

# LEGAL UPDATE

A PUBLICATION OF DREW & NAPIER LLC

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In this third issue of the year, we once again update you on important legal developments and their implications. In so doing, we hope to offer practical insight on matters which may concern you. For example, this issue contains an article which will be of interest to companies contemplating an Initial Public Offering (“IPO”).

Other articles include a case brief on a recent local High Court decision in which the Singapore High Court had to determine the legal effect of a memorandum of understanding (MOU). This case serves as a timely warning that businesses should not presume that a preliminary document to the contract would be non-binding in nature. There is no magic attached to the form and label. Instead, the courts will look at the substance of the document and the surrounding evidence when determining the enforceability of a document.

In another local case, this time involving a longstanding shareholders’ dispute, several interesting questions relating to breaches of fiduciary duties and trademark infringement were raised. The decision shows that in resolving shareholders’ disputes, Singapore courts will take into account every aspect of the case, including the underlying root of the dispute.

We hope you will enjoy this issue of Legal Update.

**Directors**  
Drew & Napier LLC

## CONTENTS

**P:2**  
Announcements

**P:5**  
The Binding Effect Of A Memorandum Of Understanding

**P:8**  
Conflicts Of Interests And Interested Person Transactions In IPO Offerings

**P:12**  
Internal Wrestles: The Flexing Of Majority Shareholders’ Muscles

## RECENT APPOINTMENTS

We are pleased to announce the appointment of our following lawyers as Associate Directors:

## CORPORATE TEAM



**Mr Chan Ju-Lian**

Ju-Lian joined Drew & Napier's Banking & Corporate Department in 2001. He began practice as a litigator before specialising in financial services and corporate advisory work. He has advised extensively on international trade and business transactions, including compliance with taxation and financial regulations, with a particular focus on the China market.

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**Ms Stacy Choong**

Stacy joined Drew & Napier in 2001. Proficient in both English and Mandarin, and conversant in French, she practised in the United States from 1997 to 1999 and was called to the New York Bar in 2001. Stacy specialises in tax law and advises on all aspects of it, including corporate tax, personal tax, estate duty, property tax, goods and services tax, and stamp duty. She has also represented clients in civil litigation against the Revenue. Stacy is also involved in setting up trusts and foundations for local and foreign clients for commercial as well as private family purposes.

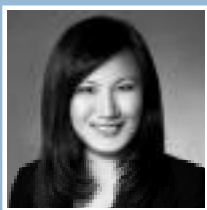
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## LITIGATION TEAM

**Ms Joanna Koh**

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**Mr Gary Low**

Gary joined Drew & Napier in 2000. He read law at the National University of Singapore Faculty of Law under a Public Service Commission (Local Merit Scholarship). After graduation in 1997, he joined the Attorney-General's Chambers as a Deputy Public Prosecutor and State Counsel. He is involved in all areas of civil and commercial litigation, focusing on banking, insolvency, contract and tort. He also specialises in criminal litigation, in particular white-collar criminal offences such as corruption, criminal breach of trust and cheating.

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**Mr Sham Sabnani**

Sham joined Drew & Napier in 1998 after graduating in the top 10 per cent of his class in National University of Singapore. He received the Law Society of Singapore Prize for the Best Student in Advocacy in 1997. His practice encompasses corporate litigation work including insolvency and restructuring, as well as commercial litigation. He also advises corporations and banks on employment, banking and securities matters, and has also assisted in high profile liquidations, judicial managements and restructuring matters.

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Mei Yen joined Drew & Napier from Richards Butler International Law Firm, London in 2002. Prior to practising as a solicitor in London, she was an advocate and solicitor in Kuala Lumpur with Skrine. Her main area of practice is corporate and commercial litigation with particular emphasis on banking and financial services litigation.

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**Mr Wendell Wong**

Prior to joining Drew & Napier in June 2000, Wendell was a Deputy Public Prosecutor and State Counsel with the Attorney General's Chambers from 1997 to May 2000. His area of practice covers criminal law as well as civil litigation, including cross border arbitrations, tortious liability cases, medical negligence cases and contractual disputes. Wendell is a member of Law Society's criminal practice committee and the Criminal Legal Aid Scheme.

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#### INTELLECTUAL PROPERTY TEAM



**Ms Jacqueline Baruch**

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**Ms Michelle Tan**

Michelle joined Drew & Napier as an Associate in 2000. She specialises in pre-and post-trade mark registration matters, trade mark oppositions and trade mark removal actions. Michelle has extensive experience in the filing and prosecution of trade marks, contentious opposition matters and revocation and invalidation actions. She has also represented major international corporations in their trade mark portfolios in Singapore and other countries.

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# The Binding Effect Of A Memorandum Of Understanding



## INTRODUCTION

In the recent local decision of *Bassatne Mohamed and Others v Rifaat El Gohary and Others* [2004] SGHC 63, the Singapore High Court had to determine the legal effect of a memorandum of understanding.

## FACTS

The facts surrounding the case are briefly as follows. The Plaintiffs were three individuals who were shareholders and directors of a Singapore company, BB Energy (Asia) Pte Ltd (“BBEA”), which traded in crude oil and petroleum products.

In early 1998, the Plaintiffs had discussions with the First Defendant, and two brothers, Zohair Bakri and Hani Bakri, on the possibility of a joint venture using BBEA as the vehicle. Together with three other brothers, Zohair Bakri and Hani Bakri managed a group of companies owned by the Bakri family, which was involved in oil trading and related activities. Both Zohair Bakri and Hani Bakri were directors of the Second and Third Defendants.

On 19 April 1998, the Plaintiffs, the First Defendant, Zohair Bakri and Hani Bakri signed a memorandum of understanding (“MOU”). The Plaintiffs and the First Defendant signed the MOU in their personal capacities, while Zohair Bakri and Hani Bakri signed the MOU “representing Bakri Group of Companies Jeddah, Saudi Arabia”.

The MOU provided that the First Defendant would purchase 5 per cent of the shares in BBEA from the Plaintiffs and the Bakris would purchase 30 per cent of the shares in BBEA.

Other terms in the MOU included, that the First Defendant would be the executive director as well as one of the resident directors of BBEA, that the share transfer forms would be executed by 1 July 1998 and that the MOU would be governed by and construed in accordance with Singapore law.

An addendum to the MOU was also signed by the parties later that same day. It stipulated that the new venture would begin operation on 1 May 1998, and that until the final execution of the sale and purchase agreement for the shares, all the relevant profit or loss would be for the account of the new shareholders of the BBEA.

The joint venture commenced operation on 1 May 1998, but due to problems with the finalisation of the sale and purchase agreement for the shares, the deadline for the execution of transfer was postponed twice until 1 November 1998. Even so, as a result of continued disagreements between the parties, the transfer of shares did not take place on 1 November 1998.

Eventually, by a letter dated on 8 May 1999 to the Third Plaintiff, Hani Bakri purported to terminate the MOU. The Plaintiffs agreed to the termination and subsequently sent the profit and loss accounts of BBEA for the period from 1 May 1998 to 8 March 1999 (“the joint venture period”) to the Bakris. The accounts showed that BBEA had made a loss during the joint venture period and in accordance with the addendum, the Plaintiff requested that the Bakris pay for 30 per cent of the total losses incurred during that period.

The Bakris did not pay. Instead, they requested for copies of documents to support the profit and loss accounts. Subsequently, Hani Bakri agreed to engage an external auditor to review the accounts of BBEA. No formal report was produced by the external auditor, although there was a draft report, which stated that the joint venture had sustained losses of US\$1,648,979.

Letters of demand were sent by the Plaintiffs’ English solicitors to the Defendants. In reply, the Defendants did

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not deny their liability but stated that their liability, if any, would only be determined when the audit by the external auditors had been satisfactorily completed. Neither the First Defendant nor the Bakri brothers nor any entity in the Bakri group paid their share of the losses demanded by the Plaintiffs.

Eventually, the Plaintiffs commenced an action pursuant to the MOU and the addendum against the Defendants, to recover 5 per cent of the loss incurred by BBEA during the joint venture period from the First Defendant and 30 per cent of the loss from the Second and Third Defendants.

One of the primary defences relied on by the Defendants was that the MOU was not a binding agreement but was only intended to facilitate further discussions and negotiations on the potential investment by a Bakri-related company into BBEA.

## DECISION

The High Court held that the MOU was a binding contract. Lai Siu Chiu J found that the First and Second Defendants were bound by the terms of the MOU and therefore liable for 5 per cent and 30 per cent of BBEA's losses respectively. The claim against the Third Defendant was dismissed on the basis that the Third Defendant was not privy to the MOU.

## REASONS FOR THE DECISION

In determining whether the MOU was a binding contract, the High Court adopted the approach used in the Malaysian Court of Appeal decision of *Sia Siew Hong v Lim Gim Chian* [1995] 3 MLJ 14, which was to focus on the language of the document and the surrounding evidence to determine its legal effect and not on the label attached to the document itself.

As such, despite the Defendants' denials, Lai J was of the view that the language of the MOU clearly indicated that it was meant to be a binding contract. The details spelt out in the MOU such as the price of the shares and a

jurisdiction clause all pointed to the intention to create a binding contract. The fact that the MOU envisioned the signing of an additional sale and purchase agreement for the shares did not make it any less binding.

Another factor which Lai J found to be of significance was that the parties had performed the MOU. For example, the First Defendant was employed by BBEA pursuant to the MOU. Further, the Plaintiffs kept the Bakris posted on all trades conducted by BBEA. As envisaged under the MOU, the parties consulted a law firm with a view to preparing and signing a sale and purchase agreement for shares in BBEA.

Lai J also noted that at no time prior to the suit did the First Defendant or the Bakris deny that the MOU was a binding agreement. In fact, they treated the MOU as enforceable, even in their letters to the Plaintiffs' English solicitors.

In addition, the Defendants had tried to argue that the court cannot look at the parties' subsequent conduct to determine whether the MOU was a binding contract. However, Lai J expressly rejected this argument. She even cited a passage from *Chitty on Contracts*, which stated that the courts would be inclined to hold the parties bound by a document where they “*have acted on the document for a long period of time or have expended considerable sums of money in reliance on it*”.

Further, Lai J applied the doctrine of estoppel by convention, which arises where both parties to a transaction have acted on an assumed state of facts or law. In such a situation, the parties are precluded from denying the truth of the assumption, if it would be “*unjust or unconscionable*” to allow them or either party to go back on it. On the facts of the case, Lai J found that there was no doubt that the Plaintiffs, the First Defendant and the Bakris believed and acted on the basis that the MOU was operative. Therefore, the doctrine of estoppel by convention would prevent them from denying that the MOU was binding.

**COMMENT**

It is not uncommon for individuals and business entities to enter into “*memorandums of understanding*” or exchange “*letters of intent*” on which they act pending the preparation of “*formal*” contracts. When all goes well with the deal proceeding as planned, the enforceability of the memorandum of understanding would naturally not be an issue.

On the other hand, if problems emerge before the “*formal*” contract is executed, questions on the enforceability of such a document would inevitably arise. As such, this case serves as a useful source of guidance on how the Singapore courts would interpret the legal effect of such documents. In particular, the following points can be gleaned from the case.

First, the court will not be restricted by the labels affixed onto the document. However, it cannot be presumed that a memorandum of understanding, letter of intent or any other “*preliminary*” document would not bind the parties. Instead, the court will construe the document as a whole to determine its true nature.

Second, assuming that there is offer, acceptance and consideration, whether there is a binding contract depends on the existence of contractual intention. As demonstrated in the present case, the language of the document is an important factor. If there is no intention to create a binding contract, the terms of the document should expressly state so. When the language of the document does not negative contractual intention, it is open to the court to hold the parties bound by the document. The more precise and detailed the terms, the more likely the court will find that there was an intention to create a binding contract.

Third, the court is not precluded from looking at the conduct of the parties after the execution of the document. Contractual intention is likely to be present especially where the parties have acted in accordance with the terms of the document and when there is no evidence of the parties denying the enforceability of the document.

Fourth, the doctrine of estoppel by convention is applicable in Singapore. In particular, where a document such as a memorandum of understanding has been signed, and the parties have acted on the assumption that the document is binding, parties would not be allowed to later claim that the document is unenforceable if it would be “*unjust or unconscionable*” for them to do so.

This case serves as a timely warning to businesses on the pitfalls of signing documents like memorandum of understandings without first making it explicitly clear what is the intended legal effect. Lai J had even remarked in her judgment that if the MOU had been better drafted legally, litigation may have been avoided. For the Plaintiffs in this case, it was a happy ending. The Singapore court showed that it would go beyond the label of the document, to examine its language and the subsequent conduct of parties to determine its true nature.

**Editor’s Note:**

The First and Second Defendants have appealed to the Court of Appeal.

**CAVINDER BULL** is a Director in Drew & Napier LLC’s Litigation & Dispute Resolution Department. He was made a partner of Drew & Napier in 1998 and a Director of Drew & Napier LLC in May 2002. He graduated with First Class Honours in law from Oxford University in 1992. Called to the Bar of England & Wales the following year, he was placed fourth in the Bar exams. He passed the Singapore Bar exams, winning the prize for top candidates. Before joining Drew & Napier in 1994, Cavinder clerked for the Chief Justice of Singapore. In 1995, he was awarded the Lee Kuan Yew Scholarship and left for Harvard Law School where he received an LL.M. He passed the New York Bar exams and was admitted to practice in New York. He practices corporate and commercial litigation and is actively engaged in trial and appellate advocacy at all levels of the Singapore Courts as well as in international arbitrations. He handles complex litigation spanning a wide area of corporate and commercial life. Cavinder has fought and won cases against Senior Counsel as well as American and British law firms.



Cavinder wishes to thank Low Sze Gin, who was an Associate in his team, for his assistance in this article.

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# Conflicts Of Interests And Interested Person Transactions In IPO Offerings

## INTRODUCTION

Prior to and after the Initial Public Offer (“IPO”) of a company, dealings between interested persons and conflicts of interest are closely regulated by the Singapore Exchange (“the Exchange”) and the Monetary Authority of Singapore (“MAS”).

In the preparatory stage of an IPO, interested person transactions (“IPTs”) and conflicts of interest would tend to be one of the more intensely debated issues between the company listed on the Exchange (known as the Issuer), the underwriters and the regulatory authorities. Primarily, this is because the elimination of conflicts of interest situations prior to listing may involve extensive restructuring, significant change in manner of operations or even the divestment of certain interests.

As such, the Issuer and underwriters should be mindful of the need to identify IPTs and conflicts of interest at an early stage and resolve these to the best extent possible prior to submission of the preliminary prospectus to the Exchange.

## WHO ARE INTERESTED PERSONS?

An “*interested person*” is a person or entity who is either a director, chief executive officer or controlling shareholder of the Issuer or one of his associates.

“*Associates*” are defined as :

- (i) his immediate family;
- (ii) trustees of any trust of which he or his immediate family is a beneficiary or in the case of a discretionary trust, a discretionary object; or
- (iii) any company in which he or his immediate family (that is, the spouse, child, adopted child, step child, sibling or parent) together (directly or indirectly) have an interest of 30 per cent or more.

## WHAT CONSTITUTES IPTS?

IPTs are monitored to guard against the risk that interested persons could influence the Issuer, its subsidiaries or associated companies, to enter into transactions with them that may adversely affect the interests of the Issuer or its shareholders.

An IPT is said to take place when the interested person is involved in business dealings with the Issuer itself, its subsidiaries or its associated companies.

Common IPTs which Issuers could face include loans and advances to and from directors, guarantees given by directors for the Issuers’ banking facilities and business dealings such as leases or commercial transactions with interested persons.

Some possible scenarios include:

- (i) The spouse of a director renting either office space or a residential property to one of the companies in the Issuer group; or
- (ii) The professional firm of a director providing consultancy services to the Issuer.

In assessing the amount at risk to the Issuer, the value of the transaction is the main consideration. This is illustrated by the following examples:

- (i) In the case of a partly-owned subsidiary or associated company, the value of the transaction is the Issuer’s effective interest in that transaction;
- (ii) In the case of a joint venture, the value of the transaction includes the equity participation, shareholders’ loans and guarantees given by the entity at risk;



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- (iii) In the case of borrowing funds from an interested person, the value of the transaction is the interest payable on the borrowing;
- (iv) In the case of lending of funds to an interested person, the value of the transaction is the interest payable on the loan and the value of the loan.

**PRE-LISTING COMPLIANCE**

**Prospectus disclosure of IPTs**

The Securities and Futures (Offers of Investments) (Shares and Debentures) Regulations 2002 (“the Regulations”) requires that IPO prospectuses contain information on each IPT or loan for the three most recent completed financial years ending on the latest practicable date. Each IPT or loan is required to be carried out on an arm’s length basis on normal commercial terms and the procedure undertaken or to be undertaken to ensure this has to be disclosed in the prospectus.

The Regulations also require that prior to listing, all debts owed to the Issuer by directors, substantial shareholders

or companies controlled by them would need to be repaid. This does not, however, apply to debts owed to the Issuer by its subsidiaries or its associated companies.

**Conflicts of interest**

The Listing Manual requires that an Issuer resolve or eliminate conflict situations prior to listing. In instances where more time is needed, the Exchange may accept a proposal to resolve or eliminate conflicts of interest within a reasonable period after listing.

**Prospectus disclosure of conflicts**

In instances where a director or a controlling shareholder or his associate has an interest in a company which either carries on the same business or deals in similar products, the Regulations require certain details to be disclosed in the prospectus. These include the identity of the competitor, the identity of the director or controlling shareholder and the extent to which the person is involved in the management of the competitor.

In addition, the Issuer must also disclose whether the conflict has been resolved or mitigated. Where the conflict

is ongoing, the Issuer must set out the proposals for its resolution or mitigation. Its directors must also state their opinion in the prospectus whether the particular conflicts of interest can be mitigated.

### Review by the Exchange

In reviewing compliance with the Exchange's policy on conflicts of interest, the Exchange takes into account the following:

- (i) The parties involved in the conflict situation and their relationship to the Issuer,
- (ii) The significance of the conflict in relationship to the size and operations of the Issuer and in relation to its potential influence on the interested person,
- (iii) Whether the parties who are involved in the conflict derive any special advantage from it, and
- (iv) Whether the conflict can be terminated, and if so, how soon and on what basis.

If the conflict cannot be promptly terminated, the Exchange will consider:

- (i) Whether the arrangement is necessary and beneficial to the operations of the Issuer,
- (ii) Whether the terms of arrangement are the same or better than those that can be obtained from third parties,
- (iii) Whether the arrangement will be reviewed at regular intervals and approved by independent directors or shareholders,
- (iv) Whether the Issuer has or will have adequate internal procedures to ensure that the terms of the arrangement are fair and reasonable, and
- (v) Whether there is, or has been, adequate disclosure of the conflict, the parties to it, and the measures taken in respect of it. This may be communicated to the public through the prospectus, offering memorandum, introductory document, circular or other reports.

In instances where there is a potential conflict of interest, the regulatory authorities may require the competitor to give a written undertaking not to enter into specific markets or geographical areas in competition against the Issuer and the Issuer may give a similar undertaking. Other undertakings may include an undertaking not to solicit any

officer, manager or key employee from the Issuer and not to provide services to the Issuer's competitors. Details of these undertakings would be included in the prospectus.

Where the director or controlling shareholder holds substantial shares in a competitor, the person may be required by the Exchange to give an undertaking that his capacity in the competitor is strictly that of an investor and non-executive in nature. In addition, he or she may be required to give an undertaking that should the Issuer choose to go into a market where the competitor has established a presence:

- (i) the director or controlling shareholder would divest his or her stake in the competitor; or
- (ii) if circumstances permit, sell his or her stake in the competitor to the Issuer.

On an ongoing basis, the director or controlling shareholder is required to disclose his conflicts and to abstain from voting on resolutions on which there is a potential conflict of interest. He or she may also be required to undertake not to exert any undue influence on the decision making process.

### POST-LISTING COMPLIANCE

Upon listing, the Issuer is required to comply with various continuing obligations relating to IPTs and conflicts of interest.

The Listing Manual sets out specific compliance requirements on the part of the Issuer, such as immediate announcements on the Monetary Authority of Singapore Network ("MASNET") or the obtaining of the shareholders' mandate.

In addition, the Issuer's Audit Committee, consisting largely of independent directors, periodically reviews new and continuing IPTs and potential conflicts of interest.

### Announcements and shareholders' mandate thresholds

An Issuer must make an immediate announcement of any IPT of a value equal to, or more than 3 per cent of the group's latest audited net tangible assets ("NTA"). If the aggregate of all transactions entered into with the same interested person during the same financial year amounts to 3 per cent or more of the group's NTA, the Issuer must make an immediate announcement of the latest transaction and all future transactions entered into with the interested person during that financial year.

Where this value crosses the 5 per cent threshold, the Issuer is required to obtain the approval of the shareholders

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at a general meeting. These rules do not apply to any transaction less than S\$100,000.

However, a transaction which has been approved by shareholders previously, or is the subject of aggregation with another transaction that has been approved by shareholders, need not be included in any subsequent aggregation.

The Issuer may obtain general mandates from shareholders on an annual basis at the annual general meeting where the IPTs are for recurrent transactions of a revenue or trading nature and those necessary for the purchase and sale of supplies and materials. For the purpose of obtaining the shareholders' mandate, the Issuer should ensure that these transactions are carried out at arm's length and on commercial bases. However, the general mandate does not extend to the purchase or sale of assets, undertakings or businesses.

The Listing Manual provides a list of exceptions where announcements need not be made and shareholders' mandates need not be obtained such as where the provision of goods or services by an interested party is based on a fixed or graduated scale, which is publicly quoted.

#### Audit committee

The Code of Corporate Governance recommends that the Audit Committee comprise of at least three directors who are all non-executive, the majority of whom, including the chairman, should be independent.

In the context of IPTs, the Audit Committee will be tasked to review all IPTs to ensure that they are transacted:

- (i) on an arm's length basis,
- (ii) on normal commercial terms, and
- (iii) will not be prejudicial to the shareholders.

The Audit Committee may also implement certain policies such as obtaining two independent quotations for similar services for comparison or in the case of supplying goods or services to an interested person, to compare the pricing with two or more successful transactions of a similar nature to non-interested persons.

In instances where the IPTs are leases, the Audit Committee may require that quotes for similar properties in terms of size and location are obtained. The rent payable should be commensurate with the most competitive market rates of similar properties.

The Audit Committee is also tasked to periodically review potential conflicts of interest to ensure that the Issuers' interests are protected.

#### COMMENT

As a launching pad to propel companies to their next stage of growth, the IPO process allows Issuers to raise proceeds in the marketplace whilst raising their public profile at the same time.

In taking the path to listing, potential Issuers should be aware that resolving IPTs and conflicts of interest may require time and perhaps even involve some personal sacrifice on the part of the interested persons. As such, these issues should be broached from the start and dealt with a significant degree of sensitivity on the part of all parties concerned.

The Banking & Corporate Department of Drew & Napier LLC regularly advises on matters relating to initial public offerings (IPO). Primarily led by Director Sin Boon Ann, the IPO team also includes Directors Gary Pryke and Petrus Huang. The Department, as a whole, handles the full spectrum of corporate and finance work including mergers and acquisitions, takeovers, corporate restructuring, capital markets, corporate finance and bank lending.

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## Internal Wrestles: The Flexing Of Majority Shareholders' Muscles

“ The central issue at trial was whether or not there was an exclusive distributorship agreement between Apollo Food and Hup Huat Singapore... ”



## EXECUTIVE SUMMARY

In *Hup Huat Food Industries (S) Pte Ltd v Liang Chiang Heng and Others [2003] SGHC 244*, a case involving a long-standing shareholders' dispute, several interesting questions relating to what amounts to breaches of fiduciary duties and trademark infringement were raised. The decision shows that in resolving shareholders' disputes, Singapore courts will take into account every aspect of the case, including the underlying root of the dispute.

## FACTS

The court proceedings arose out of a dispute between two families – the Tans and Liangs.

### The Apollo Group

In 1998, the Liangs became the controlling stakeholders in the Apollo Group, a multi-million dollar confectionery enterprise based in Malaysia. The Apollo Group companies included Apollo Food Industries Sdn Bhd ("Apollo Food") and Hap Huat Food Industries Malaysia Sdn Bhd ("Hap Huat Malaysia").

### Hup Huat Singapore

In Singapore, the Tans were the majority shareholders of Hup Huat Singapore, while the Liangs were the minority shareholders. Hup Huat Singapore was not part of the Apollo Group. Mr Tan Song Cheng took over the management of Hup Huat Singapore from Mr Liang Chiang Heng in 2002.

### Ban Hock

Ban Hock distributed "Apollo" products in Singapore. Like Hup Huat Singapore, Ban Hock was not part of the Apollo Group. Neither the Tans nor the Liangs had any stake in Ban Hock.

### "Apollo" trademark

Since 1990, Apollo Food was the sole manufacturer of confectionery products bearing the "Apollo" trademark. Some of us may be familiar with their products, such as the popular "Apollo" chocolate wafers. Hup Huat Singapore was the registered proprietor of the "Apollo" trademark in Singapore, while in Malaysia, the "Apollo" trademark was owned by Hap Huat Malaysia.

## ISSUES

Hup Huat Singapore raised several allegations of breaches of fiduciary duties against the Liangs, and trademark infringement against Ban Hock:

### (i) Exclusive distributorship agreement

The central issue at trial was whether or not there was an exclusive distributorship agreement between Apollo

Food and Hup Huat Singapore for "Apollo" products in Singapore. Hup Huat Singapore alleged that such an exclusive distributorship agreement was implied, and that the Liangs had breached their fiduciary duties by causing Apollo Food (in their capacity as directors of Apollo Food) to divert business away from Hup Huat Singapore to another company.

The Liangs denied that there was an exclusive distributorship. They contended that there was a valid decision taken by both the Tans and the Liangs to close down the business of Hup Huat Singapore. Following from that decision, the Liangs sought companies to take over the business of Hup Huat Singapore to assist Apollo Food to distribute "Apollo" products in Singapore and certain other countries. They therefore maintained that they were not in breach of their fiduciary duties to Hup Huat Singapore.

### (ii) Payment of directors' fees

Hup Huat Singapore also alleged that the Liangs had paid themselves unauthorised directors' fees in breach of its memorandum and articles of association. The Liangs denied any breach. They contended that the formal company procedure prescribed in the articles of association was never followed. Instead, there was an informal arrangement adopted by Hup Huat Singapore, and this was adhered to when the directors' fees were paid out.

### (iii) Misappropriation

Hup Huat Singapore also claimed that Mr Liang Chiang Heng had breached his fiduciary duty by misappropriating certain travellers' cheques purchased with company funds for his personal use. This was denied by Mr Liang Chiang Heng, who claimed that there was a decision taken by the Tans to reverse the travellers' cheques as a director's loan to him, and that he was therefore free to use the travellers' cheques as he pleased.

### (iv) Trademark infringement

Hup Huat Singapore also brought a claim of passing off against Ban Hock, and alleged that it had infringed Hup Huat Singapore's trademark by importing "Apollo" products into Singapore from Apollo Food. Ban Hock however denied any infringement and argued that it had imported genuine goods from the same source and that further, there was an implied or express consent by Hup Huat Singapore for the use of its trademark under Section 29(1) of the Trade Marks Act ("TMA").

## RELEVANT LEGISLATION

Section 29(1) of the TMA provides that a registered trade mark is not infringed by its use in relation to goods which

“ The case is also a timely reminder to all company directors that they have to balance their respective fiduciary duties owed to the various companies in which they hold directorship. ”

have been put on the market, whether in Singapore or outside Singapore, by the proprietor of the registered trade mark or with his express or implied consent (conditional or otherwise).

### DECISION OF THE HIGH COURT

At the end of the 12-day trial, Tay Yong Kwang J dismissed all the claims of Hup Huat Singapore against all the defendants.

#### (i) Exclusive distributorship agreement

On the evidence before him, he found that there was no exclusive distributorship agreement between Apollo Food and Hup Huat Singapore. He also found that there was a valid decision taken by both the Tans and the Liangs to close down the business of Hup Huat Singapore. As such, the Liangs had not diverted the business.

In reaching his decision, Tay J took into account the dispute between the Tans and the Liangs. He noted that Hup Huat Singapore had not instituted any action against Apollo Food for the alleged breach of the exclusive distributorship agreement. He was convinced that the Tans were using their majority shareholding in Hup Huat to conduct a witch-hunt against the Liangs.

#### (ii) Payment of directors' fees

He also found that the Liangs had paid themselves commercially justifiable directors' fees in accordance with the established understanding of all the shareholders of the company.

#### (iii) Misappropriation

Tay J further held that Mr Liang Chiang Heng had not misappropriated the travellers' cheques as there was a valid decision taken by Hup Huat Singapore to treat the money used to purchase the travellers' cheques as a loan to Mr Liang Chiang Heng.

#### (iv) Trademark infringement

He also dismissed the trademark infringement claim against Ban Hock, holding that this was classic

parallel importation, because the goods that were imported were genuine goods. Further, he found there was consent, be it express or implied, under Section 29(1) of the TMA on the part of Hup Huat Singapore for the use of its trademark. Further, Tay J found that Hup Huat Singapore did not enjoy any goodwill as a distributor of "Apollo" products in Singapore.

Tay J also dismissed other claims brought by Hup Huat Singapore, including claims against two other defendants for conspiracy to divert Hup Huat Singapore's business. These were not pursued on appeal.

### DISMISSAL BY COURT OF APPEAL

Not being satisfied with the decision of Tay J, Hup Huat Singapore appealed on the following issues – breach of fiduciary duties in misappropriating money from Hup Huat Singapore, paying unauthorised directors' fees, and trademark infringement.

The Court of Appeal upheld the decision of Tay J and dismissed Hup Huat Singapore's appeal in its entirety.

### COMMENT

At the High Court trial, Tay J was persuaded that the claims brought by Hup Huat Singapore were without merit. In fact, he went so far as to make a finding that *"Tan Song Cheng was flexing his majority shareholder's muscles unreasonably in apparent retaliation against the Liangs for having displaced the Tan family as kingpins in the Apollo Group."*

This decision is an example of how the courts will take into consideration every aspect of the case in resolving shareholders' disputes. The fact that the Tans had not instituted proceedings against Apollo Food for the breach of the alleged exclusive distributorship certainly persuaded Tay J that the proceedings taken out by Hup Huat Singapore was for an ulterior motive.

The case is also a timely reminder to all company directors that they have to balance their respective

fiduciary duties owed to the various companies in which they hold directorship. On the facts of the case, Tay J was of the opinion that the Liangs had discharged their duties to both Apollo Food and Hup Huat Singapore faultlessly. Given that there was no exclusive distributorship, and that a decision had been taken to close down the business of Hup Huat Singapore, the Liangs were right in seeking alternative companies to distribute “Apollo” products.

Finally, on the issue of trademark infringement, trademark owners must be careful to maintain the use of their trademark if they subsequently decide to manufacture their products in a different country. In the present case, Hup Huat Singapore ceased manufacturing activities once Apollo Food took over manufacture of “Apollo” products in 1990, and became only a distributor. Its trademark was therefore susceptible of being revoked for non-use of more than five years.

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