THE *ZRp* BRIEF

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BRIEFING…

INFORMATION TECHNOLOGY/ INTELLECTUAL PROPERTY

'…BUT WHAT WILL THEY THINK OF THIS IN ZIMBABWE…' – THE NET GAGGED?

In a recent decision, the High Court of Australia ruled that an article on the Internet is considered to be published at the point it is read, rather than the point it originated. With cross-border Internet defamation, an important issue for consideration in *Dow Jones v Gutnick* (Dec 2002) is how publication is defined in cyberspace.

<u>How it all started</u>

Dow Jones is the publisher of the Wall Street Journal and a related periodical known as 'Barrons Magazine'. Dow Jones operates from New Jersey where its website is located.

An article headed 'Unholy Gains' appeared on Barrons' Website on 29 October 2000. Joseph Gutnick, an Australian citizen and prominent business identity with a reputation in philanthropic, sporting and religious circle with substantial connections in the US claimed that the article was defamatory. The article allegedly claimed that Gutnick was the biggest customer of Nachum Goldberg (a jailed money launderer and tax evader); that he was masquerading as a reputable citizen when in fact he was a tax evader who had laundered large sums of money through Goldberg and that he had bought Goldberg's silence.

The magazine was published in hard copy form in the US but in Australia, where Gutnick chose to sue, it was available only on the Internet. Dow Jones wanted the action heard in the US rather than Australia not only because it would be more convenient for it, but also because US law is far more favourable to defendants in libel actions.

Dow Jones was served in the US with the Victorian legal proceedings and applied to the Victorian court to dismiss the proceedings primarily on two grounds:

(a) that the proper forum was the United States; and

(b) that the Victorian court did not have jurisdiction

<u>Lex loci delicti</u>

The article was authored in New York, placed on a web-server in New Jersey and later downloaded by a person in Victoria. Was the article published in Victoria for the purpose of defamation law?

The rule for the assessment of the applicable law is where the tort was committed (lex loci delicti). In the High Court of Australia, Michael Kirby J distinguished an action in defamation from other product liability or negligence claims, stating that:

> In a cause of action framed in defamation, the publication of the material which damages the reputation of the plaintiff is essential. Merely creating and making the material available is insufficient. The material has to be accessed or communicated in a jurisdiction where the plaintiff has a reputation. That will usually

> be the place where the plaintiff is resident. Unlike product liability or some other negligence claims, damage to reputation cannot occur fortuitously in a place outside of the defendant's contemplation. Where a person or corporation publishes material which is potentially defamatory to another, to ask the publisher to be cognizant of the defamation laws of the place where the person resides and has a reputation is not to impose on the publisher an excessive burden. At least it is not to do so where the potential damage to reputation is substantial and the risks of being sued are commensurately real.

An article on the Internet is considered to be published therefore at the point it is read, rather than the point it originated. This decision upholds the ruling by the Supreme Court of Victoria which held that an online article is published in the jurisdiction where it is downloaded, regardless of where it was uploaded or where the publisher's server resides:

> In defamation, the same considerations that require rejection of locating the tort by reference only to the publisher's conduct, lead to the conclusion that, ordinarily, defamation is to be located at the place where the damage to reputation occurs. Ordinarily that will be where the material which is alleged to be defamatory is available in comprehensible form assuming, of course, that the person defamed has in that place a reputation which is thereby damaged. It is only when the material is in comprehensible form that the damage to reputation is done and it is damage to reputation which is the principal focus of defamation, not any quality of the defendant's conduct. In the case of material on the World Wide Web, it is not available in comprehensible form until downloaded on to the computer of a person who has used a web browser to pull the material from the web server. It is where that person downloads the material that the damage to reputation may be done. Ordinarily then, that will the place where the tort of defamation is committed.

<u>*Entores Ltd v Far East Corp* revisited</u> ?

The ruling in *Dow Jones v Gutnick* brings to mind the case of *Entores Ltd v Far East Corp* (1955) in which the postal rule was discussed as well as the exact point a contract is deemed to have been concluded in cases of instantaneous communications.

A basic requirement of contract law is that a contract is not concluded until an offer has been accepted and the acceptance is communicated to the offeree. Thus a contract is usually concluded where the offeree is. An exception however is made to this rule – that is where contracts are made via the post. According to the postal rule, the acceptance is complete as soon as the letter is properly posted. This would be the place where the offeror is. Reference on this point may be made to the case of *Adams v Lindsell* (1818).

In *Entores Ltd v Far East Corp* the issue was whether the postal rule extended to instantaneous communications. Denning LJ in distinguishing the postal rule from instantaneous communications, said:

> …my conclusion is that the rule about instantaneous communications between parties is different from the rule about the post. The contract is only complete when the acceptance is received by the offeror; and the contract is made at the place where the acceptance is received.

The decision in *Dow Jones v Gutnick* appears to have some resemblance to *Entores'* case, the difference being that in the latter, the issue for consideration was at what point of time was the contract concluded.

Pre-Internet law

What is interesting to note is although the High Court of Australia in *Dow Jones v Gutnick* was dealing with issues concerning cross-border Internet defamation, reference was made to pre-internet cases such as *Calder v Jones*; *Telco Communications v An Apple A Day* and *Blumenthal v Drudge*. The court then concluded that the law in defamation cases has for centuries been that publication takes place when and where the contents of the publication, oral or spoken, are seen and heard and comprehended by the reader or hearer.

Having decided that a person is defamed at the place where publication is made, the court found that the dissemination of the material on the Internet and the downloading of that information in Victoria meant that publication had been made there. The court followed the line of developing authority and found that the publication of the material in Victoria gave the court the necessary connection to allow it to assume jurisdiction and hear the claim.

The issue is whether the court was right in referring to pre-Internet law. In fact no attempt was made to distinguish between the Internet and other means of communication. In the words of Callinan J:

> Statements made on the Internet are neither more nor less 'localized' than statements made in any other media or by other processes. Newspapers have always been circulated in many places. The reach of radio and television is limited only by the capacity of the technology to transmit and hear or view them, which already, and for many years has extended beyond any one country.

An issue for consideration is whether Internet publishing is indeed the same as other means of mass communication. One wonders therefore whether the relevant aspects of Internet technology were appreciated by the judges. In referring to the lack of knowledge displayed by the judges, a comment was made by Roger Clarke, an IT consultant and Visiting Fellow at the Department of Computer Science, Australian National University:

> Justice Callinan argued that the Internet raises no new issues. He used the example of 'The London Times' in the 19th century, which went everywhere coloured red on the map. He appeared to be oblivious to the uncontested expert evidence before him, which in effect stated that a web-server cannot reliably recognize the colour red.
>
> Justice McHugh asked a question about why there was no screening program for the word 'Victoria' (which suggested that he had not read the expert evidence); apparently did not comprehend the notions of distributed databases and backup sites; talked about 'impulses' and 'packets' when referring to a web-site; and later referred to such data being installed on a silicon chip with circuits, which would require an electron microscope in order to be read.
>
> Justice McHugh's understanding appears to be so wide of the mark that a tutorial is sorely needed, to get the judge up to speed on the basic concepts of information technology. But there is still no mechanism in the Australian court system whereby judges can avail themselves of independent advice on such matters. It can be expected that the quality of judicial work, even in the highest courts, will continue to be very poor in technical matters such as this.

'…but what will they think of this in Zimbabwe…'

The ruling in *Dow Jones v Gutnick* would have global implications for publishing and for laws of defamation. Organizations may have to tailor their content to take into account the most restrictive legal systems in the world – what might be called the '….but what will they think of this in Zimbabwe…' factor.

This may appear to be rather burdensome because publishers would not know in advance what specific defamation laws prevail in a particular country. For example in Australia, there is no single point-of-publication rule while in Zimbabwe, journalists may be imprisoned for criticizing the government. Authors and publishers may therefore find themselves the subject of proceedings in foreign jurisdictions, even if the material does not offend the law where it is posted, provided that the material has a sufficient connection with the jurisdiction where proceedings are instituted.

This could have a serious impact on publishing and news-gathering activities in countries with strict libel laws.

Self-censoring therefore is an aspect that publishers may want to consider. However on this issue, it was stated by Robert O'Neil, the director of the Thomas Jefferson Center for the Protection of Free Expression:

> It would be unworkable as a practical matter to have to edit each day's Web issue with an eye to what material might focus on what states, where residents might draw what inferences. That's simply an outlandish, unmanageable process. Even if it was possible, it's still in our view not something that constitutes a reasonable expectation of a publisher.

Much ado about nothing?

Although *Dow Jones v Gutnick* appears to send an unnerving message to Internet publishers around the world, such a ruling may not be entirely novel in the light of similar previous decisions. For example, like Dow Jones, Yahoo was sued for online content in a foreign country when a French Court ordered the company to remove Nazi memorabilia from its auction site because the sale of such goods is prohibited in France (It may be interesting to note that in November 2001, a US Federal judge ruled that Yahoo was not bound to comply with French laws governing Internet content on US based websites). Similarly a Guardian journalist faced deportation from Zimbabwe earlier this year due to reports in the newspaper which the Zimbabwean prosecutor claimed could be said to be published in the country due to the Internet.

It may also be interesting to note that one favourable aspect of *Dow Jones v Gutnick* is that it discourages 'forum shopping', that is where publishers locate their web servers in countries with the freest communication laws in order to avoid libel prosecution in their own countries. An Australian lawyer commented:

> It is very important in that it says that publishers have to look to the place where the document is read/received when determining jurisdiction, not the place

> where the servers are hosted or some other place. Otherwise everyone would locate their servers in Antarctica or wherever in an effort to escape defamation laws.

Dow Jones may be facing an uphill battle but certain aspects of the judgment appear to be encouraging. In the words of Kirby J:

> In such a case, potential liability in defamation for the publication of material relating to such a person on the Internet may indeed have a chilling effect on free speech merely because one of those jurisdictions has more restrictive laws than the others. This approach could subject Australian defendants to the more restrictive defamation laws of foreign jurisdictions. However, such problems are the result of the absence of uniformity in defamation laws, combined with an ability to access and broadcast material across national boundaries (which is not limited to the Internet) and the absence of international treaties or reciprocal laws to govern those issues.

<u>Comment</u>

In the absence of express provisions in our Defamation Act 1957, the impact of this decision in the Malaysian jurisdiction will have to be considered. In the past, decisions from Australia have been adopted and is always considered persuasive more so in view of the fact the Australia is a component of the Commonwealth and applies common law principles. However in considering this decision, the Malaysian courts will have to take heed of the criticisms already levelled and may depart in its finding of facts – *ZRp.*

CYBER-SQUATTING – E-LEGAL OR ILLEGAL?

Cyber-squatting (domain hijacking) appears to be a highly contentious matter. In the light of a recent Malaysian case (*Skrine v My Information Centre Sdn Bhd*) (May 2002) relating to the same, one wonders to what extent our conventional intellectual property laws are sufficient to address the problems.

Cyber-squatting currently appears to be one of the most contentious issues in the cyber-law area throughout the world. It occurs upon the registration by a person of a domain name belonging to another, even if it is without any intention of using it.

A company or a person needs to register its name in the local language of the country in which they are operating. It can cost as low as USD35 to do that but if a company gets squatted, it may have to pay ten times more to try to get it back.

Cyber-squatting seems to be on the increase. Whenever a person applies for a domain name, nine times out of ten, someone else already owns it. In fact domain names have become so valuable that apparently in Korea, banks have begun accepting them as collateral for property mortgages!

The dispute between Skrine, one of the leading law firms in Malaysia, and My Information Centre Sdn Bhd began in April 1999 when the latter had registered or caused the registration of the domain name 'skrine.com' without the licence, consent or authority of the complainant. In December 1999, Skrine filed a suit at the High Court of Malaya and a month later discovered that the domain name had been re-registered to a person known supposedly as Skrine Low Chit Sin who resided in China.

In August 2000, Skrine filed a complaint with the WIPO (World Intellectual Property Organization) Arbitration and Mediation Center and the panel ruled that that the domain name 'skrine.com' be transferred to Skrine.

On 17 May 2002, Skrine was awarded damages in the sum of over RM200,000. Damages were awarded against My Information Centre Sdn Bhd which did not enter an appearance to the suit filed by Skrine.

In the first suit of this nature, a sum of over RM30,000 was awarded based on the cost of investigation and retrieving its domain name while exemplary damages in the sum of RM200,000 was awarded as a form of deterrence to other potential cyber-squatters.

As there is lack of cyber-piracy laws in Malaysia, Skrine based its cause of action on conventional intellectual property laws, namely the common law of passing off. One wonders therefore wherein lies the difference between conventional intellectual property laws and the more specific and technical cyber-piracy legislation.
Cyber-piracy in particular cyber-squatting occurs in a unique manner in that the mere act of registration of a domain name, identical or similar to a name belonging to another is sufficient to constitute a violation. According to trade marks law however, in particular section 38 of the Trade Marks Act 1976, an infringement takes place only upon the unauthorized use of a trade name or mark belonging to another as is likely to confuse the public. Many cyber-pirates simply register a trademark as a domain name without activating a website at that address or otherwise using the domain name registration, and then offer the registration for sale to the trademark owner at a large profit. The registrant merely 'squats' on the registration, hence the term 'cyber-squatting'.

The difficulty that arises is that under the Trade Marks Act, the mere act of registration may not amount to 'use', thus there may not be any violation of the statute. There is an urgent need therefore for specific cyber-piracy laws to be enacted.

In Malaysia currently, the cyber-laws in existence are the Computer Crimes Act 1997; Digital Signature Act 1997; Telemedicine Act 1997; and the Communications and Multimedia Act 1998. There is no specific statute governing cyber-piracy or cyber-squatting. Lessons could perhaps be learnt from the events culminating to the drafting of the US Trademark Cyber-Piracy Prevention Act 1999.

In the meantime however some solace may be sought from the UK case of *Marks & Spencer & Ors v One In A Million Ltd & Ors* (1999). In that case, Marks & Spencer and other companies (the plaintiffs) issued proceedings against One In A Million Ltd and others (the defendants) who specialized in the unauthorized registration of Internet domain names comprising or incorporating the names or trade marks of well-known companies. Having registered them, the defendants then attempted to sell the rights in the domain names for large sums of money to the organizations concerned. None of the websites involved was active.

It was held by the High Court that the mere creation of an 'instrument of deception' without either using it for deception or putting it into the hands of someone else to do so is not passing off. It followed therefore that the mere registration of a deceptive company name or a deceptive Internet domain name is not passing off.

However it was also held that although the defendants merely registered the domain name belonging to Marks & Spencer, what they had done was calculated to infringe the plaintiff's rights in future:

> The name Marks & Spencer could not have been chosen for any other reason than that it was associated with the well known retailing group. There is only one possible reason why anyone who was not part of the Marks & Spencer Plc group should wish to use such a domain address, and that is to pass himself off as part of that group or his products off as theirs. Where the value of a name consists solely in its resemblance to the name or trade mark of another enterprise, the court will normally assume that the public is likely to be deceived, for why else would the defendants choose it? In the present case, the assumption is plainly justified. As a matter of common sense, these names were registered and are available for sale for eventual use. Someone seeking or coming upon a website called http://marksandspencer.co.uk would naturally assume that it was that of the plaintiffs.

Injunctions were therefore granted ordering the defendants to assign the domain names in question to the plaintiffs though no financial relief was granted bearing in mind that the actual use of the name had not occurred.

Incidentally, *Marks & Spencer & Ors v One In A Million Ltd & Ors* was the case that formed the basis of the award of the arbitrator at the arbitration between Skrine and Skrine Low at the WIPO Arbitration and Mediation Centre in December 2000 – ***ZRp.***

INDUSTRIAL RELATIONS

GUILTY AS CHARGED…?

In the light of the Court of Appeal decision in *Esso Production (M) Inc v Maimunah bte Ahmad & Anor* (Nov 2001) how specific should the drafting of charges be before the employee is made to answer them?

<u>Facts</u>

Following an internal investigation being conducted, the employee, Maimunah bte Ahmad was made to appear before the company's Board of Inquiry on 11 and 12 February 1992 on two charges:

> 1. That you received RM400 from Aladdin bin Mohd Hashim, knowing that this sum was part of the money received from the company's contractors, Oilfield Resources Sdn Bhd or its representatives in return for assistance rendered in relation to payment of that contractor's invoice in contravention of the company's gift and entertainment policy and the conflict of interest policy.

> 2. That you concealed and failed to disclose to the company's management, the existence of irregular business practices and/or violation by employee and/or yourself, of the above-mentioned company's policies.

The internal Board of Inquiry of the company, after a hearing, found that both charges against the employee had been proved. Subsequently, a letter dated 26 March 1992 was sent to the employee informing her that the management 'views the gravity of your misconduct very seriously and after due consideration, has decided to terminate your employment with the company with immediate effect.'

<u>High Court</u>

It was held in the High Court that the charges which were criminal or semi-criminal in nature did not contain the particulars of date, time and place of the acts that were alleged to have been committed. As they were material particulars, they should have been stated in the charges. The judge drew a comparison to the prosecution's duty in criminal cases:

> The applicant (the employer company) could not and must not assume that the first respondent knew all the particulars in respect of the charges. As regards the two charges proffered against the first respondent the applicant failed to state the date, time and place the offence was alleged to have been committed by the first respondent. The failure to state such material particulars would render the charges bad.
>
> …A defective charge for want of material particulars is void ab initio. On such improper charges, the finding of guilt of the first respondent by the Board of Inquiry should be set aside thereby rendering the dismissal of the first respondent unlawful.

The appellant appealed while the respondents cross-appealed against the judge's refusal to decree specific performance.

<u>Court of Appeal</u>

The decision of the High Court was upheld by the Court of Appeal where it was stated that the charges were vague and lacked material particulars. Several points were made by the Court of Appeal:

- The charges were criminal or at least semi-criminal in nature, the consequence of which would deprive the employee of her right to livelihood as indeed had happened to her by being dismissed from her employment;

- The charges were criminal or semi-criminal and therefore could not be brushed aside as being of no significance;

- The burden was on the party that alleges, to satisfy the tribunal adjudicating the matter, that the charges had been proved before the employee could be condemned. This was based on section 20 of the Industrial Relations Act 1967;

- Material particulars were required to be disclosed in the charges for otherwise how would one accused upon the charges be able to prepare proper defences to them;

- The validity of the charges was the threshold of the matter before the merits could be considered and taking into account that the charges were bad in law, the High Court judge was correct when he said that such charges were void ab initio for want of material particulars.

Comment

It appears that employers would have an onerous task in establishing the guilt of the employee based on the charges proffered against him. Care and caution must be taken in the language employed in drafting the charges against the employee.

Employers should also take note that since charges of this nature appear to be criminal or quasi-criminal, the standard of proof imposed on them may be relatively high. This is based on the comparison made by the Federal Court to the prosecution's duty in criminal cases – *ZRp.*

RAISING STANDARDS (OF PROOF)?

When a criminal allegation is made against a person in a civil case, what is the standard of proof of such allegation? This was the issue for consideration in *Telekom Malaysia Kawasan Utara v Krishnan Kutty a/l Sanguni Nair & Anor* (June 2002).

Facts

The first respondent, Krishnan Kutty was a clerk of the appellant and was dismissed on the ground that he had committed an act of dishonesty, ie theft of the employer's property. The Industrial Court upheld the dismissal. The employee however obtained an order of certiorari from the High Court quashing the award of the Industrial Court.

High Court

In deciding in favour of the employee it was stated in the High Court that the employer had to discharge its burden beyond a reasonable doubt in proving the charge of theft against the employee.

The beyond a reasonable doubt standard is a very high degree of probability imposed on the prosecution in a criminal case. The balance of probabilities standard on the other hand is relatively lower and is applied in civil cases. This brings us to the issue of what standard of proof should be imposed when a criminal allegation is made in a civil case.

The High Court had followed the Federal Court case of *Ang Hiok Seng @ Ang Yeok Seng v Yim Yut Kiu (Personal representative of the estate of Chan Weng Sun, deceased)* (1997) where Mohd Azmi FCJ had imposed the burden of proving criminal fraud beyond a reasonable doubt. In that case, in dealing with the allegation of fraud, it was stated that a distinction should be made between civil fraud on the one hand and criminal fraud on the other. The reason for this distinction is to differentiate between the standards of proof; the allegation of civil fraud to be proved on a balance of probabilities while criminal fraud should be proved beyond a reasonable doubt. Examples of criminal fraud were held to include (a) criminal breach of trust; (b) criminal misappropriation of money and (c) conspiracy to defraud.

Court of Appeal

The Court of Appeal in the present case disagreed with the decision of the High Court, stating that first, the Industrial Court should not be burdened with technical rules of evidence and procedure; and secondly, the employee was not charged with a criminal offence. In the words of Abdul Hamid Mohammad JCA:

> … it is quite clear to us that the Industrial Court should not be burdened with the technicalities regarding the standard of proof, the rules of evidence and procedure that are applied in the court of law. The Industrial Court should be allowed to conduct its proceedings as a 'court of arbitration', and be more flexible in arriving at its decision, so long as it gives special regard to substantial merits and decides a case in accordance with equity and good conscience.
>
> The employee is not charged with a criminal offence of theft under the Penal Code. The proceeding is not a criminal prosecution. The Industrial Court is not going to convict the respondent as in a criminal prosecution. He is not going to be sentenced to an imprisonment or a fine or both. The parties appearing or representing the parties in the court are non-lawyers, except with the permission of the court. The acts alleged to have been committed by the employee vary from insubordination, absent without leave or just excuse to misappropriating the employer's property. There is no reason why for some wrong, the standard of proof is lighter than in the other when the final order is the same.

The decision of the Court of Appeal is laudable as it maintains the consistency between the standards of proof in civil cases on the one hand and criminal trials on the other. In fact it is submitted that the balance of probabilities standard should be maintained in all civil cases in all courts of law, Industrial or otherwise, regardless of the fact that the allegation involved may be criminal.

Comment

Be that as it may, in the light of the seriousness of the allegation made towards the employee, the degree of the standard of proof should at least have been considered. This is because the balance of probabilities standard ranges from the 'more probable than not' (where the accuser has to merely tip the scales) to a demonstrably high degree of probability.

In the Federal Court case of *Lee You Sin v Chong Ngo Khoon* (1982), reference was made to *Bater v Bater* (1950) where it was stated by Denning LJ:

> It is true that by our law there is a higher standard of proof in criminal cases than in civil cases, but this is subject to the qualification that there is no absolute standard in either case. In criminal cases the charge must be proved beyond reasonable doubt, but there may be degrees of proof within that standard. Many great judges have said that in proportion as the crime is enormous, so ought the proof to be clear. So also in civil cases. The case may be proved by a preponderance of probability, but there may be degrees of probability within that standard. The degree depends on the subject matter. A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal court, even when it is considering a charge of a criminal nature, but still it does require a degree of probability which is commensurate with the occasion

It is submitted therefore that while the Industrial Court should not be burdened with the technicalities of the standards of proof, the seriousness of the allegation must be borne in mind. Although the employee in the present case was not charged for theft under the Penal Code and may not have been faced with an imprisonment or fine, the implications of such allegation in a civil case remain just as grave – *ZRp.*

PROPERTY/ CONVEYANCING

REWRITING SECTION 72?

What is the implication of section 72 of the Perbadanan Danaharta Nasional Berhad Act 1998 (Danaharta Act)? This was the issue for consideration in the Court of Appeal case of *Kekatong Sdn Bhd v Bank Bumiputra Malaysia Berhad* (Nov 2002).

Facts

In *Kekatong Sdn Bhd v Bank Bumiputra-Commerce Bank Bhd & Anor*, the former (Kekatong) applied for an interlocutory injunction restraining the second defendant, Perbadanan Danaharta Nasional Berhad (Danaharta), from exercising its rights under the Danaharta Act in respect of a charge of a certain land.

The background facts were that Bank Bumiputra Malaysia Bhd (BBMB) the predecessor of Bank Bumiputra-Commerce Bank Bhd granted a loan amounting to RM30 million to one Kredin Sdn Bhd on the security by a third party charge created by Kekatong. Kredin had defaulted and judgment was entered in favour of the bank against Kredin. At about the same time the bank had commenced foreclosure proceedings against Kekatong. An order for sale was granted on 7 September 1986 by the High Court. On 9 March 1998 the Court of Appeal had set aside the order for sale granted by the High Court on the ground that no proper or effective service of demand was made by the bank to the plaintiff prior to the commencement of the foreclosure proceedings in the High Court.

On 7 May 1999, Danaharta had acquired from the bank by way of statutory vesting, the loan and charge pursuant to the provisions of the Danaharta Act 1998 - thus the rights and remedies originally vested in the bank under the loan agreement and the charge against the plaintiff were vested in Danaharta.

High Court

The issue that arose in the High Court concerned the interpretation of section 72 of the Danaharta Act in which it is stated:

> Notwithstanding any law, an order of a court cannot be granted –
>
> (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
>
> (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

> (c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act,
>
> and any such order, if granted shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

It was held in the High Court that:

> The wording of section 72 of the [Danaharta] Act is very clear and contains no ambiguity as to its meaning and intention, and in the absence of any ambiguity, it was incumbent upon this court to interpret it literally. On the clear provision of section 72 of the Act, this court had no power to issue any order of injunction against Danaharta.

The court therefore had no power to entertain the plaintiff's application for an injunction against the second defendant as it was a wholly-owned subsidiary of Danaharta.

Court of Appeal

Kekatong appealed to the Court of Appeal. The Court of Appeal ruled in favour of Kekatong and found that section 72 of the Danaharta Act is unconstitutional and void and as a result, granted an injunction to stop Danaharta from selling the land pending trial in the High Court.

In a unanimous decision, Gopal Sri Ram JCA said that there was no bar to the High Court to consider the application for the injunction (Note however that at the time of publication of this Brief, the full judgment was still pending).

Tan Sri Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors revisited

The decision in *Kekatong Sdn Bhd v Bank Bumiputra-Commerce Bank Bhd & Anor* brings to mind the earlier High Court case of *Tan Sri Tajuddin Ramli v Pengurusan Danaharta Nasional Bhd & Ors* (2002). In that case, on a similar application made by the plaintiffs, it was held that section 72 of the Danaharta Act constituted a caveat against the granting of a restraining order and that parties could not contract out of or waive clear and affirmative provisions of a statute. The court was therefore precluded by section 72 from granting the injunction or restraining order sought by the plaintiff. A comparison was made to the Government Proceedings Act 1956 and the Societies Act 1966. In the words of Vincent Ng J:

> Section 72, though quite unprecedented in its scope is not wholly without parallel in our law. Section 29 of the Government Proceedings Act 1956 protects the government and its officers from injunctive orders. Section 29 of the Government Proceedings Act has been upheld in Malaysian courts. The power of the High Court to grant an interlocutory or final injunction is derived from statute. Common law does not give power to the High Court or for that matter any other court to grant injunctive relief. …It follows that what statute can give, statute can also take away or limit. Statutory provisions like section 29 of the Government Proceedings Act, section 40(1) of the Societies Act 1966 (even Order 29 rule 2C of the Rules of the High Court 1980 is a close parallel) and section 72 of the Danaharta Act are examples of Parliament's intention in certain specified and limited circumstances to take away such injunctive power.

Powers and functions of Danaharta

Danaharta is a public company incorporated under the Companies Act 1965. Danaharta was established by the Government of Malaysia to act as the national asset management company.

Specifically, Danaharta has two main objectives. First, to remove the distraction of non-performing loans from financial institutions thus allowing them to focus their attention on their core business activity which is to lend to viable borrowers. Secondly, Danaharta is to maximise the recovery value and acquired assets.

The Danaharta Act provides the legislative framework for Danaharta to undertake its unique mission. It sets out Danaharta's main objective which is to act as the asset management company and to acquire, manage, finance and dispose of assets and liabilities.

Amendments to the Act were introduced by the Danaharta (Amendment) Act 2000 which aimed to clarify existing provisions of the Act in order to remove any doubt about the intended effect and to overcome proclaimed difficulties which have arisen since Danaharta began operations.

Comment

It appears that Danaharta may now be open to any legal suit taken against them. The decision of the Court of Appeal is accepted with mixed response as some fear that this may lead to a floodgate of legal pursuits, bearing in mind that Danaharta has faced several challenges over the years.

Although Danaharta has applied for leave to appeal to the Federal Court, it must brace itself for what could be a deluge in court processes.

It must be borne in mind that the Danaharta Act was enacted to give Danaharta special powers to resolve the non-performing loan (NPL) problems in the banking sector. It is an expeditious, efficient and economical manner for the benefit of taxpayers. What may be of concern is also the fact that Danaharta and BBMB had been trying for nearly 20 years to sell the land to recover the NPL.

Bearing in mind the functions, powers and purpose of the establishment of Danaharta, surely the drafters of the Danaharta Act must have written section 72 to prevent debtors from delaying the foreclosure process.

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The law is of as much interest to the layman as it is to the lawyer – Lord Balfour

BRIEF-CASE...

ARBITRATION

SANWELL CORPORATION v TRANS RESOURCES CORPORATION SDN BHD & ANOR - May 2002, Federal Court

The dispute between the appellant (Sanwell) and the first respondent (Trans Resources) concerned an arbitration clause. The appellant filed an application for stay of proceedings in the High Court pursuant to section 6 of the Arbitration Act 1952 (Arbitration Act).

It is stated in section 6 of the Arbitration Act:

> If any party to an arbitration agreement or any person claiming through or under him commences any legal proceedings against any other party to the arbitration or any person claiming through or under him in respect of any matter agreed to be referred to arbitration, any party to the legal proceedings may, before taking any other steps in the proceedings, apply to the court to stay the proceedings, and the court, if satisfied that there is no sufficient reason why the matter should be referred in accordance with the arbitration agreement, and that the applicant was at the time when the proceedings were commenced and still remains ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings.

The issue for consideration before the Federal Court was in relation to the meaning of the phrase 'any other steps in the proceedings' in section 6, in particular whether the entry of appearance by virtue of Order 12 of the Rules of the High Court 1980 amounted to 'any other steps in the proceedings' in section 6 of the Arbitration Act. This is important to the party who applies to the court to stay the proceedings which have commenced, as a stay will not be granted if it is found that such party has taken 'other steps in the proceedings.'

<u>High Court</u>

In the High Court, it was stated that 'entering an appearance is not or cannot be regarded as a step in the proceedings'. Reference was made to the case of *Ives & Barker v Williams* (1984) where it was stated by Lindley LJ:

> The authorities show that a step in the proceedings means something in the nature of an application to the court, and not mere talk between solicitor or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out summons or something of that kind, which is, in the technical sense, a step in the proceedings.

It was held that the entry of an unconditional appearance does not constitute a step in the proceedings within the meaning of section 6 of the Arbitration Act.

<u>Court of Appeal</u>

The respondent, Trans Resources appealed. In the Court of Appeal, reference was made to an earlier decision of the Court of Appeal in *Interscope Versicherung Sdn Bhd v*

Sime AXA Assurance Bhd and another appeal (1999). This was the judgment of Gopal Sri Ram JCA affirming an earlier High Court decision of *Usahabina v Anuar bin Yahya* (1998), where it was held that the entry of an unconditional appearance does indeed constitute the taking of a step in the proceedings within section 6 of the Arbitration Act.

What appeared to have been overlooked by the Court of Appeal is the fact that the decision in *Interscope Versicherung Sdn Bhd v Sime AXA Assurance Bhd and another appeal* had been overruled by the Federal Court on 18 September 1999 (no written judgment was delivered) in *Sime AXA Assurance Bhd v Interscope Versicherung Sdn Bhd*. In that case it was ruled by the Federal Court that the entry of an unconditional appearance did not constitute a step in the proceedings.

Federal Court

The Federal Court in the present case reaffirmed the 1999 decision of the Federal Court in *Sime AXA Assurance v Interscope Versicherung Sdn Bhd*, thus departing from the decisions of the Court of Appeal in *Interscope Versicherung Sdn Bhd v Sime AXA Assurance Bhd* and High Court in *Usahabina v Anuar bin Yahya*.

Thus an entry of an unconditional appearance does not constitute a step in the proceedings.

ZRp ZRp ZRp ZRp ZRp

BRIEF-UP...

SECURITIES COMMISSION (AMENDMENT) ACT 2002

Act No
A1149

Date of coming into operation
12 June 2002

Amendments
Sections 17, 32, 35, 41, 165

Incorporations
Part IVA (sections 124A and 124B)

Notes
The purpose of this amendment act is to amend the Securities Commission Act 1993. The amendments made are primarily to facilitate the consolidation exercise involving capital market intermediaries by facilitating the transfer of business among the entities involved.

The emphasis of the amendments is on the introduction of Part IVA - AGREEMENT OR ARRANGEMENT FOR TRANSFER OF BUSINESS (sections 124A and 124B) where provisions are made for vesting orders to be obtained. The application for the vesting order (which is to be made to the High Court) is for the purpose of facilitating the transfer of the whole or part of the business of licensed persons, exempt fund managers and exempt futures fund managers. This is consistent with the government's objective of further developing and strengthening the capital market.

With the incorporation of sections 124A and 124B, the whole or part of a business entity may be transferred to another entity forthwith without the necessary transfer documents. This is an advantage as it minimizes the expense of the parties concerned in terms of stamp duty which would otherwise be imposed.

SECURITIES COMMISSION - GUIDELINES ON UNIT TRUST FUNDS, PRACTICE NOTE 17

SC Press Release – Minimum trustee fee abolished

It was announced that with effect from 1 July 2002, trustees and management companies of unit trusts funds would be able to negotiate on trustee fees without any minimum restriction.

This new policy is said to be in line with the efforts of the SC to further liberalize and enhance competitiveness of the fee structure for unit trust funds and this policy is introduced via Practice Note 17 of the Guidelines On Unit Trust Funds.

With the removal of the minimum restriction on trustee fees, the negotiation of the said fees between trustees and management companies shall be based on the responsibilities of the trustee to a unit fund and the level of services the trustee provides.

KLSE – AMENDMENTS TO LISTING REQUIREMENTS – PRACTICE NOTES 13 AND 14/2002

In line with the amendments made to the Listing Requirements, KLSE has issued clarifications on the same with the issuance of Practice Notes 13/2002 and 14/2002.

Practice Note 13/2002

The amendments are issued in relation to paragraphs 1.01, 2.08, 9.27, 15.07 and 15.10 of the Listing Requirements.

The key areas covered by the amendments are as follows:

- Definition of 'Independent Director'.

  The amendments provide clarification in relation to the specific exclusions to the definition of 'Independent Director'.

- Qualifications for the signatory to statutory declaration of audited accounts and for members of the Audit Committee.

  The amendments provide for additional qualifications which the signatory to the statutory declarations of audited accounts must possess.

- Restriction in number of directorships that may be held by a director of a listed company.

  Although the number of directorships that may be held by a director of a listed company has not been altered, a new method of computation for directorships in non-listed companies has been introduced.

Practice Note 14/2002

PN 14/2002 relates to requirements on transactions and Related Party Transactions. The amendments are issues pursuant to Chapter 10 of the Listing Requirements and paragraphs 2.06 and 2.08 of the Listing Requirements.

The main areas covered are as follows:

- The application of the percentage ratio which uses the market value as a basis for comparison;
- The principles in relation to the aggregation of transactions entered into by listed issuers or their subsidiaries;
- Additional transactions that are not normally regarded as related party transactions;
- The application of shareholders' general mandate to provision of financial assistance by listed companies or their subsidiaries

The amendments are with effect from 1 January 2003. However listed companies are given up to 31 March 2003 to comply with certain listing requirements relating to independent directors, qualifications of one of the audited committee members and signatory to statutory declarations among annual audited accounts.

NEWS-BRIEF...

LOCAL

Proposed amendments to the Bankruptcy Act 1967

A study of the Bankruptcy Act 1967 has been conducted by the Official Assignee's Department and the Legal Division in the Prime Minister's Department. A decision has now been made to amend the Bankruptcy Act 1967.

The main feature is the increase of the level of debt from RM10,000 to RM50,000 before bankruptcy proceedings could be initiated.

The rising number of bankruptcies in the first six months of 2002 is one of the reasons why the Bankruptcy Act is being amended.

Other proposals include:

- Empowering the Director to conduct investigations under the Criminal Procedure Code;
- Renaming the Official Assignee's Department to the Insolvency Department, to be headed by the Director Of Insolvency instead of the Official Assignee.
- Distinguishing between the borrower and guarantor and that the borrower be pursued first before turning to the guarantor.

FOREIGN

Corporate Governance in the United States

In the wake of failures of giant corporations like Enron and Worldcom and in the effort to combat corporate corruption, the President of the United States, George W Bush, on 30 July 2002, signed into law the Sarbanes-Oxley Act. The Act was named after Senator Paul Sarbanes and Congressman Mike Oxley.

Among other things, this law authorizes new funding for investigators and technology at the Securities & Exchange Commission (SEC) to uncover wrongdoing. The SEC will now have the administrative authority to bar dishonest directors and officers from ever again serving in positions of corporate responsibility. The penalties for obstructing justice and shredding documents are greatly increased. Chief Executive Officers who profit by betraying the public trust will be forced to return those gains to investors and the maximum prison term for common types of fraud has quadrupled from five to twenty years.

For the first time, the accounting profession will be regulated by an independent board. This board will set clear standards to uphold the integrity of public audits, and have the authority to investigate abuses and discipline offenders, and auditing firms will no longer be permitted to provide consulting services that create conflicts of interest.

ZRp IN-BRIEF…

We are pleased to announce the publication of our inaugural issue of the ZRp *Brief*. The ZRp *Brief* is published for the purposes of updating its readers on the latest development in case law as well as legislation. We have also incorporated some aspects of legal development in the international scene.

We welcome feedback and comments and if you require further information, please contact the Editor at:

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IN MEMORIAM

This Brief is dedicated to the memory of
P. Anandarajah
(28 October 1945 – 12 January 2003)

When his life was a dream – he allowed it to be fulfilled;
When it became a challenge – he said it was a thrill;
When his life was a song – he sang it from his soul
and when life was a stage – he willingly played his role;
When his life was a sacrifice, he offered it graciously
And when it became a battle, he fought it so bravely;

We will always remember you Andy,
For a man whose life was love -
and for one who loved life abundantly.

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