MESSAGE FROM THE EDITOR-IN-CHIEF

WE BRING YOU THE YEAR-END ISSUE OF LEGAL INSIGHTS FOR 2006

As the end of the year is fast approaching, I am sure that many of you would be reminiscing on your journey through 2006. Needless to say, much has been accomplished, but yet, there is still much to be done before we head towards a brand new year with renewed hope and vigour.

We have an interesting array of articles and case notes for you to read in this issue especially within the context of recent developments in the law both locally and abroad. In our feature article at the centre pages, Lam Wai Loon revisits his previous analysis on pure economic loss in light of a recent House of Lords’ decision and a Malaysian Court of Appeal decision. In the article at page 3, Alan Teoh Kheng Huat, presents the final instalment on pre-empting a winding-up petition.

At pages 4, 5 and 11 Fatimatul Zahra Binti Mustapha introduces the concept of Takaful and proceeds to give a concise account of the framework of a Takaful contract together with a helpful table enumerating the salient points between Takaful and conventional insurance. Other areas of interest include Teh Hong Koon’s article at pages 14 and 15 which highlights the advantages afforded by the Patent Cooperation Treaty in filing applications to protect inventions internationally as well as the brief and succinct discussion by N. Pathmavathy and Kamraj Nayagam on the Construction Industry Development Board (pages 6 and 13).

Leela Baskaran explains the stance adopted by the Court at page 7 regarding software copyright infringement where it is amply clear that the Court deprecates copyright infringement and will not hesitate to grant injunctive remedies to the aggrieved party in such instances. Meanwhile, Claudia Cheah Pek Yee touches on a recent Federal Court decision which made significant findings on the relationship between banker and customer at page 10. In the other commentary at pages 12-13, Trevor Jason Mark Padasian deliberates on a landmark decision by the House of Lords regarding the common law defence of qualified privilege in libel cases.

My editorial team endeavours to bring you the latest articles and case notes which are both interesting and educational. In line with our ongoing efforts to improve the contents of this newsletter, we welcome you to email us at skrine@skrine.com on topics which you feel would be of interest to all readers.

Skrine advocates a caring corporate culture and to seal its commitment in community projects, the firm celebrated Children’s Day at the Selangor School for the Deaf in Kelana Jaya, Petaling Jaya on 12.11.2006. Please turn to the announcements column at page 2 for more information regarding this.

I believe that this is an opportune time for me, my editorial team, partners and staff of Skrine to extend Seasons Greetings and good wishes for a fruitful 2007 to all of you. Till we meet again with more legal articles and case notes which are truly insightful!

Lee Tatt Boon
ltb@skrine.com
Editor-In-Chief
LEGISLATION UP-DATE

The following legislation have been passed:-

Statutes

- Central Bank of Malaysia (Amendment) Act 2006 [A1271]
c.i.f. 19.10.2006 except for sec.3 [PU(B) 279/2006]

- Chemical Weapons Convention Act 2005 [Act 641]
c.i.f. 1.9.2006 [PU(B) 231/2006]

- Control of Supplies (Amendment) Act 2006 [Act A1270]
c.i.f. 14.9.2006 [PU(B) 240/2006]

- Electronic Commerce Act 2006 [Act 658]
c.i.f. 19.10.2006 [PU(B) 280/2006]

- International Interests in Mobile Equipment (Aircraft) Act 2006 [Act 659]
c.i.f. 19.10.2006 [PU(B) 281/2006]

- Legal Profession (Amendment) Act 2006 [Act 1269]
c.i.f. 2.10.2006 [PU(B) 248/2006]

- National Skills Development Act 2006 [Act 652]
c.i.f. 1.9.2006 [PU(B) 233/2006]

Subsidiary Legislation

- Co-operative Societies (Koperasi Serbaguna Supreme Berhad) (Directive) Order 2006
c.i.f. 6.10.2006 [PU(A) 361/2006]

- Co-operative Societies (Koperasi Pekebun Kecil Getah Malaysia Berhad) (Directive) Order 2006
c.i.f. 6.10.2006 [PU(A) 362/2006]

- Educational Institutions (Discipline) (First Schedule)(Amendment) Order 2006
c.i.f. 1.9.2006 [PU(A) 322/2006]

- Free Zones (Amendment) Notification 2006
c.i.f. 6.10.2006 [PU(B) 253/2006]

- Poisons (Amendment of Third Schedule) Order 2006
c.i.f. 8.9.2006 [PU(A) 334/2006]

- Poisons List (Amendment)(No 2) Order 2006 c.i.f. 8.9.2006 [PU(A) 335/2006]

- Prevention and Control of Infectious Diseases (Amendment of First Schedule) Order 2006
c.i.f. 12.10.2006 [PU(A) 374/2006]

- Revision of Laws (Rectification of Animals Act 1953) Order 2006
c.i.f. 27.10.2006 [PU(A) 391/2006]

- Subordinate Courts (Amendment) Rules 2006 c.i.f. 8.9.2006 [PU(A) 331/2006]

ANNOUNCEMENTS

Skrine is pleased to announce that its partner, Mr. Leong Wai Hong was recently appointed Fellow of the Chartered Institute of Arbitrators.

In continuous support of policies to recycle and protect the environment, Skrine is proud to announce that as of 1.1.2007, the firm will utilise O’bon pencils produced wholly from newspapers.

As part of the firm’s efforts to give back to society, the firm has undertaken to contribute to the welfare and aid of the Selangor School for the Deaf in Kelana Jaya, Petaling Jaya. The School is registered with the Ministry of Education and receives its funding from the Malaysian Federation of the Deaf. The School currently has 31 deaf pupils with ages ranging from 3 to 20 years. Apart from monetary assistance, in-kind contributions consisting of computers were also donated with the objective of providing new resources to the School.

As a kick-start to Skrine’s relationship with the School, 16 lawyers from the firm participated in the School’s Children’s Day celebration on 12.11.2006. The day was a great success and the children appeared happy and well. The firm intends to continue with its efforts to support the School by providing administrative assistance as well as collaborating in its various activities.

The School welcomes further support, donation and participation from interested parties.
PUBLIC INTEREST IS A RELEVANT AND IMPORTANT FACTOR FOR CONSIDERATION IN RESTRAINING A WINDING-UP PETITION

ADVERTISING THE PETITION

Once a winding-up petition has been filed, a court has no jurisdiction to grant an injunction to restrain the advertising of the winding-up petition as the requirements for advertisement as prescribed in the Companies (Winding-Up) Rules 1972 (“Winding-Up Rules”) are mandatory in nature. Rule 24 of the Winding-Up Rules reads:

“Every petition shall be advertised in Form 4 seven clear days or such longer time as the Court may direct before the hearing”.

The scope of Rule 24 was construed in the case of Azman Tay & Associates Sdn Bhd v. Sentul Raya Sdn Bhd [2002] 2 MLJ 395 (“Azman Tay”). In this case, the company applied for an injunction to restrain the advertising of the winding-up petition. In construing the wording of the rule, Vincent Ng J said (at p. 396G) that:-

“…once a winding-up petition is filed, the court is precluded from granting an injunction against advertisement or gazettal of the petition. Due to the deliberate choice of the words ‘Every petition shall be advertised…’ in Rule 24 in contradistinction to the words in the dissimilar provision for advertisement in the English and Australian Rules, I would hold that our legislature had intended gazettal and advertisement to be mandatory procedures concomitant with the petition itself which debar the courts from restraining it”.

Vincent Ng J in Azman Tay relied on the Supreme Court (“SC”) case of Chip Yew Brickworks Sdn Bhd v. Chang Heer Enterprise Sdn Bhd [1988] 2 MLJ 447 (“Chip Yew”). In Chip Yew, the appellant served a sec. 218 Notice on the respondent in respect of a sum for costs of bricks supplied. No payment was made and the respondent filed a petition for winding-up. The appellant applied for an injunction to restrain the advertising of the petition. In the affidavit in support of the application, the respondent had admitted part of the debt but however, contended that it was solvent. The respondent relied on inter alia its balance sheet, trading, contract, profit and loss account to show that it was solvent and would be prejudiced by the advertising of the said petition.

In dismissing the application for injunction, the SC found that the Winding-Up Rules require that every petition should be advertised and it was immaterial whether the effect of such advertisement in a particular case would result in damage being caused to the company proposed for winding-up and if the advertisement would in fact cause such damage, that would not be a ground to prevent a bona fide Petitioner from advertising.

This case was also applied by Vincent Ng J in two other cases, namely Malaysian Resources Corporation Bhd v. Juranas Sdn Bhd [2002] 3 MLJ 169 (“Juranas”), which was decided in the same year as Azman Tay and the more recent decision in Pembinaan Lian Kiong Sdn Bhd v. Yip Fook Thai (practising as Messrs Yip & Co) [2005] 5 MLJ 786 (“Pembinaan Lian Kiong”).

However, the position in the aforesaid cases was not followed by the High Court (“HC”) in Celcom (Malaysia) Bhd v. Inmiss Communication Sdn Bhd [2002] 3 MLJ 178 (“Celcom”). In Celcom, the plaintiff applied for an ex parte injunction to restrain the defendant from taking further steps in a winding-up petition pending the hearing of the plaintiff’s appeal to the Court of Appeal against the decision made by the HC in dismissing the plaintiff’s application for an injunction to restrain the defendant from filing a winding-up petition. In allowing the application for an ex parte injunction, Zulkifli J stated his reasons for granting the injunction as follows:

“The plaintiff is a public listed company with the Kuala Lumpur Stock Exchange (“KLSE”). It is currently undergoing a merger exercise with TM Cellular Sdn Bhd and upon completion of the same, the plaintiff will have the largest number of subscribers for mobile phones in the country. The filing of the petition will have an adverse impact on its shares and its public perception. The plaintiff as a public listed company is also subject to constant monitoring and supervision by the KLSE and the Securities Commission and is under a duty to apprise the KLSE of the petition at every stage. Notwithstanding that, the plaintiff will have to face media attention and speculation arising from the petition. Such consequences cannot be quantified in monetary terms and compensated accordingly. Public interest is a relevant and important factor for consideration”.

In this case, Zulkifli J applied the test of ‘public interest’ as held by his Lordship Mohamed Dzaiddin FCJ (as he was then) in the Federal Court case of Vijayalakshmi Devi d/o Nadchattiram v. Dr. Mahadevan s/o Nadchattiram & Ors [1993] 2 MLJ 709. Further, Zulkifli J distinguished Azman Tay on the basis that in that case, the court was dealing with an application for an injunction to restrain from advertising or otherwise publishing the existence or contents of a winding-up petition whereas in the instant case, the court was dealing with an ex parte injunction to restrain a winding-up petition from proceeding pending the hearing of the appeal to restrain the filing of the winding-up petition.
INTRODUCTION
The Takaful industry has in recent years exhibited excellent growth as reflected in the threefold increase in the total assets of Takaful operators from RM1.9 billion in 2001 to RM6.5 billion in 2006. More significantly, in terms of net contributions, the Takaful industry has a record market growth of an average of 18.9% in the past three years, and is fast emerging as one of the key players in the Malaysian insurance industry.

In Malaysia, Takaful is governed by the Takaful Act 1984 (“the Act”). Sec. 2 of the Act defines Takaful as “a scheme based on brotherhood and mutual assistance which provides for mutual financial aid and assistance to the participants in case of need whereby the participants mutually agree to contribute for that purpose”.

In essence, it is a system in which a group of people undertake to provide reciprocal guarantees to others within the group against certain losses that might be inflicted upon any person(s) in that group.

Part one of this article examines the basic fundamentals and the framework of Takaful contracts, where else, part two will contain an in-depth discussion on the various Takaful products in Malaysia and the future of the Takaful industry.

PROHIBITION OF INSURANCE IN ISLAM
Insurance was unanimously declared “haram” (prohibited) at the Fiqh Academy Conference in Jeddah in December 1985. Muslim scholars opined that insurance contains elements contradictory to the teachings of Islam. The scholars identified at least three prohibited elements in insurance and among them are “gharar”, “maisir” and “riba”. Insurance also contradicts the doctrine of “adil” (fairness/equity) and “ihsan” (good virtue/good deed).

It is fundamental in Islam that the goods sold and purchased in a contract of sale must be identifiable and ascertainable as to its nature, character and value prior to the conclusion of the contract. Under conventional insurance, the product offered for sale by the insurers to the policyholders is contingent upon an event such as the insured event does not occur. In short, the insurer’s payment of premiums which are smaller. In addition to that, there is a high chance that the policyholder would lose all the premiums paid when the insured event does not occur. In short, the insurer’s profits or losses are contingent upon the occurrence of the insured event (underwriting result). Nevertheless, insurance per se is not gambling. As with the case of other banking businesses, investments by insurers are made primarily with a view to profit through interest.

“Riba” (usury) is “haram” in Islam and hence, any form of transaction involving interest is haram. Therefore, insurance is prohibited in Islam if investments of premiums are made in “riba” based ventures. The practice of imposing penalty for late payment is also perceived as “riba” alongside with interest imposed on policy loan. Moreover, the refund of premium in the event the insured event does not occur is not made based on pro-rata basis and therefore is unfair to policyholders. This contradicts the doctrine of “adil” or fairness.

MODIFICATION OF INSURANCE TO BE SYARIAH COMPLIANT
In the Takaful system, the contributions by each participant must be made with an intention of “tabarru” (donation) to avoid all uncertainties that go with conventional insurance contracts. Essentially, in Malaysia two types of Syariah contracts are undertaken by Takaful operators. They are mudharabah and wakalah contracts.

Mudharabah based contract
The essence of this type of contract specifies how the profit (surplus) from the operation of Takaful managed by the Takaful operator is to be shared in accordance with the principle of al-Mudharabah between the participants as provider of capital and the Takaful operator as entrepreneur. The sharing of profit is to be mutually agreed between the contracting parties prior to entering into the contract. The element of uncertainty is eliminated through the incorporation of the concept of “tabarru”, whereby the participants agree to relinquish as “tabarru” certain proportion of their Takaful instalments or contributions that they undertake to pay, thus enabling them to fulfil their obligation of mutual help and joint guarantee should any of their fellow participants suffer a defined loss. These amounts are placed in a fund called the Participants’ Special Account (PSA).

The sharing of profits or surplus that may emerge from the operation of Takaful is made only after the obligation of assisting the fellow participants has been fulfilled. The Takaful contract will clearly state how profit from the operation managed by the Takaful operator will be shared between the participants and the Takaful operator. It is important to note that the management or operating expenses is to be borne solely by the Takaful operator. The Takaful operator is not allowed to deduct the participants’ contributions to cover its operating costs. Therefore, under the Mudharabah contract, the income of the Takaful operator can only be calculated at the end of the contract.

Wakalah based Contract
The Wakalah contract is also premised on the concept of risk sharing among participants with a Takaful operator earning a fee for services as an agent (wakil). The agent does not participate or share in any underwriting results as these surpluses belong to the participants. Similarly, any deficit in the Takaful operations will be borne by the participants. Thus, under the Wakalah contract, the management or operating expenses of the Takaful operator can be charged to the PSA.
CONCLUSION

The Takaful industry is expanding at a very rapid rate and well placed to become a major player in the insurance industry. The concluding segment of this article which will appear in the next issue (Issue1/2007), will examine the various Takaful products in Malaysia and the future of the Takaful industry.

Table: Comparison between Takaful and Conventional Insurance

<table>
<thead>
<tr>
<th>ISSUE(S)</th>
<th>TAKAFUL</th>
<th>CONVENTIONAL INSURANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bonus</td>
<td>Takaful contract specifies from the outset how the profits from Takaful investments are to be shared between the operator and the participants. This will be in accordance with the principle of Mudharabah and the share distribution could be in different ratios i.e. 5:5 or 6:4 or 7:3 etc. as agreed between the participant and the operator in the contract regardless of the amount of investment profit made during the year.</td>
<td>May offer bonus or profits in general terms only especially with profit policies, i.e., there is no exact specification with regard to the profit-sharing in the contract. The insurer may also decide to give or not to give bonus for any particular year depending on the result of the investment returns. The rate of bonus may vary from year to year and is based upon the discretion of the insurer.</td>
</tr>
<tr>
<td>Claims</td>
<td>In a life Takaful policy, if the risk occurs, the beneficiary has the right to claim the policy value from the Participant’s Special Account (“PSA”) besides the entire accumulated fund from the Participant’s Account (“PA”). Nevertheless, under this category of policy, the claim of a participant who survives at the maturity of the policy, is confined within the amount available in the PA.</td>
<td>Under the conventional insurance system, if the risk occurs, the beneficiary has the right to claim the whole amount stated in the policy. However, if the risk does not occur, the insured may only claim the policy value at maturity together with the interest, if any.</td>
</tr>
<tr>
<td>Contract</td>
<td>Participants own the Takaful funds which are managed by the operator. Participants give up individual rights to gain collective rights over the contributions and benefits.</td>
<td>Insurance is a buy-sell contract in which policies are sold and the policyholders are purchasers.</td>
</tr>
<tr>
<td>Company</td>
<td>A company is known as an operator, which acts as a trustee, manager and also entrepreneur.</td>
<td>Relationship between the company and the policyholders is on a one-to-one basis</td>
</tr>
<tr>
<td>Elements</td>
<td>Takaful practices are free from the elements of “riha” (usury) and other unIslamic elements, but revolves around the elements of Mudharabah (Profit and Loss Sharing), “Tabarru” (Donation) and other Syariah justified elements.</td>
<td>Insurance practices involve “riha” (interest) and some other elements, which may not be sanctioned by Syariah principles.</td>
</tr>
<tr>
<td>Extra Risk Premiums</td>
<td>Generally, the premium rates imposed are fixed by the actuarial evaluation, and no one is discriminated by foreseeable extra risk. Hence, no one shall be required to pay extra premium over the agreed ones. However, if a particular policyholder is considered to pose an undue strain on the mutual fund owing to his poor health, the policyholder may have to increase his proportion of “al-Tabarru” i.e. the contribution from his premium to the PSA. This means that the proportion of his PA would be lesser than it would generally have been.</td>
<td>Usually an extra premium is charged in addition to the normal amount where the extra risk is deemed to be higher than average. Extra risk is foreseen against smokers and people with high risk occupations such as fire-fighters, miners etc.</td>
</tr>
</tbody>
</table>
CONSTRUCTION INDUSTRY DEVELOPMENT BOARD

N. Pathmavathy and Kamraj Nayagam give an overview of the Construction Industry Development Board.

INTRODUCTION

The Construction Industry Development Board (“CIDB”) is an inescapable presence for those engaged in the construction industry within Malaysia, largely through the levy which it imposes on all major construction projects, and the compulsory courses which it conducts.

The CIDB is a body corporate which was created by the “Akta Lembaga Pembangunan Industri Pembinaan Malaysia 1994” (“the Act”). Its purpose was summarised by the Minister of Works at its official opening ceremony:

“We are entering into an era of continued growth as we position ourselves into the new millennium when we become an industrialized nation with not only manufactured goods to export but also skills and expertise to sell overseas. In order to fulfil this aspiration the construction industry need to be guided, nurtured and developed to attain the required quality and ingredient”.

REGISTRATION OF CONTRACTORS

Under the Act, no person shall undertake any construction works unless he is registered and holds a valid certificate of registration issued by CIDB. Non-registration is an offence punishable by a fine not exceeding RM50,000.00. A contractor building a residence for his own use or who employs less than 3 workers is exempted from this requirement.

Under Regulations made by the CIDB in exercise of the power to make regulations conferred by sec. 38 of the Act, registration of local contractors is time-based. Local contractors are entitled to be registered in particular categories such as Civil Engineering Construction, Building Construction and Mechanical and Electrical, for a minimum period of 1 year but not exceeding 3 years to perform construction works in Malaysia. A contractor is not allowed to execute any construction works outside his registered category. There are also 7 specified registration grades for each category as set out below and a contractor is not entitled to undertake any construction project which exceeds the value of the construction works specified in the registration grade. The registration fee payable to CIDB varies according to the registration grade.

<table>
<thead>
<tr>
<th>Grade</th>
<th>Tendering Capacity (RM)</th>
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</thead>
<tbody>
<tr>
<td>G1</td>
<td>Not exceeding 200,000</td>
</tr>
<tr>
<td>G2</td>
<td>Not exceeding 500,000</td>
</tr>
<tr>
<td>G3</td>
<td>Not exceeding 1 Million</td>
</tr>
<tr>
<td>G4</td>
<td>Not exceeding 3 Million</td>
</tr>
<tr>
<td>G5</td>
<td>Not exceeding 5 Million</td>
</tr>
<tr>
<td>G6</td>
<td>Not exceeding 10 Million</td>
</tr>
<tr>
<td>G7</td>
<td>No Limit</td>
</tr>
</tbody>
</table>

Applicants for registration in any particular registration grade are expected to have executed engineering and construction works similar to those categories, satisfy CIDB that they have sufficient financial resources to meet financial commitments which would normally arise and that they have the necessary full-time personnel resources in Malaysia to undertake work corresponding to the registration grade and category. Financial capacity of an applicant is generally evaluated, in the case of a corporate applicant, on the paid-up capital, and in the case of a sole proprietorship or partnership, on the average balance of the last 3 months’ bank statements, fixed deposits and the amount of overdraft facilities enjoyed by the applicant.

Insofar as foreign contractors are concerned, registration is project-based. The certificate of registration of a foreign contractor allows the holder to execute only the project specified in the certificate. The certificate does not allow the holder to participate in a tender or to carry out any other construction works. The dates of commencement and completion of the project is set out in the certificate and if for any reason the date of completion of the project is extended, the contractor has to apply to CIDB for an extension of the validity of the certificate within 14 days before the expiry of the validity of the certificate.

WHAT ARE “CONSTRUCTION WORKS” UNDER THE ACT?

“Construction works” are defined in sec. 2 of the Act to mean “the construction, extension, installation, repair, maintenance, renewal, removal, renovation, alteration, dismantling, or demolition of:

a) any building, erection, edifice, structure, wall, fence or chimney, whether constructed wholly or partly above or below ground level;

b) any road, harbour works, railway, cableway, canal or aerodrome;

c) any drainage, irrigation or river control works;

d) any electrical, mechanical, water, gas, petrochemical or telecommunications works; or

e) any bridge, viaduct, dam, reservoir, earthworks, pipeline, sewer, aqueduct, culvert, drive, shaft, tunnel or reclamation works;

and includes any works which form an integral part of, or are preparatory to or temporary for the works described in paragraphs (a) to (e), including site clearance, soil investigation and improvement, earthmoving, excavation, laying of foundation, site restoration and landscaping”.

LEVY ON CONTRACTORS

A registered contractor must notify the CIDB of any contract which he has executed having a contract sum of more than RM500,000.00. Non-notification is an offence that shall on conviction be liable to a fine of RM5,000.00. CIDB will impose, before the commencement of such construction works, a levy calculated as a percentage of the contract sum. This percentage was originally 0.25% of the contract sum and has since been decreased to 0.125% of the contract sum by way of Regulation 2 of the Lembaga Pembangunan Industri Pembinaan Malaysia (Imposition of Levy) Order 2003 effective from 21.5.2003.

Non-payment of the levy within a prescribed time is an offence that shall on conviction, be liable to a fine not exceeding RM50,000.00. Further the amount of any levy payable may be recoverable as a civil debt due to CIDB.

The procedures relating to the determination of the levy amount are set out in the Construction Industry (Collection of Levy) Regulations 1996. Regulation 6 therein provides that for the purpose of determining the amount of levy payable by the registered contractor, the CIDB shall determine the contract sum of the construction works. In determining the contract sum, the CIDB may take into consideration the following:

a) the consideration in respect of any construction works

continued on page 13
HARD STANCE ON SOFTWARE INFRINGEMENT

SAP(M) Sdn Bhd & Anor v. I World HRM Net Sdn Bhd & Anor [2006] 2 MLJ 678

INTRODUCTION

The above decision by the High Court (“HC”) concerned an application for an interlocutory injunction to prevent infringement of copyright in the well-known SAP business application software programme and breach of a license agreement in relation to the said software.

FACTS

The second plaintiff (“SAP AG”) is the owner of the copyright in a business application software programme known as SAP R/3 software and the first plaintiff is their exclusive distributor in Malaysia. The first plaintiff had entered into an individual end user license agreement with the defendant (“the License Agreement”).

The plaintiffs brought an action against the defendants (I World HRM Net Sdn Bhd and I World Sdn Bhd) alleging that the defendants had breached the License Agreement by distributing the SAP R/3 software to third parties and extended its use beyond the extent permitted by the License Agreement and infringed the copyright in the SAP R/3 software.

The plaintiffs also applied for an interim injunction to restrain the defendants from using the plaintiffs’ software and to stop the defendants from infringing the plaintiffs’ copyright in the software.

DECISION

The HC found that the plaintiffs had fulfilled the requirements for obtaining an interlocutory injunction namely that:-

i) there were serious questions to be tried;
ii) the balance of convenience favoured the plaintiffs; and
iii) monetary compensation was not an adequate remedy.

The interlocutory injunction was granted as the Court was of the view that based on the facts of the case, the plaintiffs had made out a plausible case that the defendants had infringed the plaintiffs’ copyright in the SAP R/3 software by reproducing and downloading the software on to computer/servers of third parties without permission and this raised a serious issue to be tried.

The HC was satisfied that the balance of convenience favoured the plaintiffs for two reasons. Firstly, if the defendants were allowed to continue distributing the plaintiffs’ SAP R/3 software to third parties by way of licensing without the plaintiffs’ permission, such third parties would suffer a disruption of services in the event that the plaintiffs succeeded at trial. This would in turn result in customers losing confidence in the plaintiffs’ software. Secondly, the uncontrolled licensing of the software would irrevocably destroy the value of the copyright in the software and such loss cannot be remedied by monetary compensation.

During the course of proceedings, the defendants had also made an application to cross-examine the deponents of the affidavits in support of the plaintiffs’ application for interlocutory injunction.

This application was dismissed on the ground that at the stage of an application for interim injunction the Court is only required to determine whether there is a serious issue to be tried and not to make a decision on the merits of the entire case. Besides, such application would merely delay the plaintiffs’ application for interim injunction.

IMPLICATIONS OF THE DECISION

The Court placed great importance on the need for prompt determination of the application for interim injunction and refused to assist endeavours to delay the swift outcome of the matter.

Although this decision merely concerns an application for interim injunction, it raises some interesting issues. Firstly, that the Court recognised that downloading software on to computers/servers of third parties could amount to reproduction of the software and therefore could be regarded as an infringement of the copyright in the software. Secondly, the Court acknowledged that the uncontrolled licensing of software without the copyright owners’ permission would destroy the value of the copyright in the software which was considered to be an irreparable damage which could not be remedied by monetary compensation. Most importantly, this decision signifies that the Court recognised the need for a swift resolution in cases of copyright infringement and deprecated vexatious applications designed to unreasonably delay the fair and speedy determination of the matter.

LEELA BASKARAN (bl@skrine.com)

More Legal Terms Made Easy...

Qualified Privilege

The defence that a statement cannot be made the subject of an action for defamation because it was made on a privileged occasion and was not made maliciously, for an improper motive. Qualified privilege covers statements made fairly in situations in which there is a legal or moral obligation to give the information and the person to whom it is given has a corresponding duty or interest to receive it.

Ratio Decidendi

[Latin: the reason for deciding] The principle or principles of law on which the court reaches its decision. The ratio of the case has to be deduced from its facts, the reasons the court gave for reaching its decision and the decision itself. Only the ratio of a case is binding on inferior courts, by reason of the doctrine of precedent.

Stare Decisis

[Latin: to stand by things decided] A maxim expressing the underlying basis of the doctrine of precedent, i.e. that it is necessary to abide by former precedents when the same points arise again in litigation.

Uberrimae Fidei

[Latin: of utmost good faith] Describing a class of contracts in which one party has a preliminary duty to disclose material facts relevant to the subject matter to the other party.
INTRODUCTION

Two recent decisions, one from the English House of Lords ("HL"), and the other, from the Malaysian Court of Appeal, ("CA") make it necessary to revisit this topic sooner than anticipated, after the conclusion in Issue 2/2006 of this Newsletter of the three part article entitled Recovering Pure Economic Loss In Negligence: The Malaysian Position.

The recent House of Lords' decision in Commissioners of Customs and Excise v. Barclays Bank [2006] 4 All ER 256 ("Barclays Bank") has not only clarified the position of banks in relation to their duty in tort for failure to comply with an injunction served on them, but also the general English position on the recovery of pure economic loss in negligence. Their Lordships' decisions on the law of recovery of pure economic loss in negligence have recently been applied by the CA in Malaysia in the case of KGV & Associates Sdn Bhd v. The Co-operative Central Bank Ltd [2006] 5 MLJ 513.

This article will examine the significance of the HLs’ decision in the Malaysian context, with particular attention to its impact on the Malaysian position on recovery of pure economic loss in negligence.

THE HOUSE OF LORDS’ DECISION

The case itself concerned a claim brought by the Commissioners of Customs and Excise ("the Commissioners") against Barclays Bank for its failure to comply with 2 "freezing order" (more popularly known as Mareva Injunctions) after being notified of the same. The case proceeded on the basis of the following presumed facts.

In the beginning of 2001, two companies, Brightstar Systems Ltd ("Brightstar") and Doveblue Ltd ("Doveblue") were heavily indebted to the Commissioners in respect of VAT. On 26.1.2001, the Commissioners successfully obtained a freezing order against Brightstar, in that Brightstar was not to remove from England and Wales or in any way dispose of or deal with or diminish the value of any of its assets owned up to the value of $1,800,000.00, including any money in a specific account in Barclays Bank. On 30.1.2001, the Commissioners obtained a similar freezing order against Doveblue with a limit of $3,928,130.00. In both instances, the Commissioners notified Barclays Bank of the orders. Despite this, due to an error, Barclays Bank authorised substantial payments to be made out from the two specific accounts of Brightstar and Doveblue. In due course, the Commissioners obtained judgments in default against Brightstar and Doveblue respectively, but Brightstar and Doveblue paid nothing.

The Commissioners then commenced an action against Barclays Bank, seeking damages for the loss (pure economic loss) which they claimed to have suffered as a result of Barclays Bank's negligence in authorising the payments after being notified of the orders. The Commissioners based their cause of action principally in negligence.

The preliminary issue in this case was whether, on these assumed facts, Barclays Bank owed a duty of care to the Commissioners to prevent payments out of an account once it had been frozen by injunction. At the High Court level, Coleman J held that no duty of care existed (see [2004] 1 Lloyd's Rep 572) but his decision was subsequently reversed by the CA (see [2005] 1 Lloyd's Rep 165). On appeal, the HL overturned the CA's decision and reinstated the decision of Coleman J.

In essence, the HL found, on the presumed facts, that Barclays Bank did not assume any responsibility towards the Commissioners on notification of the orders. At most, it could only be said that Barclays Bank has, by the freezing orders, had thrust the responsibility upon it. Barclays Bank's position was wholly involuntary.

On policy grounds, their Lordships found that it would be unfair, unjust and unreasonable that Barclays Bank, on notification of the orders, become exposed to a liability which was in this case for a few million pounds only, but might in another case, be for very much more. Their Lordships also recognised that if a duty of care were to be owed by a bank in this type of situation, it would be difficult to avoid the conclusion that other third parties, even private individuals, would also owe a duty of care upon receiving notification of a freezing order in respect of a defendant's assets which they happened to be holding. And in the case of physical assets, questions could arise as to how far that would impose duties similar to those incurred by bailees to preserve or guard such assets. In most cases, the imposition of a duty of care in such circumstances would produce unfair, unjust and unreasonable results.

The fact that there had been no assumption of responsibility but that instead Barclays had had responsibility thrust upon it, appears to have been an important but not determining factor in the HLs' decision. These decisions also establish that the breach of a duty owed to and imposed by a Court does not equate to a breach of a duty owed to an adverse party in litigation, and in fact, no such duty generally exists.

At this juncture, it must be noted that, although this case is not binding on the Malaysian Courts, their Lordships' decisions have historically been regarded by the Malaysian Courts as extremely persuasive, and as providing invaluable guidance to Malaysian judges in similar situations.

In the process of coming to their conclusions, their Lordships extensively reviewed the leading cases on the recovery of pure economic loss in negligence. These cases disclosed that there are 3 broad approaches in deciding whether a defendant who had caused pure economic loss to the claimant owed him a duty of care. They are:

a) the assumption of responsibility test, i.e. whether the defendant had assumed responsibility [Hedley Byrne & Co Ltd v. Heller & Partners & Co [1964] AC 465], which in Murphy v. Brentwood DC [1991] 1 A.C. 398 appears to be the necessary requirement to found a duty of care in negligence in respect of claims for pure economic loss;

b) the threefold test of whether loss to the plaintiff was a reasonably foreseeable consequence of what the defendant did or failed to do, whether the relationship between the parties was one of sufficient proximity and whether in all the circumstances it was fair, just and reasonable to impose a duty...
circumstances, the ultimate question whether a duty of care should be in a
indicia or guidelines to ascertain whether a duty of care exists in given
leading to pure financial loss is this. Whilst there are several useful tests,
Hoffmann on the subject of a negligent misstatement (by act or omission)
“In my view, what seems to follow from the speeches of Lords Bingham and
by Lord Bingham of Cornhill in Her Majesty’s Commissioners of Customs
loss as a result of the negligent act or omission of a defendant has been stated
“The current approach to a case where a plaintiff has suffered pure economic
loss was affirmed ... but the general approach ... appears to be more flexible (or “fact sensitive”)...
The Malaysian CA’s decision is of interest in that it appears that the
landmark decision of the Federal Court (“FC”) in Majlis Perbandaran Ampang Jaya v. Steven Phoa Cheng Loon & Ors
[2006] 2 MLJ 389 was not considered notwithstanding the fact that it had, prior to the publication of the HLs’ decision, already been decided and reported. Instead, the CA adopted the approach applied by the Law Lords in the Barclays Bank case.
It will be recalled that the FC’s judgment in Steven Phoa turned largely on an issue of public policy: a consideration expressly disavowed by the CA in the same case. Although the issue in the present case appears not to have been one of public policy (being largely on an issue of public policy: a consideration expressly
disavowed by the CA in the same case. Although the issue in the present case appears not to have been one of public policy (being instead essentially “fact sensitive” as the CA puts it) it is difficult to reconcile the approach adopted in either of the Steven Phoa decisions with the approach adopted in the Barclays Bank case. The role of “policy” in deciding whether or not to impose liability in tort for economic loss was affirmed by the HLs, but the general approach endorsed by them appears to be more flexible (or “fact sensitive”) and holistic than the rather rigid “threefold test” adopted by the FC in Steven Phoa.
It will also be re-called that a recent analysis of the topic (see Legal Insights Issue 2/2006) suggested that the FC’s judgment in Steven Phoa might form the foundations for the development of a coherent Malaysian doctrine on this vexed and difficult area of the Law. However, it now appears that the latest decision of the CA gives rise to more questions than answers.

KGV & ASSOCIATES SDN BHD V. THE CO-OPERATIVE CENTRAL BANK LTD [2006] 5 MLJ 513

In this case, the defendant/appellant company was a valuer. It prepared a valuation report in respect of a particular property on the instructions of one Tan for financing purposes, which set out that the fair market value of the said property was RM4908,000.00. The report was given to Tan who then took it to the plaintiff’s office. At that time, Tan was accompanied by his friend, Kong.

Subsequently, Kong used the report to apply for a loan from the plaintiff who refused to entertain Kong as the report was addressed to Tan. Nevertheless, by 2 letters dated 17.10.1985 and 2.4.1986 the plaintiff confirmed the grant of 2 separate loans of RM100,000.00 each to Kong. Kong defaulted on the loans. The plaintiff then discovered that the market value of the said property was only RM51,000.00. The plaintiff commenced an action in negligence against the defendant for the shortfall together with claims for pure economic loss.

The role of “policy” in deciding whether or not to impose liability in tort for economic loss was affirmed ... but the general approach ... appears to be more flexible (or “fact sensitive”)...

It appears from the judgments that their Lordships accepted that none of the 3 approaches adumbrated above could form a universal concept which would itself always provide a just answer to all situations. Their Lordships were of the view that it would be more sensible to treat the 3 approaches as useful guidelines for the Judges to approaching the issue of duty of care in negligence in respect of claims for pure economic loss.

CONCLUSION

The HLs’ decision is of interest in that it marks the first time since 1991 that their Lordships have examined in depth, and reviewed this area of the law, and may indicate a re-convergence between English law and other Commonwealth jurisdictions. It is to be noted that Murphy v. Brentwood DC [1991] 1 AC 398 was not much referred to by their Lordships, notwithstanding their extensive survey of the development of this area of the law.

Applying the above approach, the CA found that no duty of care existed in this situation, as there was no evidence to show that the defendant knew the report given to Tan would be used by Kong. Neither was there evidence to show that the defendant permitted Kong to use the report after the plaintiff had rejected it. The CA concluded that there had been no assumption of responsibility by the defendant, and that the proximity and policy conditions of the threefold test had not been satisfied.

The issue before the CA was whether the defendant owed a duty of care to the plaintiff in negligence. In allowing the appeal, the CA adopted the approach enunciated in the Barclays Bank case. The role of “policy” in deciding whether or not to impose liability for economic loss was affirmed by the HLs, but the general approach endorsed by them appears to be more flexible (or “fact sensitive”) and holistic than the rather rigid “threefold test” adopted by the FC in Steven Phoa.

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INTRODUCTION

The landmark decision of the Federal Court ("FC") in the above case recently made significant findings on the relationship between banker and customer.

FACTS

Carah Enterprise Sdn Bhd ("Customer") sought a loan facility of RM20 million from several financial institutions ("Bankers") to finance its project to purchase a cold storage from a company overseas ("Vendor"). For the purposes of the loan facility, the parties entered into a series of negotiations and ultimately agreed on a working draft, with terms to be formalized into a facility agreement. The facility agreement as drawn up reflected the terms of the working draft save for one material variation i.e. the loan would now be disbursed in one draw down, instead of two draw downs as stated in the working draft ("Material Variation"). The Customer signed the facility agreement ("Agreement") 29 days later without scrutinizing its terms. Acting on the terms of the Agreement, the Bankers disbursed the full loan sum in one draw down. Subsequently, the Customer defaulted in repayment. As a result, the Bankers appointed a receiver and manager over the assets of the Customer pursuant to a debenture between the parties.

The Customer filed a claim at the High Court ("HC") complaining that the Bankers committed a fundamental breach of duty of care by failing to inform the Customer of the Material Variation made in the Agreement. The Customer contended that it signed the Agreement under the impression that it contained the exact terms as the working draft. The Customers inter alia, claimed that it was not liable for the loan, that the appointment of the receiver and manager was invalid and further prayed for damages to be assessed against the Bankers and the Receiver and Manager. In reply, the Bankers argued that the Customer, having signed the Agreement was bound by its terms despite the Material Variation and that the Customer was merely a pre-contractual negotiation with no bearing on the working draft.

DECISIONS OF THE HIGH COURT AND COURT OF APPEAL

The HC trial judge held that the working draft was immaterial as it was merely a pre-contractual negotiation with no bearing on the eventual Agreement. The Customer only had itself to blame for failing to scrutinize the Agreement before signing the Agreement. Further, it was inconceivable for the loan to be disbursed in two draw downs as it would be contrary to the contract between the Customer and Vendor. As such, the learned Judge dismissed the Customer’s claims and allowed the Bankers’ counterclaims for the amounts due to them. The Court of Appeal ("CA") endorsed the findings of the HC.

THE FEDERAL COURT’S DECISION

The decisions of the HC and CA were overruled by the FC. In allowing the Customer’s appeal with costs, the FC decided that:

1) The relationship of banker and customer begins the moment the parties enter into relationships or negotiations which are considered part of the contract, ultimately concluded. The negotiations must be part of the process and lead directly to the agreement; negotiations without agreement cannot establish the relationship.

2) The Customer might have been imprudent by failing to scrutinize the Agreement but there was an element of trust between the parties that no one would renege on the terms agreed upon on the working draft.

3) There was elementary obligation on the part of the Bankers to inform the Customer of the Material Change that they inserted in the Agreement. The Bankers failed to do so. Further, there was no evidence that the Bankers advised the Customer to seek independent advice prior to the execution of the Agreement.

4) If a bank executes an order knowing it to be dishonestly given, or shuts its eyes to an obvious fact of dishonesty, or acted recklessly in failing to disclose material facts, the bank will plainly be liable. It is an implied term of the contract between the bank and the customer that the bank will observe reasonable skill and care in and about executing the customer’s orders.

5) It is immaterial that the mode of disbursements provided in the working draft had contradicted the contract between the Customer and the Vendor. A bank is supposed to treat the Customer’s mandate at its face value, unless there is a question of fraud or misuse of authority for the purpose of committing fraud.

6) As a result of the breach of duty of care and negligence committed by the Bankers in amending the Agreement, the Customer suffered financial losses.

SIGNIFICANCE OF THE CASE

The above case establishes that the bank owes a duty of care to its customers. This duty commences from the moment the parties enter into negotiations which directly and ultimately culminate in an agreement between the parties. The bank is obliged to advise its customers on the terms of the loan/facility agreement if they differ from those agreed upon earlier during negotiations. Failure to do so could result in the bank being held liable for breach of duty and negligence and the nullification of the entire loan/facility agreement. Further, the bank must execute its customers’ orders with reasonable skill. The bank is not to question its customers’ mandate save in extreme cases e.g. where there is a question of fraud or misuse of authority for the purpose of committing fraud.

In light of the above case, it is advisable for banks and financial institutions to exercise extra caution and vigilance in drafting a loan/facility agreement. They should ensure that the agreement does not depart from the terms agreed upon by the customer during negotiations, save and except with the express consent of the latter. Further, the customer should be notified in writing to seek independent advice on the terms of the agreement prior to the execution of the same. There should also be an express provision in the agreement to the effect that the agreement constitutes the final and conclusive contract between the parties and supersedes all previous negotiations, understandings and/or agreements.

CLAUDIA CHEAH PEK YEE (cpy@skrine.com)
Comparison between Takaful and Conventional Insurance (Cont.)

<table>
<thead>
<tr>
<th>ISSUE(S)</th>
<th>TAKAFUL</th>
<th>CONVENTIONAL INSURANCE</th>
</tr>
</thead>
<tbody>
<tr>
<td>Funds</td>
<td>Funds belong to the participants on a collective basis and are managed by the operator for a legitimate consideration for the services rendered.</td>
<td>Funds belong to the company.</td>
</tr>
<tr>
<td>Guarantees</td>
<td>No contractual guarantees are given by the operator. Joint indemnity between the participants is a prerequisite for participating in a Takaful scheme.</td>
<td>The company guarantees benefits.</td>
</tr>
<tr>
<td>Investments</td>
<td>The funds are invested in interest free schemes justified by Syariah. The entire procedure must comply with Syariah guidelines. Investment returns must not be driven by any unethical commercial activities.</td>
<td>The funds may be invested in an interest based scheme. They can also be invested in any scheme or project, which may not be supported by Syariah.</td>
</tr>
<tr>
<td>Nature</td>
<td>The entire operation aims at paving the way of brotherhood, solidarity and mutual cooperation.</td>
<td>The operation aims for commercial gain based on business principles.</td>
</tr>
<tr>
<td>Profits</td>
<td>The proportion of the share of profits is determined in the contract for as long as the policy is still in force, but the amount itself will depend on the investment performance or returns each year.</td>
<td>In a life insurance policy, the insurer can arbitrarily choose to give the policyholders a share of profit at whatever amount they wish whenever they like.</td>
</tr>
<tr>
<td>Regulations</td>
<td>Regulations affecting Takaful are based on Divine sanctions (Quran and Hadith). Secondary sources of Islamic Law.</td>
<td>Insurance law is regulated and developed based on human thought, norms and cultures.</td>
</tr>
</tbody>
</table>

Source: An Opportunity for ICMIF Member to Provide Islamic Insurance (Takaful) Products by Dr. Mohd. Ma’zum Billah and Sabbir Patel.

FATIMATUL ZAHRA BINTI MUSTAPHA (fzm@skrine.com)

Courtroom Blooper

Attorney: The truth of the matter is that, you were not an unbiased, objective witness, isn’t it?
You too were shot in the fracas?

Witness: No, sir. I was shot midway between the fracas and the navel.

Source: http://www.fenichel.com
LIBERALISING QUALIFIED PRIVILEGE

Jameel & Ors v. Wall Street Journal Europe Sprl [2006] UKHL 44

INTRODUCTION

This landmark judgment of the House of Lords (“HL”) in England (soon to be renamed Britain’s Supreme Court) at once restated and strengthened the principles set down by an earlier panel of the HL in Reynolds v. Times Newspapers Ltd [2001] 2 AC 127 (“Reynolds”). Reynolds had developed the traditional common law defence of qualified privilege in libel cases to establish a public interest defence to protect to a certain degree newspaper articles which were the product of responsible journalism. This marked a significant development of the traditional defence of qualified privilege in which a privileged occasion arises out of a duty to communicate information to the public generally and a corresponding interest in receiving it (“the duty and interest test”). Qualified privilege would only be relevant where a statement made is in fact defamatory and untrue.

In the above case, a libel action, arose from an article in The Wall Street Journal Europe (“the newspaper”), “a respected, influential and unsensational newspaper” (per Lord Bingham at paragraph 2 of the judgment). The background to this case was the defining event of the century, that is, the terrorist attacks on and destruction of the World Trade Center in New York, USA, and the other atrocities of 11.9.2001. The heading and sub-headings of the article were, respectively: “SAUDI OFFICIALS MONITOR CERTAIN BANK ACCOUNTS: Focus Is on Those With Potential Terrorist Ties”.

The article reported that the Abdul Latif Jameel Group of companies were among 150 accounts being monitored by the Saudi Arabian Monetary Authority (“SAMA”) to “uncover whether those listed in suspect lists have any real connection with terrorism” (per Lord Hoffmann at paragraph 41 of the judgment). The first claimant was Mohammed Abdul Latif Jameel (“Jameel”) and the second, Abdul Latif Jameel Company Ltd, of which, Jameel was the general manager, president and chief executive officer. The writer of the article was Mr James Dorsey, the newspaper’s special correspondent general manager, president and principal figure. The writer of the article was Mr James Dorsey, the newspaper’s special correspondent in Riyadh, Saudi Arabia. The newspaper claimed that the sources for the article were a prominent Saudi businessman, a banker, a US diplomat, a US Embassy official and a senior Saudi official. The article went on to state that the Jameel group was not available for comment.

... (in) story presentation ... allowance must be made for editorial judgment or decision ...

Jameel and the second claimant sued the newspaper for libel and won at the High Court (“HC”) and the Court of Appeal (“CA”). The newspaper appealed to the HL. There were 2 issues before the HL:-

a) whether a trading corporation (as opposed to an individual) may sue for libel and recover damages without pleading or proving special damages;

b) whether the Reynolds privilege applied and its scope.

The newspaper won the appeal on both issues, with a majority affirmative decision on the issue that a trading corporation ought to show that the libel was likely to cause a financial loss (per Baroness Hale with Lord Hoffmann agreeing with her) and that the Reynolds privilege applied on the facts. This article will focus on the second issue as it has more far-reaching consequences.

In strengthening the Reynolds defence, all of the Law Lords agreed that the defence comprised 2 elements:-

i) Whether the subject matter of the publication is of public interest;

ii) Whether the publisher acted reasonably and fairly in publishing the information, that is, whether the publication was the product of responsible journalism.

The publisher can rely on the Reynolds defence once these elements or conditions are established (Lord Hoffman, paragraph 57 of the judgment).

PUBLIC INTEREST

On the first element of public interest:-

(a) Lord Hoffmann (with whom Baroness Hale agreed) was of the view that the thrust of the article ought to be considered as a whole and the question of public interest is to be decided by the judge (paragraph 49 of the judgment). In this case, the thrust of the article was to inform the public that the Saudis were cooperating with the US Treasury in monitoring bank accounts in the aftermath of the terrorist attacks on and destruction of the World Trade Center in New York, USA. The public interest of the subject could not be denied.

(b) The two-stage process (duty and interest test) is not employed to determine public interest. If the publication is in the public interest, then duty and interest are taken to exist (paragraph 50 of the judgment).

Although the question of whether the story as a whole was a matter of public interest must be decided by the judge and the issue of whether a defamatory statement should have been included is a matter of story presentation and allowance must be made for editorial judgment or decision unless it was made in a casual, cavalier, slipshod or careless manner (Lord Bingham at paragraph 33 of the judgment).

If the article as a whole is in the public interest, opinions may differ on the details needed to convey the general message. The fact that a judge with hindsight would have made a different editorial decision should not destroy the defence (paragraphs 50 & 51 of the judgment).

The inclusion of the names of large and respectable Saudi businesses was an important part of the story, showing that cooperation with the US Treasury was not confined to a few companies but extended to main Saudi companies (paragraph 52 of the judgment).

Although this case dealt with a publication in a newspaper, the
defence is available to anyone who published material of public interest in any medium (paragraph 54 of the judgment).

RESPONSIBLE JOURNALISM

On the second element of responsible journalism:-

a) If the publication fulfils the test of public interest, the next issue is whether the steps taken to gather and publish the information were responsible and fair. The question in each case is whether the publisher behaved fairly and responsibly in gathering and publishing the information (paragraphs 53 and 54 of the judgment).

In “reportage cases”, the publisher ought to make it clear that he is simply reporting what others have said ...

b) Did the newspaper in this case satisfy the conditions of responsible journalism? It was held that the author of the article did indeed make the necessary verification with its sources, particularly in Washington DC and that, although it would have been better if the newspaper had delayed publication to give Jameel an opportunity to comment in person, their failure to do so did not deprive them of the public interest defence. In addition, publishing the article would not damage the diplomatic interests of the United States or its attempts to secure Saudi co-operation in tracing terrorist funds as the US Treasury had given clearance to the article.

c) It was further held that the standard of conduct expected of a journalist should be applied in a practical and flexible manner (Lord Scott at paragraph 140 of the judgment). This conduct included the duty to take such steps as are practicable to verify the truth of what is reported and to provide an opportunity to comment and/or an opportunity to have a response published by the newspaper (paragraph 138 of the judgment). In “reportage cases”, the publisher ought to make it clear that he is simply reporting what others have said although he himself does not believe the information to be true (Baroness Hale at paragraph 149 of the judgment).

CONCLUSION

The above case did not reject the traditional defence of qualified privilege in which the essential element is the duty and interest two-stage test. Instead, it liberalised qualified privilege by giving greater weight to the value of informed public debate on significant public issues through responsible journalism.

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continued from page 6

... Construction Industry Development Board

The imposition of the CIDB levy is complicated by the different procurement methods used in the construction industry. The position is relatively straight-forward in the case of traditional contracts where design of the project is separately undertaken by design consultants and the contractor performs only the physical construction works. There is no levy payable on design work undertaken by architects or engineers pursuant to such separate consultancy contracts. The levy is therefore only calculated on the contract sum awarded to the contractor.

Relatively recent procurement innovations, such as management contracts, BOT contracts and turnkey contracts have posed difficulties in the assessment of the CIDB levy. The pricing of such contracts includes design and supervision elements which are traditionally contained in separate consultancy contracts. The question which then arises is whether the CIDB’s levy is to be calculated according to the entire contract sum, or only the “construction” element of that sum. The occasional failure to include within the terms of the contract any breakdown of the entire sum only exacerbates this potential problem.

A difficulty also arises in engineering projects where sophisticated (and thus expensive) equipment and machinery need to be incorporated into the works. The cost of such specialised equipment and machinery usually far exceeds the cost of the physical erection and installation of the said equipment and machinery. The question which again arises is whether the CIDB’s levy is to be calculated according to the entire contract sum, or only the cost of the physical erection and installation works. Again, where the contractual framework does not allow for the easy differentiation between “supply” and “construction” elements, the potential for difficulty arises.

The authors’ experience have been that the CIDB, not unnaturally, tends to select the larger sum when calculating its levy. It is perhaps ironic that the body charged with the development of the Construction Industry in Malaysia has not been keener to recognise recent developments in procurement strategies. The authors are aware of at least one case in which the levy imposed by the CIDB is currently being challenged in the Courts.

CONCLUSION

This is not the appropriate forum for a consideration of whether the CIDB has succeeded in achieving the laudable aims set out at the beginning of this article. For the present, those intending to carry out construction works in Malaysia should be aware of the existence of what is in effect another level of taxation in the construction industry, and of the prophylactic measures which can be taken to avoid or minimize exposure to this, whilst those engaged in such works should be aware of the possibility of challenging the amounts which the CIDB wishes to levy.

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& Kamraj Nayagam (kn@skrine.com)
INTRODUCTION


The PCT is administered by the World Intellectual Property Organization (WIPO) and is open to contracting states to the Paris Convention for the Protection of Industrial Property (1883). The PCT enables an applicant for a patent to seek protection for its invention simultaneously in any or all 133 contracting states to the PCT by filing a single international patent application in one language with a set of fees. Under the PCT system, a patent applicant is no longer required to file applications directly with patent offices in countries or regions in which protection is sought. The applicant merely enters the national phase of the international patent application of countries or regions which are of interest to him.

TRADITIONAL APPROACH

An applicant can of course seek to protect his inventions without using the PCT route but it is more expensive and cumbersome. Pursuant to the non-PCT route, the applicant is required to appoint local agents in the countries in which protection is sought and is required to pay separate filing fees and translation costs. Further, the applicant must file applications in countries in which protection is sought within 12 months following the filing of his first application, failing which, he would have lost his rights to seek protection in those countries which are not covered in the first application. Many times, the processing of the first application has not proceeded to the point where a good assessment of the commercial viability of the invention can be appreciated.

By filing a PCT application, the applicant has an additional 18 months, i.e. a total of 30 months to deliberate on the usefulness and necessity of patent protection in various countries. The applicant is given more time to reflect on the desirability of seeking protection in foreign countries, to assess the technical value of the invention, to exploit the invention commercially, to seek business partners, to secure funding, to appoint local patent agents in each foreign country, to prepare the necessary translation and to pay the national fees.

ADVANTAGES OF PCT

An interesting feature of the PCT is such that it only facilitates the filing and processing of the application. An international PCT applicant must enter the national phase for the international application for countries or regions for which designations are made and are of interest. The grant of the patent in these countries or regions will remain with the national or regional patent offices.

Further, the PCT applicant is assured that if his international application is in the form prescribed by the PCT, it cannot be rejected on formal grounds by any designated patent office during the national phase of the application process. The PCT system features an international search which is most useful.

On the basis of the international search report and the written opinion rendered following the search, the applicant is able to evaluate with reasonable probability the chances of his invention being patented. Further, the applicant is afforded an opportunity to amend the international application during the said preliminary examination to put his application in order.

MALAYSIAN POSITION

Malaysia acceded to the PCT on 16.5.2006 and is bound by the PCT on 16.8.2006. Effective 16.8.2006, PCT applications can be filed by nationals or residents of Malaysia with the Intellectual Property Corporation of Malaysia (MyIPO) or the International Bureau of WIPO, acting as the Receiving Office.

In order to file a PCT application in Malaysia, at least one of the applicants must be a Malaysian national or resident of Malaysia. The application must be in English, contains the name of the applicant and inventor, a description of the invention and any possible claim(s) indicating that the applicant’s request is intended to be an international application.

On filing of the international application, all contracting states are automatically designated. In other words, an international application has the effect of a national patent application in all 133 PCT contracting states.

The Receiving Office checks the international application to determine whether it meets the prescribed requirements as to form, content and payment of fees. If the requirements are met, an international filing date will be assigned.

Subsequently, the international application will be subject to an international search. The international search is carried out by one of the patent offices of the world acting as an International Search Authority. The applicant who files its international application with MyIPO has the choice of choosing the Korean Patent Office, Australian Patent Office or the European Patent Office as the International Search Authority.

The International Search Authority produces an international search report which identifies any “prior art” (all information made available to the public) which might affect the patentability of the invention claimed. The report contains a listing of references to published patent documents and technical journal articles and indications for each of these documents listed as to their relevance to the claimed invention. Based on the search report, the International Search Authority prepares a preliminary and non-binding written opinion giving a detailed analysis of the patentability of the claimed invention on questions of whether the claimed invention is novel, involves an inventive step and is industrially applicable.

The international search report and the written opinion are communicated by the International Search Authority to the applicant by the 4th or 5th month after the filing of the international application who then decides whether or not to amend his claims or withdraw the application.

If the international application is not withdrawn, the application together with the international search report will be published by the International Bureau of WIPO shortly after the expiration of 18 months from the earliest priority date. In addition, the weekly
The PCT offers an efficient and less expensive alternate route to filing of patent applications...

Following this, an optional international preliminary examination may be requested. Once requested, the International Preliminary Examination Authority carries out the patentability analysis and provides an opinion in the form of an International Preliminary Report on the compliance with the international patentability criteria of each of the claims searched. The report provides useful advice to the applicant as to whether it is worthwhile to proceed with the international application in the national phase.

During the international preliminary examination procedure, the applicant has the opportunity to amend the description, claims and drawings of the international application, to put it in good order.

The international preliminary examination will be considered by the national or regional patent offices in which the national phase is entered but is not binding on them.

At 30 months from the filing date of the international application or from the priority date if any, the international phase ends and the international application enters into national or regional phase.

If the entry into national or regional phase is not performed within the prescribed time limit, the international application generally ceases to have the effect of a national or regional application.

In the national phase, each patent office is responsible for examining the application in accordance with the national or regional patent laws, regulations and practices.

CONCLUSION

The PCT offers an efficient and less expensive alternate route to filing of patent applications to protect inventions internationally. It has proven to be a popular route and by the end of 2004, WIPO received one million applications from across the globe. Now, the doors have opened up for Malaysia. Malaysian inventors should strategically leverage on the PCT to exploit their inventions to the fullest to remain competitive in the global village.

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Therefore, Celcom can be distinguished on the facts from the decisions of Vincent Ng J in Azman Tay, Juranas, Pembinaan Lian Keong and the SC decision in Chip Yew all of which have held that the Court has no jurisdiction to grant an injunction to restrain winding-up where the petition has been filed. Further, in instances where a "public interest" issue is involved, for example, where the company is extremely solvent and the presentation of the petition would have an adverse impact on its financial position and the public perception of the company, the Court will lean towards the granting of an injunction. In light of the above, the most appropriate stage at which to apply for an injunction is before the petition is presented and at the time the company receives a statutory demand for payment, in the form of a sec. 218 Notice. The Court's power to grant an injunction before the presentation of a winding up petition was confirmed in the case of Instrumech Engineering Sdn Bhd v. Sensorslink Sdn Bhd [2001] 1 MLJ 127.

MALICIOUS PROSECUTION

Where a winding-up petition has been improperly presented by a creditor to coerce the company to settle the debt, an action can be brought against the petitioner by the company for malicious prosecution. The SC case of Si & Si Sdn Bhd v. Hazrabina Sdn Bhd [1996] 2 MLJ 509 illustrates this point. In this case, the appellant had filed a winding-up petition against the respondent. By consent of both parties, the winding-up order was set aside and the petition was fixed for hearing. Meanwhile, the respondent filed an application to strike out the petition and claimed damages on the basis that as a result of the petition, its bank accounts were frozen and that it was unable to carry on its business. Mohamed Dzaiddin FCJ (as he was then) said that an application for a winding-up order, even if subsequently dismissed as being ill founded, can damage a solvent company's reputation. An action for damages against the petitioner, whose winding-up petition has been struck out, can be brought by an entirely separate suit founded on the tort of malicious prosecution or abuse of process. His Lordship cited two Australian authorities Quartz Hill Consolidated Gold Mining Co v. Eyre [1883] 11 QBD 674 and QIW Retailers Ltd v. Felview Pty Ltd [1989] 7 ACLC 519 in support of his proposition.

CONCLUSION

In determining whether to grant an injunction to restrain the presentation of a winding-up petition, the Court must balance an unpaid creditor's right to file a petition against the company's right not to have its reputation in the eyes of the public and its credit standing damaged. The Courts are more likely to grant an injunction whenever the winding-up petition is not grounded on a judgment debt and there has been no unequivocal acknowledgement of the debt by the company. As such, it is clear that the law in this area continues to develop and the Courts have shown a willingness to adapt the basic principles in granting injunctions to restrain winding-up petitions, to new situations which it had not previously faced.

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