

LEGAL UPDATE

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How quickly we come to the close of one year and face another new year of possibilities, challenges and changes.

Competition law will gain importance in the coming year as we ink more free trade agreements with the nations around us. While businesses and consumers may expect to benefit from these free trade arrangements, local businesses will face greater competition from foreign businesses. In this issue, our lawyers have prepared a short feature on competition law to help you understand what is competition law and its possible implications for your businesses. We trust you will find it informative.

The Slim 10 case was a significant milestone for product liability law in Singapore and it provides useful guidance on consumer protection in Singapore. Many of you may have read the juicy details of the Slim 10 trial arising from the close media coverage it received. Here instead, our lawyers have summarised in a nutshell the law on product liability following from the judgment handed down in that case.

Also included in this issue is an article on judicial management and another on a recent High Court decision discussing the use of trade marks and its variants.

We thank you for all your support this year. The rankings and accolades we received in the latest *Asia Pacific Legal 500*, *Global Counsel Handbook: Intellectual Property 2002* and *World IP Survey in Managing Intellectual Property* reflect your support and confidence in us. We look forward to being your legal partner for your new ventures in the coming new year.

All of us at Drew wish you a happy holiday season and a prosperous new year.

Directors
Drew & Napier LLC

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ANNOUNCEMENTS

- *The Asia Pacific Legal 500 2003/2004 Edition* is a guide to the leading commercial law firms in Asia and Australia. Editors for the Singapore section produce independent commentary after researching the local legal market, clients and the international legal community. We are pleased to have maintained our top tier ranking for Dispute Resolution, International Arbitration and Intellectual Property. Some comments received were:

Banking, Finance and Capital Markets

“Drew & Napier LLC advised the Development Bank of Singapore on the S\$782m (US\$444m) restructuring of Singapore Press Holdings subsidiaries. The firm also acted for The Royal Bank of Scotland plc on the refinancing and restructuring of £45.5m credit facilities to Angliss International Ltd. In the equity markets, the firm advised BreadTalk Pte Ltd on its IPO. David Ang, Leena Pinsler and Sin Boon Ann are recommended.”

Corporate/M&A

“Drew & Napier LLC’s practice head David Ang led a team that acted for Temasek Holdings Ltd on its sale of CPG Corporation, the corporatised arm of the Singapore government’s public works department. Other highlights included acting on the S\$350m (US\$199m) voluntary takeover of Vertex Venture Holdings Ltd by Ellensburg Holding Pte Ltd, the subsidiary of Singapore Technologies Pte Ltd. Gary Pryke, who combines ‘excellent powers of legal interpretation with a strong commercial sense on transactions’; Christina Ng, who has particular expertise in the technology sector; and Sin Boon Ann are also well-known practitioners.”

Dispute Resolution

“Drew & Napier LLC successfully acted for Asia Pulp & Paper on a proceeding brought by Deutsche Bank and BNP Paribas to place the group under judicial management. The firm also advised on important termination of employment cases and cases involving Singaporean politicians. Davinder Singh SC enjoys a formidable reputation amongst peers and clients alike; Jimmy Yim SC and Harpreet Singh are also well known. Raj Singam has a focus on medical negligence cases.”

Information Technology

“Drew & Napier LLC advised IDA (Info-communications Development Authority of Singapore) on the deployment of ultra wideband technology in Singapore, as well as on a collaboration with Intel. Andrew Ong, Cavinder Bull and Lim Chong Kin are well known.”

Intellectual Property

“Drew & Napier LLC advised on a ground-breaking patent case involving the HIV-2 patent and also acted in a patent dispute involving pioneering audio and visual technology patents. Practice head Morris John, Dedar Singh Gill and Joseph Grimberg SC are recommended.”

International Arbitration

“Drew & Napier LLC advised on a dispute over the construction of a cement silo. The practice also acted as counsel for a Japanese auto corporation in a dispute with an Iranian over premature termination of a distribution agreement. Davinder Singh SC, Jimmy Yim SC and senior consultant Joseph Grimberg are recommended. Indranee Rajah SC was appointed Senior Counsel in January 2003. She has particular expertise in property matters; clients say she is ‘responsive, professional’ and ‘understands a client’s business needs well’.”

Property

“Drew & Napier LLC advises major local and foreign banks and statutory boards on real estate transactions. Chua Bee Lan, David Chin and Indranee Rajah SC are recommended.”

Shipping

“Drew & Napier LLC advised on a serious collision between the ANL *Indonesia* and navy vessel *RSS Courageous* in the South China Sea. The firm also acted in *Peer Voss v APL*, a watershed case on the law governing an owner’s delivery obligations under non-negotiable bills of lading. Ian Koh is highly recommended.”

- The recently published *Global Counsel Handbook: Intellectual Property 2002* by Practical Law Company has listed Drew & Napier LLC as one of the leading Intellectual Property law firms in Singapore. It has also named our IP Managing Director, Morris John, and Director, Dedar Singh Gill, as highly recommended lawyers in Intellectual Property practice in Singapore. *The Global Counsel Handbook* is a distinguished multi-jurisdictional guide covering specialist areas of law.
- In the latest World IP Survey (covering trade mark practice) conducted by *Managing Intellectual Property*, Drew & Napier LLC has once again been named the leading trade mark firm in Singapore for the seventh year. Nominations for up to three firms in each of 50 categories were requested from nearly 4,000 IP specialists in companies and in private practice across over 100 countries.

FAREWELL

- We bid farewell to our Consultant and Head of Building & Construction practice, Mr Christopher Chuah, who left us last month after 11 years at Drew & Napier LLC.

Christopher joined us in 1992. He became a Partner in 1993, and then a Director upon our corporatisation on 1 May 2001. Thereafter, he became a Consultant, a position he occupied until last month.

During his career at Drew, Christopher specialised in building and construction law, handling numerous construction related disputes, in both litigation and arbitration.

Competition Law: What It Means For Singapore

“ Why is competition law coming to our shores? What is the significance of competition law to Singapore’s economy? This article seeks to answer some of these questions by providing an overview of competition law and the benefits that competition law will bring to our economy. ”



INTRODUCTION

Singapore recently concluded a Free Trade Agreement with the US (USSFTA). The USSFTA represents a landmark bilateral trade agreement for Singapore in many respects, one of which is Singapore’s commitment to establish a general competition law regime by 1 January 2005.

Why is competition law coming to our shores? What is the significance of competition law to Singapore’s economy? This article seeks to answer some of these questions by providing an overview of competition law and the benefits that competition law will bring to our economy.

WHAT IS COMPETITION LAW?

The fundamental basis of competition law is the economic principle that competition is desirable in a free market. Competition leads to cost efficiency, lower prices and innovation. Specifically, it seeks to prevent businesses from engaging in practices that are harmful to competition and consumer welfare. In short, competition law is about economic regulation.

A system of competition law usually possesses a number of features:

Distinction between concerted and unilateral activities, and horizontal and vertical agreements

Concerted activities undertaken amongst enterprises are generally subject to a greater degree of scrutiny as compared to the unilateral conduct of a single enterprise. This is reflective of the reality that an agreement between two or more economic entities is far more likely to have an impact on competition as compared to the unilateral conduct of a single enterprise acting by itself (unless that enterprise is dominant).

Competition law also distinguishes between agreements that are horizontal (i.e. between competitors) and vertical (i.e. between parties at the different levels of the supply chain). Horizontal agreements are generally viewed with the highest degree of suspicion for the reason that agreements between two or more competitors are far more likely to restrict than promote competition. In certain jurisdictions like the US, some types of horizontal agreements are outright prohibited by competition law while others are weighed against their impact on competition. One example that springs to mind is price-fixing amongst competitors through the formation of cartels. These forms of collusion are often difficult to prove especially when enterprises employ price-signalling devices such as the sharing of pricing in order to facilitate coordinated behaviour. In Singapore, allegations of price-fixing have long been made against the petroleum companies but in the absence of competition law, such behaviour is not illegal.

Control over dominant enterprises

In the US, companies with significant market power are often the subject of scrutiny by competition law. A prominent example will be the antitrust prosecution against Microsoft alleging amongst others, its bundling of Internet Explorer into Windows and attempting to contain and subvert Java technologies that threaten Microsoft’s operating system monopoly. The concern from a

competition law perspective is the abuse by that company of its significant market power to 'kill off' its competitors.

An example of another form of abuse that may arise is where an entity which owns and controls a particular facility that is essential to the delivery of services, unreasonably refuses its competitors access to that facility. Even if the dominant player permits access, in the absence of regulatory intervention, that dominant player will likely charge uncompetitive rates for the use of its facility such that its competitors are unable to compete effectively. Such behaviour is more likely to arise in the utilities, telecommunications and transport markets. Some of us may recall that not long ago, a formal complaint made by a number of international telecommunication operators to the Info-communications Development Authority of Singapore (IDA), alleging that Singapore Telecommunications Limited (SingTel) were charging uncompetitive rates for local leased circuit (LLC) services. While there are other operators in Singapore which also provide LLC services, SingTel possesses a much more extensive network in terms of geographic coverage. The complaint prompted the regulator to seek industry views on whether SingTel's LLC services should be designated a mandatory wholesale service to be provided at a rate determined by the IDA. This is one example of the kind of intervention that a competition regulator may have to undertake to implement the competition rules for purposes of checking the potential abuse by dominant companies.

Regulation of mergers between enterprises

Therefore, in a jurisdiction where there is competition law, enterprises that want to merge will have to convince the competition authority that their proposed merger will have pro-competitive effect and will not adversely restrict competition. This involves defining the markets in which the enterprises operate in, ascertaining the relevant market shares and making assessment on the impact on competition in those markets post-merger.

IS SINGAPORE READY FOR COMPETITION LAW?

In our view, the USSFTA could not have signalled a better time for the introduction of a general competition law regime in Singapore for the following reasons.

Development of external economy

Singapore companies wishing to venture overseas must first strengthen their home base in anticipation of the competition abroad. To do this, the clinching argument is that Singapore must first create a competitive environment within our local economy for our home-grown companies to sharpen their skills.

A good example is SingTel. In recent years, SingTel has expanded overseas into markets such as India, Philippines and Australia. In Australia, SingTel-owned Optus is pitted against the incumbent Telstra. Instead of wilting to the weight of a bigger and stronger opponent, Optus has risen up to the challenge by increasing its market share and posting healthy financial figures. Its success overseas can partly be attributed to SingTel's experience and resilience in the face of increasing competition in the local telecommunications market.

Encourage growth of local entrepreneurship

The introduction of competition law is also timely given the Singapore Government's long-term strategy to encourage the growth of local entrepreneurship and to move away from the traditional dependence on Government Linked-Corporations (GLCs) to drive the economy. This is evident from the Singapore Government's continuing initiative to divest of its controlling stakes in GLCs that are not considered to be of national or strategic importance. Such divestment exercises have the effect of severing the Singapore Government's control over these companies, many of whom are giants in their own backyards, having been granted exclusive licences or nurtured on lucrative state contracts. Competition law therefore plays a key role by guarding local entrepreneurs, especially the Small and Medium Enterprises (SMEs), from any anti-competitive abuse by these divested entities and preventing them from stepping beyond the bounds of accepted business practices into anti-competitive conduct. With competition regulation, SMEs can look forward to competing on an equal footing with these giants, as competition law attempts to inject some form of fair play in the conduct of businesses amongst competitors. In the absence of rules in place to guard against any abusive practices, SMEs can possibly be out-muscled by the 'big boys'. Such a situation is clearly unsatisfactory. Through the creation of a level playing field, SMEs will be given an opportunity to nurture, grow and take on the giants in their respective industries.

Promotion of international free-trade

Perhaps the most widely acknowledged benefit of instituting a system of competition law is the enhancement of Singapore's reputation of having a pro-business environment. The fact that Singapore has entered into the USSFTA assumes greater significance given the ongoing momentum to conclude free trade agreements with other major trading partners. To succeed in tearing down international trade barriers, Singapore must lead the way in instituting a free and open domestic economy. In this respect, competition law plays a key role to ensure a free, thriving and competitive economy.

LESSONS LEARNED FROM EXISTING SECTORAL COMPETITION REGULATION IN SINGAPORE

In Singapore, while we do not have a general competition law regime, sectoral competition regulation already exists in the liberalised telecommunications, energy and to a limited extent, the media industry. We will briefly examine the effects of competition regulation in the telecommunications industry in Singapore and the ensuing benefits.

With full liberalisation of the telecommunications market in April 2000, sectoral competition regulation in the form of the Telecom Competition Code came into force on 29 September 2000. The Telecom Competition Code covered issues such as prescribing rules of fair market conduct between competing operators, subjecting the incumbent to heightened competition regulation, specifying the duties of telecommunications service providers towards their customers, setting out rules for interconnection and infrastructure sharing, prohibiting unfair methods of competition and anti-competitive agreements, and regulating merger reviews. Within a short span of about three years from 1 April 2000, competition in the telecommunications industry has been firmly entrenched by IDA's administration of the Telecom Competition Code.

It is plain to see that competition has brought tremendous benefits to the telecommunications industry as well as to end-users who now enjoy greater choice in services, amongst the many competing service providers and the service plans offered. Many of us would have remembered how much more international calls used to cost and from

this, it becomes immediately apparent to the average consumer that competition has brought tremendous benefits both in terms of the wide range of services available and the affordable prices.

CONCLUSION

Singapore's obligation under the USSFTA involves enacting a general competition legislation by January 2005. However, the form that our competition legislation will take will depend on the competition policies that Singapore will adopt. It is perhaps too early to speculate at this juncture. Working backwards from the deadline of 1 January 2005, it is widely expected that the Ministry of Trade and Industry (MTI) will issue its draft consultation document on competition law towards the end of this year or early next year.

Certainly, exciting times lie ahead for the business community. The introduction of general competition law is timely and represents a maturity of our economy as well as our legal system. Competition law is never intended to stifle commercial activity nor the way we carry out our businesses. On the contrary, competition brings benefits to businesses and consumers alike. It merely seeks to act as a regulatory instrument to check on enterprises that engage in anti-competitive behaviour or misuse their dominant positions to the detriment of other competitors. Ideally, the market should be left to its own devices but we recognise that this is an imperfect world. Competition law is necessary to ensure that there is a sense of fair play when firms compete, very much like the role of a referee in a soccer game.

Lim Chong Kin is an Associate Director with Drew & Napier LLC's Info-Communications & Technology Business Group. His principal areas of practice include competition, market access, info-communications, broadcasting and technology-related work. He regularly advises the industry on regulatory, licensing, competition and market access issues. His extensive competition, market access, info-communications, broadcasting and technology-related experience includes working on a proposed code of practice for fair market conduct to regulate the broadcasting industry in Singapore as well as on a code of practice for competition to regulate the telecommunications industry in Singapore. Chong Kin also has broad experience in corporate and commercial transactions including mergers and acquisitions.

Chong Kin can be reached at +65 6531 4110 or by email at chongkin.lim@drewnapier.com



Chester Toh is an Associate with the Info-Communications & Technology Business Group. He graduated with First Class Honours from the National University of Singapore in 2002. In the same year, he represented Singapore in the International Negotiation Competition that was held in Kingston, London. Chester's principal areas of practice are in telecommunications and media, including transactional, regulatory and licensing work. He also regularly advises the industry on regulatory, licensing, competition and market access issues.

Chester can be reached at +65 6531 2363 or by email at chester.toh@drewnapier.com



Judicial Management – A Lifeline To Insolvent Companies?



“ Judicial management was introduced in 1987 following the 1985 economic recession in Singapore. It was a response to provide financially troubled but viable companies with an opportunity to rehabilitate themselves. It affords a second lease of life for insolvent companies with good long-term prospects, and creates a better conducive business environment for companies in Singapore. ”

INTRODUCTION

These are trying times for Singapore. With the economy still reeling from the effects of the post-SARS period and the Iraq war, a primary concern weighing heavily on many companies' minds is whether this is the end of the road for companies currently in debt? Is there really no way out of the prolonged slump that these companies are facing?

Fortunately, the answer is no. In a High Court decision in the Supreme Court of Singapore (*Originating Petition No 2 of 2002/D, In the Matter of Part VIIIA of the Companies Act (Cap 50) and In the Matter of Asia Pulp and Paper Company Ltd between Deutsche Bank AG and Another and Asia Pulp and Paper Company Ltd*, judgment dated 31 October 2002),

the High Court implicitly reaffirmed the principle that an insolvent company can rely on judicial management to give the company a new lease of life.

In that case however, the High Court refused to grant a judicial management order on the basis that the provisions of judicial management contained in the Companies Act (Cap 50) were not satisfied.

The company, Asia Pulp and Paper Company Ltd, a Singapore-incorporated holding company for about 150 foreign subsidiaries, had accumulated massive debts arising from the Asian financial crisis and a fall in the pulp and paper prices worldwide. The High Court was of the opinion that the consensual restructuring

“ Ultimately, whether an insolvent company is able to weather the storm depends very much on the relationship between the company and its creditors. It is a question of balancing the interests of all parties. ”

of the company with its creditors was more likely to provide relief and thereby refused to grant an order for judicial management.

WHAT IS JUDICIAL MANAGEMENT?

What is judicial management? What benefit does a company derive from being in judicial management?

Judicial management was introduced in 1987 following the 1985 economic recession in Singapore. It was a response to provide financially troubled but viable companies with an opportunity to rehabilitate themselves. It affords a second lease of life for insolvent companies with good long-term prospects, and creates a better conducive business environment for companies in Singapore. The Finance Minister had informed the Singapore Parliament during the introduction of the judicial management provisions in the Companies Act (Cap 50):

“... the other major reform is found in clause 46 which introduces a judicial management procedure to provide for financially troubled but viable companies to rehabilitate themselves. The procedure has been adapted from the relevant insolvency laws in the United States and the United Kingdom, and strives to strike a balance between the interests of the shareholders and the creditors”

Echoing the sentiments of the Finance Minister, members of the Singapore Parliament welcomed the provisions of judicial management as a “major innovation” in Singapore’s insolvency laws, enabling “financially troubled companies to have a certain degree of protection from its creditors”.

Lest there be any concerns that creditors’ interests would be compromised by the judicial management provisions, the following statement by the Finance Minister should ease any such concerns:

“... The new provisions... must not be used as delaying tactics to avoid an inevitable liquidation of a company that is hopelessly insolvent... Government’s objective is not to tamper with the normal entry and exit of firms in the private enterprise system but to provide a chance to resuscitate some financially troubled companies that are capable of returning to profitability.”

INVOKING THE JUDICIAL MANAGEMENT PROVISIONS

How does a company therefore go about invoking the provisions for judicial management? An insolvent company or its creditors must apply to the Court for a judicial management order.

The relevant provisions governing judicial management are found in Part VIIIA of the Companies Act (Cap 50). This Part sets out the procedure and pre-requisites for a judicial management order.

Generally, a Court will grant an order if it is shown that:

- (i) the company is or will be unable to pay its debts; and,
- (ii) there is a reasonable probability of rehabilitating the company or of preserving all or part of its business as a going concern, or that otherwise the interests of creditors would be better served than by resorting to a winding up.

In granting the order, the Court must consider the following matters: firstly, that the company is or will be unable to pay its debts (Section 227B(1)(a)); and secondly, whether the Court considers that the order would be likely to achieve at least one of three purposes (Section 227B(1)(b)), being:

- (i) the survival of the company, as a whole or part of its undertaking as a going concern;
- (ii) a compromise or scheme of arrangement under Section 210 of the Companies Act (Cap 50); or
- (iii) a more advantageous realisation of the company’s assets would be effected than on a winding-up.

Moratorium

Clearly, in order to meet the above conditions, an essential factor is the ability of the insolvent company to continue its business. An immediate consequence of a judicial management order is a moratorium on all legal proceedings instituted against the company (Section 227C). The moratorium will give the company the breathing space it needs to improve its cashflow position. Often, the company’s tight squeeze on its cashflow is due to the stranglehold of creditors scrambling to recover their debts.

JUDICIAL APPROACH TO CASES INVOLVING JUDICIAL MANAGEMENT ORDERS

In one of the earliest reported cases on judicial management, the High Court held that an insolvent company's inability to pay its debts *per se* was not sufficient to justify a judicial management order. The Court must further be satisfied that one of the three purposes of Section 227B(1)(b) would be satisfied (see *Re Cosmotron Electronics (Singapore) Pte Ltd* [1989] 2 MLJ 11). In the same case, the Court also highlighted that while Section 227(1)(b) may not be satisfied, the Court retains an inherent power to grant the order in the public's interest if so required. This discretionary power is embodied in Section 227B(10)(a), although it would appear that this provision is rarely used.

In *Re Genesis Technologies International (S) Pte Ltd* [1994] 3 SLR 390, the High Court shed further light on the approach of the Court in granting a judicial management order. The Court held that notwithstanding the primary purpose of judicial management "*is the protection of the company from its creditors, the court should be vigilant to ensure that it is not directly or indirectly used by the directors and shareholders to the detriment of creditors and unsecured creditors in particular. The motives of the application should therefore be clearly honourable. Further, a company whose debts far exceed its assets in effect belongs to its creditors. The court must show great heed to the wishes and views of such creditors.*"

This pronouncement indicates that our Courts will not tolerate any abuse of the judicial management process. The Court will give due regard to the views of all parties involved in the insolvent company, including directors,

shareholders and its creditors, in determining whether such an order is appropriate. Ultimately, whether an insolvent company is able to weather the storm depends very much on the relationship between the company and its creditors. It is a question of balancing the interests of all parties.

Of course, once the Court considers that a judicial management order ought to be granted, and a judicial manager is appointed by the Court, this paves the way for the appointed judicial manager to revive the company. To do so, Sections 227G to 227M provide a host of powers available to the judicial manager to take necessary steps to rehabilitate the company. These powers are wide-ranging, and involve the judicial manager taking control of all the property of the company.

CONCLUSION

The effectiveness of a judicial management order depends very much on numerous factors, including the potential financial health of the insolvent company. There is no guarantee that a judicial management order automatically results in a rehabilitation of an insolvent company. Nonetheless, it is a first small step to take to increase its chances of survival in the long term.

Companies weighed down by their financial difficulties may wish to obtain advice on whether it is appropriate to seek the protection of a judicial management order. Such an order may provide them with a little breathing space to turn their businesses around.

Tan Boon Khai is an Associate Director with the Civil & Commercial Dispute Resolution Practice Group. His practice encompasses all types of corporate and commercial litigation, and arbitration. He has represented clients, both local and overseas, in a wide range of disputes. He was recently involved in the debt restructuring exercise of Asia Pulp and Paper, one of the largest debt restructurings ever to take place. Prior to joining Drew & Napier LLC in 2002, he was a Justices' Law Clerk with the Supreme Court of Singapore from 1997. In 2001, he became an Assistant Registrar in the High Court of Singapore. Boon Khai was also an Honorary Secretary with the Singapore Academy of Law from 2001 to 2002. He has co-authored *Butterworths' Annotated Statutes of Singapore: Criminal Procedure Code (Vol 3, 1997 Issue)* and *Halsbury's Laws of Singapore: Civil Procedure, Volume 4 (2002 Issue)*.

Boon Khai can be reached at +65 6531 2414 or by email at boonkhai.tan@drewnapier.com



Will Using A Variant Of A Trade Mark Be Considered Use?



INTRODUCTION

It is not uncommon for businesses to use their trade mark in various differing forms. The risk of this practice is that if the variants used deviate too much from the form in which the mark is registered, such use may not be considered use of the trade mark as registered. In such instances, the proprietor of the registered trade mark runs the risk of having his mark revoked on the basis of non-use.

Our lawyers, Dedar Singh Gill and Paul Teo, represented the Respondents in *Bluestar Exchange (Singapore) Pte Ltd v Teoh Keng Long and Others [2003] SGHC 169*. This case is the first in Singapore decided under the provisions of the new Trade Marks Act relating to revocation due to the non-use of a registered trade mark. In particular, the Court considered to what extent the use of variants would constitute use of the mark.

The case also explores the question of whether a trade mark should be partially revoked in situations where an item in a specification of goods covers a wide range of goods but use is only proved for a smaller category of the goods.

RELEVANT LEGISLATION

Section 22(1)(a) of the Singapore Trade Marks Act (“the Act”) provides that the registration of a trade mark may be revoked if it has not been put to genuine use in the course of trade in Singapore within five years after the date of registration, and if there are no proper reasons for its non-use.

Section 22(2) of the Act states that use of a trade mark includes use in a form differing in elements which does not alter the distinctive character of the mark in which it was registered.

Section 22(7) of the Act provides that where grounds for revocation exist in relation to only *some* of the goods or services for which the trade mark is registered, revocation shall relate to those goods or services *only*.

FACTS

The Applicant, Bluestar Exchange (Singapore) Pte Ltd, was a Company incorporated on 22 July 2000 with a paid up capital of two dollars for the purpose of implementing Giordano’s “downline” brand.

The Applicant commenced business in September 2000, selling various apparel under, among other labels, the BLUE STAR and BLUE STAR Exchange mark at its sole outlet in Jurong Point Shopping Centre.

The Respondents were a partnership and the registered proprietors of the trade mark “BLUE STAR and device” in Class 25 with respect to “Men’s undergarments, briefs, socks, men’s sport’s clothing, knitwear, singlets, swimwear” (“the BLUE STAR mark”). The Respondents’ trade mark consisted of two elements, a large star device and the words “BLUE STAR” below the star device. The following is a representation of the mark:



As a result of the Applicant’s use of the BLUE STAR and BLUE STAR EXCHANGE mark on clothing, the Respondents obtained search warrants and seized the Applicant’s goods. Criminal prosecution was subsequently commenced against the Applicant and one of its directors for trade mark offences.

The Applicant commenced proceedings to revoke the Respondents’ trade mark on grounds of non-use under Section 22(1)(a) of the Act.

There was evidence that the Respondents had used their mark on socks, briefs, singlets, T-shirts and swimwear. They had used the mark in varied forms: the star device beside the word “BLUE STAR”, the star device below the word “BLUE STAR” and where the star device was proportionally smaller than that found in the registered mark.

ISSUES

The issues before the High Court were:

- (i) Whether the Respondents’ use of the variants fell within Section 22(2) of the Act which provides that use of a mark includes “use in a form differing in elements which do not alter the distinctive character of the mark in the form in which it was registered”.
- (ii) If the use of the mark did not alter the distinctive character of the mark, whether the use of the variants on socks, briefs, singlets, T-shirts and swimwear would constitute use on *all* the goods listed under the trade mark specification.

REASONS FOR THE DECISION

In dismissing the Applicant’s motion with costs, the Court took the view that the distinctive character of the Respondents’ mark lay in the combination of the words “BLUE” and “STAR”, and not the star device. Thus, alterations in the use of the star device, for example, use of a smaller star device or the insertion of the star device in a

different location with the words “BLUE STAR”, did not alter the distinctive character of the mark.

The Court did not order a partial revocation under Section 22(7) of the Act for some of the goods as it found that the Respondents’ specification of goods was not unduly wide. With regard to the terms like “knitwear”, the Court was of the view that it was not in the interest of the public or the trade to try and narrow the description of clothing in the Respondents’ specification further to those specific categories for which the registered trade mark was in fact used. To do so, the Court held, would result in confusion and invite litigation.

COMMENT

When businesses use their registered trade mark in a differing form, there is a risk that the use of the variant may not be considered use of the registered mark. It is thus prudent in such cases for businesses to file a new trade mark application for the variant mark. Alternatively, if the use of the variant trade mark is anticipated at an earlier stage, the applicant should consider applying for the trade mark as a series of marks in varying forms.

This case is notable for the Court’s robust approach when dealing with ‘wide’ item specifications. The paramount concern of the Court was public interest. In this case, where the marks were used in relation to everyday products like clothing, the Court held that the public’s interest was best served if confusion or potential litigation could be avoided.

Dedar Singh Gill is a Director of the Intellectual Property Department and heads the Trade Mark Business Group. He has been recommended as a leading individual in Singapore for Intellectual Property work in Asia Pacific Legal 500 2003/2004 Edition. Drew & Napier LLC has been listed as the leading trade mark firm in Singapore for the seventh year running in the latest World IP Survey conducted by Managing Intellectual Property. Dedar joined Drew & Napier in 1984 and was made a Partner in 1989. He handles pre and post trade mark registration and oppositions as well as rectification actions. He also conducts all aspects of intellectual property litigation including patent, trade mark, copyright and design infringements, passing off cases and breach of confidential information disputes.

Dedar can be reached at +65 6531 2507 or by email at dedar.singh@drewnapier.com



Paul Teo joined Drew & Napier in 1999 and is a Senior Associate with the Intellectual Property Department. He handles pre and post trade mark registration matters, as well as all aspects of intellectual property litigation, including domain name recovery under the Uniform Domain Name Dispute Resolution Policy (UDRP) and trade mark enforcement cases. Paul has acted for individual and institutional clients in diverse industries, including software companies, technology companies, health and pharmaceuticals, food and beverage, and leisure and entertainment. He is also experienced in corporate IP matters, having drafted and reviewed licensing and franchise agreements relating to intellectual property assets.

Paul can be reached at +65 6531 4158 or by email at paul.teo@drewnapier.com



Product Liability In Singapore



“ Therefore, whether a director can be made personally liable depends very much on the factual situation at hand. The level of his involvement needs to be looked at in determining if he authorised, directed or procured the commission of the tort. ”

INTRODUCTION

Actress Andrea De Cruz consumed diet pills that led to life-threatening liver failure. Her 28-day trial against those involved in supplying Slim 10 resulted in an award of damages of about S\$900,000 against three of the four defendants she sued. Amidst the media hype and celebrity gossip, important principles of law on product liability in Singapore have evolved from this case.

The judgment of the High Court sets out useful guidance on the classes of people who owe a duty of care to consumers.

THE LAW OF PRODUCT LIABILITY

The law of product liability is concerned with the civil liability of manufacturers, retailers and others for damage

or loss caused by defective products or products which fail to meet certain minimum standards. Its main purpose is to ensure consumer safety and protection.

When a consumer suffers damage or loss caused by defective products, he can commence two kinds of actions under the law of product liability, namely:

- (i) an action in the tort of negligence; and
- (ii) an action for breach of contract, in particular, for breach of the term of satisfactory quality implied by the Sale of Goods Act.

FACTS

The Plaintiff in this case was Andrea De Cruz, a 28-year-old artiste with MediaCorp Studios. Sometime in December 2002, she saw TV Media's advertisements about a slimming drug called Slim 10. The advertisements featured a "before and after" shot of MediaCorp artiste, Chen Liping. The "before and after" difference was dramatic. Convinced of the effectiveness of the drug, Andrea decided to buy Slim 10.

Andrea bought Slim 10 from Rayson Tan, a fellow MediaCorp artiste and Chen Liping's husband. She consumed Slim 10 and about two and a half months later, started feeling lethargic and looking jaundiced. She was admitted into hospital and some three weeks later, the doctors confirmed that she was suffering from drug induced massive hepatocellular necrosis (or massive liver cell death) with impending liver failure. Andrea needed an immediate liver transplant or she would die.

The search for a suitable donor began. Andrea's boyfriend (now husband), Pierre Png, proved to be a compatible donor. Andrea underwent a timely adult-to-adult living donor transplant and was saved.

While the transplant saved Andrea's life, Andrea is now on lifelong medication to suppress her immune system to prevent rejection of the transplanted liver. She will continue to suffer the considerable side effects from this medication for the rest of her life.

To seek recovery for her pain and suffering and her medical expenses (both past and future), Andrea commenced action against the following defendants:

- (i) The first Defendants were the Chinese manufacturers of Slim 10, **Guangzhou Yuzhitang Health Products Co. Ltd.** The company had no presence in Singapore and the Chinese process servers could not locate

them in China. Hence, the action could not be served on them.

- (ii) The second Defendant was **Health Biz Pte Ltd**, the local importer of Slim 10. They were sued for negligently importing and distributing Slim 10. They were found liable.
- (iii) The third Defendant was **Simon Liu**, the founder and president of Health Biz. He was sued in his personal capacity for procuring, directing and authorising Health Biz's negligence. He was found liable.
- (iv) **TV Media Pte Ltd** were the fourth Defendants. They were the exclusive wholesale distributor of Slim 10. They also retailed Slim 10 directly and advertised it on television and through other media. They were sued in negligence for making untrue statements in their advertisements. They too were found liable.
- (v) The fifth Defendant was **Rayson Tan**. He was sued for breach of the sale of goods contract between himself and the Plaintiff, in particular, for breach of the implied term that the goods sold should be of satisfactory quality. The Court found that no contract for the sale of goods existed between Andrea and Rayson Tan because there was never any intention to create legal relations. Accordingly, Rayson Tan was found not liable.

ACTION IN THE TORT OF NEGLIGENCE

As the action for breach of contract against Rayson Tan in this case failed, the impact and significance of the present case lies in the principles enunciated on the law of negligence.

Under an action in negligence, responsibility attaches only if a duty to take care is owed. Whether a certain class of people owe the consumer a duty of care is determined by analogy to existing cases where similar duties have been held to exist. However, there is no reported precedent in Singapore. As such, this case was decided purely on its own factual matrix.

Owing a Duty of Care to the Consumer

This case has determined that at least in Singapore, the following people owe a duty of care to the consumer, to ensure product safety:

- (i) **An importer**, as in the case of Health Biz;
"There can be no doubt that [Health Biz] as importers and distributors owed a duty of care to consumers,

“ In this case, there can be little doubt that Health Biz by any other name would still be Semon Liu... [Semon Liu]’s involvement in the negligence is not merely very great, it is total. In the very exceptional circumstances of this case, I hold [Semon Liu] personally liable in negligence as well. ”

like the plaintiff, of its product.” (Tay Yong Kwang J in the judgment).

- (ii) **An exclusive wholesale distributor**, as in the case of TV Media.

“Equally, [TV Media], as the wholesaler which promoted, endorsed and advertised the product owed a duty to consumers to exercise reasonable care in its promotion, endorsement and advertisement.” (Tay Yong Kwang J in the judgment).

In this case, Andrea did not buy Slim 10 from TV Media nor did she buy Slim 10 through one of TV Media’s authorised distributors. The “link” between the Plaintiff and TV Media however, was the fact that the Plaintiff heard, was convinced by and relied upon TV Media’s advertisements about Slim 10, as intended by TV Media. The Court found that this “link” (together with other factors) created a close enough relationship between TV Media and the Plaintiff such that TV Media owed her a duty to take care in ensuring that its statements were true and accurate.

Standard of Care

Once a duty of care is established, the standard required, in order to discharge that duty of care, is determined by reference to what is reasonable in the circumstances.

Compliance with statutory requirements

As is shown from this case, it is important to comply with all statutory requirements imposed for consumer safety. These statutory requirements may differ for the various classes of persons as they may be bound by different legislation. In this case, the regulating legislation was the Medicines Act and its subsidiary legislation.

Due diligence

Further, it is generally prudent to conduct due diligence on your business partners to ensure that they too, are taking adequate safety measures. In this case, Tay Yong Kwang J commented in the judgment:

“[TV Media] was negligent in placing blind faith in everything [Semon Liu] said. [Health Biz] had no track record of any sort. [Semon Liu] had no experience at all in the importation of Chinese medicines. Without verification, [TV Media] began accepting Slim 10 packs for sale. Again without verification, it began to proclaim to the consumer world that Slim 10 was 100% herbal and was safe for consumption.”

Causation

The final element in the tort of negligence is causation. If a manufacturer, importer or distributor breaches his standard of care, he would only be liable if it can be established that the breach caused the consumer’s injury. In this case, the Court found that the Defendants’ breaches of care caused the toxic Slim 10 to reach the Plaintiff and that it was the Plaintiff’s consumption of this toxic Slim 10 that caused her liver failure.

Personal Liability

As for the personal liability of the negligent company’s officers, this is generally only imposed in exceptional cases due to the need to balance conflicting public policy considerations. As stated in a case (*Gabriel Peter & Partners (suing as a firm) v Wee Chong Jin & Others [1998] 1 SLR 374*) cited by Tay Yong Kwang J in the judgment:

“On the one hand there is the principle that a company is separate and distinct in law from its shareholders and directors, and it is in the interest of commercial enterprise that they should as a general rule, enjoy the benefit of limited liability afforded by the corporation.

On the other hand, there is the principle that everyone should answer for his tortious acts... A director of the company should not be allowed to escape personal liability to third parties for torts which he personally committed by his own hand or mouth merely because he committed the tort in the course of carrying out his duties as a director of the company.”

Therefore, whether a director can be made personally liable depends very much on the factual situation at hand.

The level of his involvement needs to be looked at in determining if he authorised, directed or procured the commission of the tort. The Court was of the view that this is “a matter of degree”.

On the exceptional facts of the present case, Semon Liu was found personally liable for the acts of Health Biz. As found by the Court:

“In this case, there can be little doubt that Health Biz by any other name would still be Semon Liu... [Semon Liu]’s involvement in the negligence is not merely very great, it is total. In the very exceptional circumstances of this case, I hold [Semon Liu] personally liable in negligence as well.”

CONCLUSION

This case was important in settling some of the classes of people who would be held to owe a duty of care to the consumer. It is significant as it highlighted the rare

occasion where the Courts were prepared to pierce the corporate veil and find an officer of the company personally liable for the negligent acts of the company.

It is arguably a watershed decision in the law of product liability in Singapore. In addition to the recently passed Consumer Protection (Fair Trading) Act, this case indicates another important development in consumer protection in Singapore.

This decision has clearly been a victory for consumers. We hope that this case will afford greater awareness of consumer rights and product safety locally.

Editor’s Note:

The decision is pending an appeal lodged by Semon Liu (in his personal capacity) and TV Media. The appeal is scheduled for hearing in the final week of May 2004.

R RAJ SINGAM is a Senior Director of the Litigation & Dispute Resolution Department. He joined Drew & Napier in 1971 and became a partner in 1977. Cited as “tough, determined and extremely practical” in high-profile litigation in *The Asia Pacific Legal 500 2002/2003 Edition*, Raj has a wide litigation and dispute resolution practice in the areas of administrative, banking, building & construction, company, commercial, criminal, insolvency, matrimonial, medical negligence, tort and partnership law. He has also been lead counsel in many high profile cases at both appellate and at trial levels.

Raj can be reached at +65 6531 2400 or by email at raj@drewnapier.com



WENDELL WONG is a Senior Associate with Drew & Napier LLC. He has a vibrant court practice covering both civil and commercial proceedings at trial and appellate levels. Wendell was a Deputy Public Prosecutor/State Counsel with the Attorney General’s Chambers, Singapore prior to joining Drew & Napier. He is a member of the Law Society’s Criminal Practice Committee and the Criminal Legal Aid Scheme. He also teaches advocacy as a part-time tutor at the Law Faculty, National University of Singapore, Practice Law Course and other courses organised by the Law Society.

Wendell can be reached at +65 6531 2496 or by email at wendell.wong@drewnapier.com



TAN SIU LIN joined Drew & Napier in 2000 and is an Associate with our Litigation & Dispute Resolution Department. Her area of practice encompasses general civil litigation. She has been involved in matters involving partnership disputes, contractual disputes, commercial disputes, medical negligence and product liability. She has also handled various civil interlocutory proceedings and trials, both in the High Court and Subordinate Courts.

Siu Lin can be reached at +65 6531 2408 or by email at siulin.tan@drewnapier.com



MAIN OFFICE

20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6535 0733
F +65 6535 4906
E mail@drewnapier.com
W www.drewnapier.com

CONTACT DIRECTORIES FOR BUSINESS GROUPS AND PRACTICE AREAS

BANKING/GENERAL FINANCE
David Ang

T +65 6531 2236
F +65 6535 4864
E david.ang@drewnapier.com

BUILDING & CONSTRUCTION
Tan Liam Beng

T +65 6531 4139
F +65 6533 3591
E liambeng.tan@drewnapier.com

CAPITAL MARKETS
Sin Boon Ann

T +65 6531 2206
F +65 535 4864
E boonann.sin@drewnapier.com

CORPORATE
Gary Pryke

T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

EMPLOYMENT & IMMIGRATION
Indraneerajah, SC (contentious)

T +65 6531 4100
F +65 6532 7149
E indraneer.rajah@drewnapier.com

Andrew Ong (non-contentious)

T +65 6531 4106
F +65 6535 4864
E andrew.ong@drewnapier.com

FAMILY & MATRIMONIAL
Raj Singam

T +65 6531 2400
F +65 6532 7149
E raj@drewnapier.com

INFO-COMMUNICATIONS & TECHNOLOGY
Andrew Ong

T +65 6531 4106
F +65 6535 4864
E andrew.ong@drewnapier.com

INSOLVENCY & REORGANISATION
Davinder Singh, SC

T +65 6531 2402
F +65 6532 7149
E davinder.singh@drewnapier.com

INSURANCE & REINSURANCE
Gary Pryke

T +65 6531 4104
F +65 6535 4864
E gary.pryke@drewnapier.com

INTELLECTUAL PROPERTY
Morris John

T +65 6531 2503
F +65 6533 0694
E mj@drewnapier.com

LIFE SCIENCES
Lim Wee Hann

T +65 6531 2244
F +65 6535 4864
E weehann.lim@drewnapier.com

LITIGATION & DISPUTE RESOLUTION
Jimmy Yim, SC

T +65 6531 2504 / 6531 2505
F +65 6533 3591
E jimmy.yim@drewnapier.com

PROJECT FINANCE
Christina Ng

T +65 6531 2250
F +65 6535 4864
E christina.ng@drewnapier.com

PROPERTY
Chua Bee Lan

T +65 6531 2302
F +65 6535 1952
E beelan.chua@drewnapier.com

SHIPPING & INTERNATIONAL TRADE
Ian Koh

T +65 6531 2436
F +65 6533 3591
E ian.koh@drewnapier.com

**TAX, TRUSTS, ESTATE
PLANNING & PROBATE**
Teoh Lian Ee

T +65 6531 2248
F +65 6535 4864
E lianee.teoh@drewnapier.com

**TRANSNATIONAL &
CROSS-BORDER WORK**
Leena Pinsler

T +65 6531 2240
F +65 6535 4864
E leena.pinsler@drewnapier.com

OTHER OFFICES

Shanghai Office

#2501 Office Tower
Bund Center
222 Yan An Road East
Shanghai 200002
China
T +86 21 6335 1628
F +86 21 6335 0638
E china@drewnapier.com

Hanoi Office

Room 605 CFM Building
23 Lang Ha Ba Dinh
Hanoi
Vietnam
T +844 514 1995 / 514 1996
F +844 214 1972
E dnhn@hn.vnn.vn

**Drewmarks Patents & Designs
(Malaysia) Sdn Bhd**

9th Floor Bangunan Getah Asli (Menara)
148 Jalan Ampang
50450 Kuala Lumpur
Malaysia
T +603 2162 2522 / 2162 2529
F +603 2162 2804
E drewmark@tm.net.my

PT Drewmarks Konsultama

Correspondence Address:
20 Raffles Place
#17-00 Ocean Towers
Singapore 048620
T +65 6531 2503 / 6531 2504
F +65 6533 0694
E ip@drewnapier.com

Through a joint venture with Freshfields Bruckhaus Deringer in Singapore, we have associated offices in: Amsterdam, Bangkok, Barcelona, Beijing, Berlin, Bratislava, Brussels, Budapest, Cologne Dusseldorf, Frankfurt am Main, Hamburg, Hanoi, Ho Chi Minh City, Hong Kong, Kuala Lumpur, Leipzig, London, Madrid, Milan, Moscow, Munich, New York, Paris, Rome, Shanghai, Tokyo, Vienna, Washington.

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#17-00
Ocean Towers
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CREATIVE
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