise a set of best practice guidelines for the medical and psychological evaluation of all potential donors.

- There is a system for informed consent established under the Human Organ Transplant Regulations, to ensure that the donors fully understand all aspects of the donation as well as the implications of becoming a living donor. The consent process will be further tightened by drawing up a comprehensive checklist that transplant centres must run through with their potential donors to ensure that they are well informed. Every transplant centre will be required to develop suitable communications materials and documents for informed consent that are easily understood by the donors, in accordance with their levels of education and their mother tongues.

- Every living donor organ transplant is subjected to a review by a hospital transplant ethics committee, whose job is to ensure that the donor is free from any undue influence, coercion, emotional pressure or financial inducement. The composition of the committee requires the MOH's approval. The MOH will work closely with these ethics committees and provide guidelines to help them conduct their assessments. The capabilities of these committees will be enhanced by requiring them to undergo training, especially in the area of medical ethics.

- The MOH will closely monitor the processes of these transplant ethics committees by requiring the hospitals to submit the relevant data after every transplant. There will be regular audits by the MOH to ensure that these ethics committees fulfil the legal requirements in evaluating transplant applications and comply with MOH guidelines.

- There is a system to detect fraudulent practices.

- As to the quantum of payment, the Minister pointed out that there are real difficulties in prescribing quantitative formulae, or reimbursement caps in the primary legislation. Instead, principles can be set out in guidelines, in both a qualitative and quantitative manner, and a platform can be provided for the transplant ethics committees to share their

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experiences, compare notes and learn best practices. The Minister stressed that the guidelines must be practical, defensible and fair to the donors.

Other issues covered in the Minister's Closing Speech related to the coverage of foreigners, impact on donor's insurability and donation of vital organs. The Closing Speech as well as the Second Reading Speech are available on the MOH website **www.moh.gov.sg**. To read the speeches, please click on the provided links below:

- **Human Organ Transplant (Amendment) Bill - Closing Speech**
- **Human Organ Transplant (Amendment) Bill - Second Reading Speech**

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Cases

Banking

Singapore High Court refuses to grant relief against forfeiture in absence of unconscionability and injustice

Sembawang Capital Pte Ltd v Ng Hock Kok
[2008] SGHC 185

In *Sembawang Capital Pte Ltd v Ng Hock Kok* [2008] SGHC 185, the Singapore High Court rejected a mortgagor's argument that the mortgagee should not be allowed to enforce its rights to sell the mortgaged property as there should be relief against forfeiture. The court ruled that the jurisdiction to grant relief would only be exercised if the circumstances of the case revealed elements of unconscionability and injustice as the courts would not ordinarily allow a departure from contractual rights and obligations. On the facts of the present case, the court found no unconscionability or injustice.

The case concerned an action by a mortgagee to obtain possession of a property from a mortgagor in default. The plaintiff and the defendant were the mortgagee and mortgagor respectively. The defendant was indebted to the plaintiff as a borrower and also as a guarantor for facilities granted by the plaintiff to several parties. The defendant acknowledged his indebtedness in a Deed of Settlement (the "**Deed**") and mortgaged a house (the "**mortgaged property**") to the plaintiff as security for his liabilities.

Under the Deed, the defendant was to make instalment payments to the plaintiff and, provided the plaintiff gave the defendant two weeks' written notice to rectify any default, the Deed would terminate upon the defendant's failure to pay any instalment as agreed. Upon termination, all the sums owing by the defendant would become immediately payable. The defendant retained possession of the mortgaged property, which was his residence.

The defendant admitted that he was in default under the terms of the Deed because he had not paid the instalments for three months. When the defendant was ill and absent from his office, the plaintiff's representative ("**Loh**") met with the defendant's wife ("**Yu**") to discuss the arrears. The plaintiff's case was that at this meeting, a letter notifying the defendant of his default in payment under the Deed and that the Deed would be terminated

within 14 days from the date of the letter if the default was not rectified, was handed by Loh to Yu and that Yu signed on a copy of the letter to acknowledge receipt. Yu asserted that although she signed an acknowledgement, no letter was handed to her.

The plaintiff applied to court for orders that the defendant deliver vacant possession of the mortgaged property and for liberty to enforce its rights as mortgagee to sell the mortgaged property. The defendant argued that the Deed was not validly terminated and even if it had been validly terminated, there should be relief against forfeiture.

Whether the Deed was validly terminated

On a balance of probabilities, the court accepted that Loh had delivered a copy of the letter to Yu at the meeting and that Yu had received the letter as an agent for the defendant. That constituted delivery of the notice to the defendant. The plaintiff was not under a duty to explain the notice.

Whether there should be relief against forfeiture

The court pointed out that the defendant was not seeking relief in relation to his right to redeem the mortgage. What he sought was to preserve his right to remain in possession of the mortgaged property by paying the monthly instalments and to prevent the plaintiff from selling the house.

The court noted that the scope of the equitable relief against forfeiture is not closed. It is well settled that equitable relief against forfeiture is available against the forfeiture of deposit and instalment payments made towards the purchase of land, as well as the contractual right to buy land. In the present case, the interests involved were the right to continued possession of the mortgaged property and the continued legal ownership of the property. These interests were more substantial (or at any rate, not less substantial) than payments of deposit and instalment payments, and the right to complete a purchase of land. As the relief applied to the latter interests, it must be available against the former interests.

However, the court ruled that the jurisdiction to grant relief would only be exercised in exceptional circumstances since the courts would not ordinarily countenance a departure from contractual rights and obligations. Hence, in order to invoke successfully the courts' jurisdiction, the circumstances of the case must reveal elements of unconscionability and injustice.

In the present case, the court held that the necessary elements of unconscionability and injustice were absent for the following reasons:

- The terms of the Deed were favourable to the defendant because he was allowed repayment of his debt in monthly instalments while remaining in possession of the mortgaged property free of rent.

- The plaintiff had shown forbearance in the enforcement of its right to terminate the Deed. It did not seek to exercise its right until the defendant had defaulted on three consecutive payments.

In allowing the plaintiff's application, the court held that the fact that the defendant was in poor health when he defaulted, and that he paid the arrears and would continue with the monthly payments, did not render the plaintiff's exercise of its rights unconscionable or unjust.

The successful plaintiff was represented by Allen & Gledhill LLP.

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English Court of Appeal holds party aware of default affirming contract despite "no waiver" clause in contract

Tele2 International Card Company SA and Ors v Post Office Limited
[2009] EWCA Civ 9

In the recent English Court of Appeal decision of *Tele2 International Card Company SA & Ors v Post Office Limited*, it was held that the provision of a "no waiver" clause in an agreement could not prevent the fact of an election to abandon the right to terminate a contract from existing. On the facts, the court agreed with the judge at first instance that the respondent's continued performance of the contract for a year without any protest or reservation of right in relation to the appellants' breach was a clear and unequivocal communication by conduct of the respondent's election to affirm the contract and to abandon its right to terminate.

The appellants made and supplied phonecards and phonecard services to companies such as the respondent, who was interested to sell phonecards and phonecard services to the public. The two parties entered into a written agreement (the "**Agreement**") whereby the appellants would provide both the physical cards and also the telecommunications connections between the telephone of the purchaser or user of the phonecard and the number which the phonecard user wished to call.

The Agreement provided that it would run from 15 October 2001 until the expiry of the "Initial Term" on 31 March 2005. Subsequent to that, the Agreement was terminable upon 24 months written notice from either side, unless the Agreement had been terminated earlier in accordance with the terms of the Agreement. The provision which precipitated the present litigation concerned the provision of parent company guarantees by the appellants. The appellants were obliged to provide to the respondent, within 20 days of the execution of the Agreement, a certified copy of a Parent Company Letter for the calendar year from January 2001. None of the appellants had, by 24 December 2003, provided a certified copy of a Parent Company Letter to the respondent for the calendar year 2004, giving the respondent a *prima facie* right to terminate the Agreement by giving written notice to the appellants that it would do so.

On 1 December 2004, the respondent purported to give such written notice, announcing that the Agreement would terminate on 1 April 2005. The appellants alleged that the respondent's delay in giving written notice of termination of the Agreement until nearly one year after the Parent Company Letters for 2004 were due (i.e. on 24 December 2003 at the latest), and its performance of the contract in the meantime without any protest as to the lack of the letters, meant that the respondent had affirmed the Agreement by election. It was argued on behalf of the appellants that the respondent was therefore not entitled to give notice to terminate for the failure to provide the letters, so that the termination notice was a wrongful anticipatory renunciation of the Agreement. The respondent relied on a "no waiver" clause in the Agreement to argue that any delay to give notice to enforce its rights to terminate could not be used to found an affirmation by election.

The relevant "no waiver" clause read as follows:

"In no event shall any delay, neglect or forbearance on the part of any party in enforcing (in whole or in part) any provision of this Agreement be or be deemed to be a waiver thereof or a waiver of any other provision or shall in any way prejudice any right of that party under this Agreement".

According to the Court of Appeal, whether a party has elected to terminate or to affirm a contract was a question of fact. If the innocent party has not affirmed the contract, then the right to terminate will be still exercisable. The court felt that the "no waiver" clause in question could not prevent the fact of an election to abandon the right to terminate from existing. Although the clause stipulated that "in no event shall any delay, neglect or forbearance" on the part of any party in enforcing a provision of the Agreement "…be or be deemed to be a waiver" of the provision or "….shall in any way prejudice any right of that party under this Agreement", it did not deal at all with the issue of election of whether or not to exercise a contractual right. The general law demanded that a party which has a contractual right to terminate a contract must elect whether or not to do so. The "no waiver' clause here did not attempt to suggest that the doctrine of election shall not apply.

The Court of Appeal upheld the judge's decision below in finding that the respondent's continued performance of the Agreement between 24 December 2003 and 1 December 2004 and its agreement to the appellants performing the Agreement, without any protest concerning the breach or any reservation of rights, was consistent only with it having elected to abandon its right to terminate. Alternatively, the respondent's conduct constituted the communication of its election to the appellants in clear and unequivocal terms.

Accordingly, the respondent was not entitled on 1 December 2004 to give to the appellants the notices to terminate the Agreement with effect from 31 March 2005. The respondent's action was an anticipatory renunciation of the Agreement; anticipatory because the notices said that the respondent would cease to perform the Agreement as from 1 April 2005. When the respondent ceased to perform the Agreement from 1 April 2005, this was a repudiatory breach of contract by the respondent. This repudiation was subsequently accepted by the appellants. Therefore, in principle, the appellants were entitled to claim damages for the respondent's repudiation of the Agreement.

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Corporate & financial services

Singapore Court of Appeal upholds High Court lifting of corporate veil

Children's Media Ltd & Ors v Singapore Tourism Board
[2009] 1 SLR 524

In the case of *Children's Media Ltd & Ors v Singapore Tourism Board*, the Singapore Court of Appeal upheld the High Court's decision to pierce the corporate veil of two UK-incorporated companies and to hold the sole director/shareholder personally liable. Generally, the courts would pierce the corporate veil where it was merely a device, facade or sham. In the present appeal, the court ruled that since the director/shareholder treated the assets of the companies as his own, he should also be made responsible for their liabilities.

The respondent was a statutory body, with the aim, *inter alia*, of promoting Singapore as a travel and tourist destination. The first and second appellants were private limited companies incorporated in the United Kingdom. The third appellant was at all material times a director and the chief executive officer of the first and second appellants. The second appellant was the shareholder of the first appellant whilst the third appellant was the sole shareholder of the second appellant.

The proceedings had arisen out of the failure on the part of the appellants to stage a mega event (the "**Event**") in Singapore, for which the respondent had paid a significant sum of money (the "**sponsorship sums**"). The obligation to stage the Event was contained in three consecutive agreements between the respondent and the first appellant (the "**First Agreement**", the "**Second Agreement**", and the "**Third Agreement**", respectively), each agreement superseding the previous agreement. Together with the execution of the Third Agreement, the respondent and the first appellant agreed to several terms set out in a letter (the "**Side Letter**"). The thrust of the respondent's case was premised on attempts to show the lack of competence and *bona fides* on the part of the appellants, who, at best, lacked the ability and resources to stage the Event and, at worst, fraudulently induced and manipulated the respondent into disbursing the sponsorship sums. The respondent sought rescission of the Third Agreement and refund of the sponsorship sums as well as damages for breach of contract.

The Court of Appeal agreed with the High Court's ruling to rescind the Third Agreement and the Side Letter, which was a collateral contract to the Third Agreement on the ground that they were entered into on the basis of the appellants' fraudulent misrepresentations, and had caused financial detriment to the respondent. Based on the available evidence, the court opined that when the Third Agreement was entered into, the third appellant was solely concerned with avoiding any subsequent legal liability for him and the related entities. Given the background events when the Third Agreement was signed it was inconceivable that the respondent would have entered into such an undertaking except on a representation by the third appellant that the Event could and would be staged.

In order to avoid the prospect of having an unenforceable and/or paper judgment against the first appellant, the respondent attempted to lift the first appellant's corporate veil by pleading that the second and third appellants should be liable for the debts of the first appellant.

The facts showed that the first appellant was merely the conduit to receive the sponsorship sums. The third appellant withdrew the sponsorship sums to generously pay himself, the second appellant, his friends and third parties before transferring all remaining funds to the second appellant's account. The first appellant was then made to bear all the expenses and liabilities of the second appellant as well those of third parties but, it obtained none of the benefits for being the organiser of the Event. Where liabilities were to be incurred, the contracts were entered into by the first appellant but where income was to be received, the contract was entered into by the second appellant. According to the Court of Appeal, it was evidentially clear that the third appellant was the controlling mind of these entities and that he was dealing with their assets as if they were his own. He was, in short, the alter ego of these entities. Further, the Court of Appeal was satisfied that the third appellant knew that the moneys paid to the first appellant were for a very specific purpose and that there was an unequivocal obligation to refund the moneys in full to the respondent if the Event was not staged. The Court of Appeal ruled that there were ample grounds to determine that it was a proper case (given the lack of the third appellant's *bona fides* to stage the Event when he entered into the Third Agreement on behalf of the first appellant and his several earlier misrepresentations) to hold him personally accountable for the refund of the moneys. In the words of the Court of Appeal, "The first and second appellants were no more than corporate puppets compliantly dancing to the tune of the third appellant. He treated their assets as his own. Their liabilities arising from the failure to stage the Event should now also be his".

In the circumstances, the appeal was dismissed.

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Singapore High Court holds employee not entitled to exercise share options following termination of employment

Paul De Fries v Noble Group Ltd
[2009] SGHC 40

In *Paul De Fries v Noble Group Ltd* [2009] SGHC 40, the Singapore High Court held that it is clearly the law in Singapore that unvested options do not confer any rights of exercise on the holder thereof. In this case, the plaintiff failed in his bid to exercise his share options as the options had not vested in him.

The plaintiff was employed by Noble Resources Ltd ("**NRL**"). At all material times, NRL was an indirect subsidiary of the defendant, Noble Group Limited ("**NGL**").

Following his nomination to participate in the Noble Group Share Option Scheme 2001 (the "**Scheme**") set up by NGL, an offer was made to the plaintiff to grant him an option to subscribe for and be allotted 3 million shares in NGL.

On 15 April 2003, pursuant to a second offer letter, NGL granted the plaintiff a further option to subscribe for and be allotted another 3.75 million shares in NGL. The 15 April 2003 offer letter stated:

"If you accept the offer, the said option will vest fully to you provided you are qualified under the Scheme on the last date of the fifth year from the date of this offer letter. Shares comprised in the option are exercisable on the last date of the fifth year from the date of this offer letter (i.e. exercisable as from 15 April 2008)."

The offer letter also stated that the option was subject to the terms of the Scheme and a copy of those terms was enclosed with the offer letter. The plaintiff accepted this option as well.

Among the provisions of the Scheme, rule 8.4 provided that if a participant ceased to be employed by NGL, he may exercise any unexercised options within a period of six months commencing from the date of such cessation of employment. By rule 4.1, the Scheme provided that confirmed full-time employees of NGL and/or its subsidiaries who had attained the age of 21 years were eligible to participate in the Scheme.

On 15 November 2007, the plaintiff was retrenched by NRL. He took the position that notwithstanding the termination of employment, pursuant to rule 8.4 of the Scheme, he was entitled to exercise the options in his hand within six months from the cessation of his employment. The plaintiff purported to exercise his options by tendering payment to NGL. NGL did not issue any shares to the plaintiff in response to his purported exercise of the options. The plaintiff accordingly brought proceedings to enforce his rights under the Scheme.

The court rejected the plaintiff's claim. In doing so, the court pointed out that the option contract between the plaintiff and NGL was governed by both the 15 April 2003 offer letter and the terms of the Scheme. The 15 April 2003 offer letter stated in no uncertain terms that the options would only vest on 15 April 2008. It also stated that the options would vest "fully" in the plaintiff provided he was "qualified under the Scheme" on 15 April 2008. Rule 4.1 set out the situation when an employee would be

considered as being "qualified under the Scheme". Such a qualified employee would be a full-time employee of the defendant and its subsidiaries who had attained the age of 21.

Hence, the court held that P could only exercise the options that he accepted in April 2003 on 15 April 2008 (and for six months thereafter) if he was on that later date eligible to participate in the Scheme by being a full-time employee of NRL. Since the plaintiff's employment with NRL had been terminated on 15 November 2007, he was not a qualified person on 15 April 2008 and therefore the options did not vest in him and he was not able to exercise them.

In the court's view, rule 8.4 which provided for an ex-employee to exercise unexercised options within six months of termination of his employment dealt with rights that had already accrued to such ex-employee because the options vested prior to the termination of his employment. If the plaintiff had been employed by NRL on 15 April 2008 and his employment had been terminated on 16 April 2008, he would have had an accrued right to exercise his options (the options would have vested on 15 April 2008) within six months from 16 April 2008. Whilst the plaintiff became a participant in the Scheme when he accepted the offer on 15 April 2003, the options were not fully vested in him on that date because it was a term of the offer that full vesting would only take place if he was qualified on 15 April 2008.

In arriving at its conclusion, the court held that it is clearly the law in Singapore that unvested options do not confer any rights of exercise on the holder thereof. The court referred to the case of *Tan Ging Hoon v MMI Holdings Ltd* [2008] SGHC 57 where one of the issues that arose was whether the plaintiff was entitled to exercise unvested options. It was held that no rights would accrue to an employee or an ex-employee where the share options had not yet vested at the time of termination of employment.

The successful defendant was represented by Allen & Gledhill LLP.

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Singapore High Court finds "puppet master" of company personally liable as joint tortfeasor for company's misrepresentation

Thode Gerd Walter v Mintwell Industry Pte Ltd & Ors
[2009] SGHC 44

In the case of *Thode Gerd Walter v Mintwell Industry Pte Ltd & Ors* [2009] SGHC 44, the Singapore High Court recognised that a director can be personally liable for a tort when he does not carry out the tortious act himself or assume liability for it, but procures and induces another, the company, to commit the tort. On the facts of this case, the court found that the director did direct or procure the negligent misrepresentation by the company, and accordingly found the director liable as joint tortfeasor with the company.

The first defendant, Mintwell Industry Pte Ltd ("**Mintwell**"), owned a building and leased two units in the building to the plaintiff, Thode Gerd Walter ("**Walter**"). The building was subject to a mortgage in favour of a bank which required Mintwell to obtain the bank's consent for any lease of units in the

building. Mintwell did not obtain the bank's consent to Walter's leases. Mintwell was in fact on the verge of financial collapse. Walter was eventually evicted by the bank.

Walter sued Mintwell as well as one Seah Bak Kheow ("**Seah**") claiming that the court should hold Seah personally liable for Mintwell's breaches. Walter claimed that Seah was the person who controlled Mintwell and the person whose directions and instructions the management of Mintwell was accustomed to act on. Seah was also the guarantor of loans extended to Mintwell. Walter urged the court to lift the corporate veil.

The other allegation against Seah was that he had procured or directed the commission of the tort of deceit or negligent misrepresentation by Mintwell, and was, therefore, personally liable for the tort. It was not disputed that the defendants did not inform Walter that written consent of the bank was needed.

Walter also alleged that Mintwell was negligent in failing to obtain the bank's written consent to the lease of the two units.

No duty on Mintwell to obtain written consent and disclose material facts

Walter argued that Mintwell owed him a duty of care to obtain the bank's written consent to grant the tenancies. As a consequence of Mintwell's failure to obtain the written consent, the bank was able to evict Walter thereby causing him to suffer loss and damage.

The court held that such a duty of care, if it existed at all, must arise out of the contract between the parties or under the general law. The court held that there was no duty on Mintwell to obtain written consent. First, the contractual relationship giving rise to rights and obligations was defined in the tenancy itself. The contract did not impose expressly or impliedly an obligation on Mintwell as landlord to seek the prior consent of the bank. There is no law against letting property that is subject to the consent clause; the tenant's remedy is upon his contract, if any. Secondly, there was no evidence, and hence no basis to superimpose obligations in negligence going beyond those carefully defined in the contractual documentation. Nothing could be clearer that Mintwell was not assuming any separate responsibility to Walter under common law. The court could see no ground on which to impose on Mintwell the duty of care contended for by Walter. As a general rule, a person involved in negotiations towards a commercial venture of this nature owes no duty of disclosure towards another prospective party. A duty of disclosure may be undertaken, but Mintwell did not either expressly or impliedly do so.

The corporate veil argument

The court highlighted that it does not disregard the corporate personality of a limited company save in exceptional circumstances. The courts have on occasion looked behind the legal personality to the real controllers. Those occasions fall within recognised exceptions where the courts have shown themselves willing to lift the veil of incorporation. The present case was not one falling under the categories of cases where the veil was lifted (such as (a) agency, (b) fraud, (c) group enterprises, and (d) trusts). In this case, Walter had not shown that exceptional circumstances existed to warrant the court to ignore the separate legal personality of Mintwell in order to impose personal liability on Seah.

Negligent misrepresentation

The court found negligent misrepresentation by conduct. Walter had established that Mintwell by offering to let the premises, entering into negotiations and the contract amounted to, by implication, representing to Walter as a fact that Mintwell was in a position to support the tenancy and hence had the capacity to fulfil everything that the tenancy purported to grant. Specifically, Mintwell was representing to Walter that the existing state of affairs were such that in the ordinary course of the contract, Walter could have quiet use and enjoyment of the units for the fixed period of time agreed upon. That representation by implication was not true at the conclusion of the contract. The representation was made with the intention of Walter acting upon it. Walter did act upon the representation, signed the contract and took over the units. The court held that Walter had a valid claim in damages in consequence of that false representation.

Personal liability of Seah as joint tortfeasor

The court referred to the case of *Standard Chartered Bank v Pakistan National Shipping Corporation* [2000] 1 Lloyd's Law Rep 218 where it was held that a director could be capable of becoming a joint tortfeasor by procuring and inducing the company for which he works to carry out a tortious act.

The court recognised that a director can be personally liable for a tort when he does not carry out the tortious act himself or assume liability for it, but procures and induces another, the company, to commit the tort.

On the facts, the court accepted Walter's contention that Seah controlled Mintwell. He was the "puppet master" who, by section 4(1) of the Companies Act, was considered a director of Mintwell. His control of Mintwell was evident from his ability to appoint and replace a director of Mintwell.

The facts of the case persuaded the court to find Seah personally liable. First the negligent misrepresentation was made with the intention of securing Walter as a tenant of the two units. At that time, Mintwell was heavily indebted to the bank. Mintwell had ceased to do any business. Mintwell was in no position to settle the indebtedness. Secondly, Seah was the guarantor of Mintwell's indebtedness to the bank. Seah as guarantor was at serious risk of being called upon to satisfy the judgment against Mintwell. He was keen to secure the tenancies so as to pacify Mintwell's creditors and to stave off a call on his guarantee whilst he continued negotiations with the bank.

The court also noted that Seah had a personal interest as guarantor in securing the tenancies. The court found that Seah had assumed personal liability for the lettings. His involvement in the transactions went beyond what would be appropriate for a mere intermediary acting on behalf of Mintwell. If he had not agreed to let the two units to Walter, Mintwell would not have done so. Therefore, the court concluded on the facts that Seah did direct or procure the negligent misrepresentation by Mintwell, and accordingly found Seah liable as joint tortfeasor with Mintwell.

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

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In brief

MAS consults on proposals to strengthen the regulation of the sale and marketing of unlisted investment products

On 12 March 2009, the Monetary Authority of Singapore released a consultation paper on proposals to further safeguard consumers' interests and promote higher industry standards for the sale and marketing of unlisted investment products.

Please **click here** to read an article about this development in the March 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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Moneylenders Act 2008 in force from 1 March 2009: Moneylending activities within a modern regulatory framework

On 1 March 2009, the Moneylenders Act 2008 (the "**New Act**") repealed and replaced its predecessor which was enacted 50 years ago. The New Act aims to introduce a more flexible and progressive approach to the regulation of moneylending to keep pace with the modern credit economy.

Please **click here** to read an article about this development in the March 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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MAS implements from 1 March 2009 revised rules for unsecured credit to individuals from financial institutions

On 25 February 2009, the Monetary Authority of Singapore issued a press release announcing that the revised rules for unsecured credit to individuals who are citizens of Singapore or permanent residents will be implemented on 1 March 2009.

Please **click here** to read an article about this development in the March 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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SGX issues consultation paper on proposed revised settlement processes to manage non-delivery of securities

From 10 to 31 March 2009, the Singapore Exchange Limited (the "**SGX**") sought feedback on its proposals to revise the Central Depository's settlement processes to further reduce non-delivery of shares due for settlement in the securities market. The proposals were set out in a consultation paper issued by the SGX entitled "Revised Settlement Processes to Manage Non-Delivery of Securities".

Please **click here** to read an article about this development in the March 2009 issue of the Allen & Gledhill Financial Services Bulletin.

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News

Bukit Sembawang Estates Limited's S$347.4 million rights issue

Bukit Sembawang Estates Limited ("**Bukit Sembawang Estates**") has launched a renounceable partially underwritten one-for-one rights issue, with two free detachable warrants for every five rights shares subscribed to raise up to S$347.4 million. This is the first partially underwritten renounceable rights issue of shares and warrants undertaken by Bukit Sembawang Estates.

Advising Bukit Sembawang Estates are Allen & Gledhill LLP Partners Tan Tze Gay, Sharon Wee and Wong Sook Ping and Senior Associate Neda Namazie.

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Chartered Semiconductor Manufacturing Ltd's US$311.2 million rights issue

Chartered Semiconductor Manufacturing Ltd ("**Chartered**") has launched a 27-for-10 renounceable fully underwritten rights offering of new ordinary shares to raise gross proceeds of approximately US$311.2 million. Singapore Technologies Semiconductors Pte Ltd ("**STS**"), a wholly owned subsidiary of Temasek Holdings (Private) Limited, has committed to the underwriters of the rights offering to act as a standby purchaser and purchase up to approximately 90 per cent. of the rights offering. This rights issue is notable as Chartered is dual listed on Nasdaq and the SGX-ST and the rights issue has to comply with the registration requirements under the US securities laws as well as under the Singapore securities laws.

Advising Chartered are Allen & Gledhill LLP Partners Tan Tze Gay and Prawiro Widjaja, Senior Associate Bernie Lee and Associate Tan Se Lene. Advising STS are Allen & Gledhill LLP Partners Lim Mei and Lee Kee Yeng and Senior Associate Zaheda Abdul Rashid.

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Oversea-Chinese Banking Corporation Limited exchange offer

Oversea-Chinese Banking Corporation Limited ("**OCBC**") has offered to exchange its outstanding five per cent. subordinated notes due 2011 (the "**Existing Notes**") for 5.60 per cent. subordinated notes due 2019 callable with step-up in 2014 (the "**Notes**"). The Existing Notes qualify as Upper Tier 2 capital of the issuer and the OCBC group while the Notes are expected to qualify as Lower Tier 2 capital of the issuer and the OCBC group. This is the first exchange offer of debt securities that qualify as regulatory capital, and the first exchange offer of debt securities cleared through The Central Depository (Pte) Limited.

Advising OCBC are Allen & Gledhill LLP Partners Tan Tze Gay and Au Huey Ling and Senior Associates Bernie Lee and Long Pee Hua. Advising the trustee, The Bank of New York Mellon, are Allen & Gledhill LLP Partner Cara Chan and Senior Associate Diana Lim.

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Alhambra Pte Ltd's S$390.1 million rated mortgage-backed term loan facilities

Alhambra Pte Ltd ("**Alhambra**") obtained a S$390.1 million rated mortgage-backed term loan facility which was in essence commercial mortgage-backed securities ("**CMBS**") in the form of loans, allowing Cambridge Industrial Trust to access an alternative investor group in light of a declining CMBS market. This is the first rated CMBS-like transaction since 2007 and is the first transaction of such a structure in Singapore.

Allen & Gledhill LLP was the advisor to Alhambra, the arrangers (The Hongkong and Shanghai Banking Corporation Limited, Singapore Branch, National Australia Bank Limited and The Royal Bank of Scotland plc), hedging banks (The Hongkong and Shanghai Banking Corporation Limited, Singapore Branch and The Royal Bank of Scotland plc), facility agent and security agent (The Hongkong and Shanghai Banking Corporation Limited) and the lenders. The lawyers involved were Allen & Gledhill LLP Partners Margaret Chin, Magdalene Leong, Jafe Ng, Cara Chan, Lyn Wee and Chew Mei Choo, Senior Associate Colin Buay, Serena Choo and Tan Ngee Hao and Associates Alex Ye and Ng Siu Fang.

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Allen & Gledhill wins Private Equity International Best Law Firm (Transactions) in Asia Award

Allen & Gledhill LLP has won the Best Law Firm (Transactions) in Asia Award in the highly regarded Private Equity International (PEI) Awards 2008. The Firm is the first Singapore law firm to have won this award, beating other international law firms in this category. Please **click here** to view the press release.

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Fordham Intellectual Property Conference to be held in Cambridge

Fordham Law School will be organising its 17th Annual Conference on Intellectual Property Law & Policy in Cambridge, UK on 15 and 16 April 2009.

The Fordham IP conference is known for its exceptional list of participants including leading judges, government officials, academics as well as IP practitioners and senior in-house counsel from around the world, and its comprehensive review and analysis of today's cutting-edge issues in intellectual property law.

Dr Stanley Lai, Partner of Allen & Gledhill LLP and Head of the Firm's Intellectual Property & Technology practice, will be speaking at this conference in his capacity as a member of the Board of Governors of the Intellectual Property Academy of Singapore. He will be speaking on the participation of Internet service providers in enforcement efforts with respect to Singapore and Asia.

For further information about the Fordham Intellectual Property Conference, please **click here**.

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