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DREW & NAPIER LLC

# LEGAL UPDATE

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## CASE UPDATE

### *Skandinaviska Enskilda Banken AB (Publ), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and Other Appeals [2007] SGCA 9*

#### Background Facts

Between 1999 and September 2003, Chia Teck Leng (“**Chia**”), the former finance manager of Asia Pacific Breweries (Singapore) Pte Ltd (“**APBS**”) opened unauthorised bank accounts and obtained unauthorised facilities in APBS’ name with four foreign banks (the “**Banks**”), for his own use. He cheated the Banks by creating fictitious/ forged documents.

Chia is currently serving a long term of imprisonment for cheating the Banks of large sums of money totalling approximately US\$83 million and SG\$18 million.

The fraud came to light on 2 September 2003 when the Commercial Affairs Department informed directors of APBS’ parent company, Asia Pacific Breweries Limited (“**APBL**”), of the fraud. Chia was charged on 4 September 2003.

At the same time, the board of APBL appointed a Special Committee of directors (the “**Special Committee**”) to oversee investigations and take action to protect the interests of APBS and APBL. The Special Committee appointed Drew & Napier LLC (“**Drew & Napier**”) and PricewaterhouseCoopers (“**PwC**”) to investigate the matter.

The Banks subsequently commenced proceedings against APBS in relation to Chia’s unauthorised acts.

In the proceedings, the Banks sought the production of the draft reports prepared by PwC working with Drew & Napier (the “**Draft Reports**”). APBS resisted disclosure on the ground that they were privileged.

The Assistant Registrar who heard the Banks’ application at first instance ordered production of the Draft Reports.

Her decision was reversed by the judge. The judge agreed with APBS that the Draft Reports were protected by legal advice privilege and litigation privilege.

The Banks appealed against the judge’s decision.

In a decision handed down last Friday, the Singapore Court of Appeal dismissed the Banks’ appeals.

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## Decision of the Court of Appeal

The Court of Appeal held that the Draft Reports are protected by litigation and legal advice privilege.

### *Litigation privilege*

A document is protected by litigation privilege if it was prepared:

- (a) when there was a “*reasonable prospect*” of litigation; and
- (b) for the “*dominant purpose*” of obtaining legal advice in anticipated or contemplated litigation. The relevant purpose is determined at the time that the document in question was created.

The Banks had argued that the dominant purpose of the Draft Reports was primarily a fact-finding exercise conducted in accordance with APBS’ own internal procedures to ascertain the facts and improve internal controls.

The court disagreed with the Banks. The court held that the factual findings constituted an integral part of the factual backdrop against which Drew & Napier’s legal findings were made. Recommendations (if any) on improving internal controls in APBS were a subsidiary purpose.

Noting that “*from 4 September 2003 onwards, letters, demands and disavowals flew fast and furious between the parties and/their (sic) respective solicitors*”, the court held that:

*“... what would have been more important to [APBS] would have been to get the best legal advice to mount the best defence in court”.*

### *Legal advice privilege*

The Court of Appeal also agreed with the judge that the Draft Reports were protected by legal advice privilege.

The court held that legal advice privilege applied to any legal advice embedded in or which forms an integral part of the Draft Reports. The court accepted the judge’s finding that Drew & Napier’s privileged legal advice communicated to PwC had been “*inseparably embedded*” in the Draft Reports.

### *Exercise of the court’s discretion to inspect the Draft Reports*

The Banks argued that the judge should have exercised her discretion to inspect the Draft Reports to determine whether or not they contained legal advice, and if so, whether such advice could be separated from the Draft Reports.

The Court of Appeal rejected this argument. It was clear that the judge had decided against inspection because she was satisfied that the Draft Reports were prepared for the dominant purpose of litigation. However, the Court of Appeal noted that inspection may be appropriate in cases where the court has a “*real doubt*” as to the claims of a party resisting discovery on the grounds of legal professional privilege.

## Comment

This is a landmark decision which clarifies the legal position in Singapore on legal advice privilege and litigation privilege.

This case also highlights the importance of obtaining the best legal advice when a fraud of this nature surfaces and litigation is bound to follow.

A team from Drew & Napier, led by Davinder Singh SC, successfully acted for APBS in the appeal. The Banks were represented by three other major law firms, led by three Senior Counsel.

If you would like more information about this case or wish to discuss how it may potentially affect you or your business, please feel free to contact the dispute resolution lawyers in Drew & Napier LLC (please refer to the Directors' Profiles on our website), or any of the following lawyers:

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