DREW & NAPIER LLC

VOLUME 6 ISSUE 4
: JUN05

LEGAL UPDATE

A PUBLICATION OF DREW & NAPIER LLC

MITA (P) 236/07/2004

Once again, we are pleased to present you with the latest edition of *Legal Update*.

It is our pleasure to announce our recent appointments of Directors, Deputy Directors and Associate Directors. Among other attributes, their promotion is also an acknowledgement of their years of outstanding service here at Drew & Napier LLC.

They are, in no particular order, as follows:

Directors – Mr Lim Chong Kin, Mr Julian Kwek, Mr Adrian Tan, Ms Cheryl Tan and Ms Valerie Kwok.

Deputy Directors – Mr Lawrence Tan and Mr Kelvin Tan.

Associate Directors – Ms Celeste Ang, Mr Paul Teo, Mr Abraham Vergis, Ms Lim Siau Wen, Ms Chu Tzy Yen, Mr Ian Oei and Ms Yarni Loi.

Read more about them and their areas of specialisation in this edition.

Following a landmark English House of Lords decision on legal privilege, we examine in greater detail the effect of this notable decision on the local law, and the practical issues it raises for companies wishing to maintain legal privilege for certain communications in "*Developments in Legal Privilege*".

Next, we bring you a discussion on some of the significant tax changes announced in the Singapore Budget 2005 ("Budget"), which was delivered in February. The Budget aims to sharpen Singapore's international competitiveness in meeting the challenges of globalisation. We highlight some of the more interesting tax changes brought about by the Budget in "*The Singapore Budget 2005: Creating Opportunity, Building Community*".

The local news in the recent months has brought reports of prominent individuals being charged with insider trading. This has put the spotlight on the insider trading legislation in Singapore, and in particular, the Securities and Futures Act ("SFA"). In "*Insider Trading*", we examine in detail the far-reaching insider trading provisions of the SFA.

Last but not least, we bring you an introduction on Islamic banking and examine briefly some common Islamic financial products. In light of the recent interest of the Singapore authorities to develop Islamic banking locally, as well as the increasing global attention on and growth of Islamic finance, we believe that this will be an area of development which will be keenly observed.

We hope you enjoy reading these features and find them informative.

Warm regards,

Directors
Drew & Napier LLC

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RECENT APPOINTMENTS

We are pleased to announce the appointment of the following lawyers:

DIRECTORS

Lim Chong Kin

Chong Kin practises corporate and commercial law with strong emphasis in the specialist areas of info-communications, media and technology. He also has significant experience in competition law and co-heads the Competition Law Practice Group. Chong Kin read law in the National University of Singapore (NUS), where he was awarded scholarships in NUS for academic achievements. He also holds a LL.M from NUS.

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

Julian Kwek

Julian practises corporate and commercial litigation with an emphasis on banking and insolvency. He is also a member of the company's Chinese Business Group. Since late 2001, Julian has been actively involved in Asia Pulp & Paper's worldwide restructuring exercise; handling among other things various cross-border dispute resolution matters. Julian read law in the University of Wales College of Cardiff. He is currently an adjunct tutor with the Law School at the National University of Singapore.

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Adrian Tan

Adrian holds degrees in Law and Computer Science & Psychology. He was the general counsel for Singapore Network Services (later known as CrimsonLogic), a Singapore Government-owned IT service provider. He joined Drew & Napier in 1992 and has experience in a wide range of corporate and commercial litigation. Due to his background, Adrian has a special focus on intellectual property and information technology law. He has advised and represented clients in disputes involving biotechnology patents, domain name disputes, blogging and media copyright.

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Cheryl Tan

Cheryl read law in the National University of Singapore and was admitted to the Singapore Bar and to the Roll of Solicitors of England & Wales. She did a three-year stint in Drew & Napier's Corporate Department where she was primarily involved in advising on mergers and acquisitions, and regulatory work. She now specialises in corporate and commercial litigation. Cheryl tutors postgraduate law students in mergers and acquisitions, insolvency and civil litigation.

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Valerie Kwok

Valerie's main areas of practice include banking and finance, debt restructuring, mergers and acquisitions, and corporate restructuring. She received mention in *The Asia Pacific Legal 500* for Corporate and Mergers and Acquisitions work in Singapore. Valerie graduated from the National University of Singapore in 1995 and was placed on the Dean's List. She was admitted as an Advocate and Solicitor in Singapore in 1996 and as a Solicitor in England in 1999. Valerie joined Drew & Napier in November 1996.

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DEPUTY DIRECTORS

Lawrence Tan

Lawrence specialises in building and construction law. He has acted for and advised statutory boards, developers, contractors and consultants in construction related disputes, in both litigation and arbitration. Lawrence is an adjunct lecturer with the Singapore Institute of Management in conjunction with the Royal Melbourne Institute of Technology as well as a tutor with the Board of Legal Education for the Post Graduate Law Course. He is also an Accredited Mediator with the Singapore Mediation Centre.

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Kelvin Tan

Kelvin's practice area encompasses a wide range of corporate and commercial litigation. He has represented Singapore and international clients in a wide range of disputes including banking, company, defamation, employment, intellectual property, international trade, land and tenancies, and trusts. He has also acted for individual and institutional clients in diverse industries, including food, health and pharmaceuticals, music, leisure and entertainment, and publishing. Kelvin joined Drew & Napier in 1995.

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ASSOCIATE DIRECTORS

Celeste Ang

Celeste joined Drew & Napier in 1999 and was with the Intellectual Property Department in her first six months. She has been involved in corporate & commercial litigation and arbitration, both domestic as well as international involving multi-jurisdictional parties, issues and law. Her primary areas of practice include employment & labour law, property law, intellectual property, media & entertainment law and oil & energy related disputes. She advises and acts for corporations, including international investment banks and investment companies, corporations in the media & entertainment and oil & energy industries, as well as educational institutes.

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Paul Teo

Paul joined Drew & Napier in 1999. His practice is predominantly in intellectual property litigation. He handles pre and post trade mark registration matters and all aspects of intellectual property litigation, including trade mark and design oppositions and revocation actions, trade mark infringement litigation, passing off cases, copyright and design infringements, breach of confidential information cases, domain name recovery under the Uniform Domain Name Dispute Resolution Policy (UDRP), Singapore Domain Name Dispute Resolution Policy (SDRP) and trade mark enforcement cases. He is also experienced in corporate IP matters, having drafted and reviewed licensing and franchise agreements relating to intellectual property assets.

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Abraham Vergis

Abraham joined Drew & Napier in 1998. He has a diverse practice in the areas of civil and criminal litigation, with an emphasis on construction and engineering issues, commercial disputes and white-collar crimes. He also has considerable experience in both domestic and international arbitrations. In 2002, Abraham was seconded to the London offices of Freshfields Bruckhaus Deringer, where he specialised in international arbitrations and construction disputes. He also assisted Queen's Counsel in hearings before the House of Lords and the Judicial Committee of the Privy Council.

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Lim Siau Wen

Siau Wen joined Drew & Napier in 1999. Her practice covers both the contentious and non-contentious aspects of intellectual property. She is experienced in the registration of trade marks, and corporate intellectual property matters, such as licensing and the sale/transfer of intellectual property assets in Singapore, Malaysia and Brunei. She is also active in the area of intellectual property litigation, with a focus on trade mark infringement and passing off cases, copyright infringement, trade mark opposition, rectification and invalidation matters.

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Chu Tzy Yen

Tzy Yen joined Drew & Napier in 2001. Her main areas of practice include corporate banking and finance. She advises banks and financial institutions, both foreign and local, as well as major listed and unlisted corporate borrowers on general banking matters and on bilateral and syndicated loans, both secured and unsecured. During her six-month secondment to the London office of Freshfields Bruckhaus Deringer in 2002, Tzy Yen was involved in several cross-border corporate transactions.

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Ian Oei

Ian read law at the University of London and joined Drew & Napier in 2001. His main area of practice is in intellectual property, covering both contentious and non-contentious matters. He also handles pre and post trade mark registration matters, trade mark oppositions, revocation and invalidation actions. Ian has extensive experience in trade mark registration and oppositions, representing many major international corporations.

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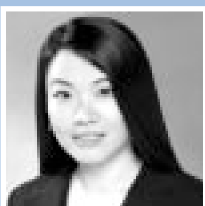

Yarni Loi

Yarni studied law at the London School of Economics and Political Science. She was called to the Singapore Bar in 1999 and joined Drew & Napier in 2001. She practises general civil and commercial litigation, and has represented both individual and institutional clients in a wide range of disputes involving banking, company, contract, employment, fraud, property and tort issues. She is also involved in negotiation, mediation and arbitration in these areas of law.

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Developments In Legal Privilege

EXECUTIVE SUMMARY

The modern law on legal professional privilege comprises two distinct classes. Legal advice privilege, which covers communications, whether oral or written, between the solicitor and his client in the course of the retainer; and litigation privilege, which covers communications, whether oral or written, between the solicitor/client and third parties, created for the purpose of obtaining advice under circumstances of pending or contemplated litigation.

The House of Lords in the United Kingdom ("UK") recently delivered a landmark judgment on legal advice privilege in *Three Rivers District Council and BCCI SA v The Governor and Company of the Bank of England [2004] UKHL 48*. This is the first significant House of Lords judgment on legal advice privilege in over 100 years. In this article, we examine some of the implications of this decision on the law of privilege in Singapore and how it could affect parties wishing to claim legal privilege.

BACKGROUND TO THE THREE RIVERS CASE

The case started with the collapse of the financial institution, BCCI, in 1991. Over 6000 depositors in the UK stood to lose everything. The Bank of England ("the Bank") had exercised supervisory functions over BCCI and would only be responsible to third parties, such as the depositors, if it could be shown that the Bank had acted in bad faith.

Following the collapse, an independent inquiry known as the Bingham Inquiry ("the Inquiry") was set up by the Government to investigate the adequacy of the Bank's supervision of BCCI and the actions taken by the Bank. The Bank nominated three of their employees to form the Bingham Inquiry Unit ("BIU") to deal with all communications between the Bank and the Inquiry. The Bank appointed Freshfields as solicitors to advise them on all aspects of their evidence and testimony before the Inquiry.

The BIU was heavily involved in the preparation of notes, briefings, information gathering and document-production in order to seek legal advice on how the Bank's witnesses might best be assisted in preparing for their appearances before the Inquiry. Thereafter, BIU sought legal advice in the preparation of letters sent by witnesses to the Inquiry commenting on their transcripts.

The relevant dispute here related only to documents generated after the closure of BCCI. During the course of proceedings, the liquidators sought disclosure of various categories of documents created by the Bank's employees

and ex-employees for the purpose of the Inquiry. The Bank claimed legal privilege for these documents.

THREE RIVERS (NO. 5)

The UK High Court in *Three Rivers District Council v Governor and Company of the Bank of England (No. 5) [2002] EWHC 2730* refused disclosure and upheld the Bank's claim for privilege. The High Court's reasoning was subsequently rejected in the Court of Appeal in *Three Rivers District Council v Governor and Company of the Bank of England (No. 5) [2003] QB 1556*, where it was held that in legal advice privilege, only communications between solicitor and client, and evidence of the content of such communications, were privileged. Preparatory materials obtained before such communications, even if prepared for the dominant purpose of being shown to a client's solicitor, or at the solicitor's request and subsequently sent to the solicitor, were not covered by the privilege because they were not strictly communications between the solicitor and client. In this instance, the Court of Appeal held that the Bank's employees and ex-employees were not the clients. Rather, in the Court of Appeal's view, the client in the case was the BIU.

Further, the Court of Appeal took the view that much of Freshfields' legal advice was for the purpose of preparing and presenting the employees/ex-employees' evidence in an orderly and attractive fashion, and not for the dominant purpose of taking legal advice upon such material. Accordingly, the Court categorised the advice as "*presentational advice*", as opposed to substantive legal advice.

Following this, the House of Lords dismissed the Petition for leave to appeal, and the matter rested for a while.

THREE RIVERS (NO. 6)

After the dismissal of the Petition for leave to appeal to the House, the Bank began the task of disclosure. However, the Bank disclosed none of the communications between BIU and Freshfields nor the drafts or internal memoranda relating to the "*overarching statement*" that had been submitted to the Inquiry on behalf of the Bank. The Bank contended that the expression "*legal advice*" should be interpreted widely so as to cover all advice and assistance from the solicitors relating to the evidence and submissions to be made to the Inquiry on behalf of the Bank, including advice given for presentational purposes. The liquidators made a further application for discovery.

The Court of Appeal judgment in *Three Rivers District Council v Governor and Company of the Bank of England (No. 6) [2004] QB 916* made it clear that for legal advice privilege purposes, the advice being sought from the lawyers must be advice as to legal rights or liabilities. Advice relating to how the Bank should present its case to the Inquiry, so as to lead to a conclusion as favourable as possible to the Bank, did not qualify for privilege.

The Bank then appealed to the House of Lords.

THE HOUSE OF LORDS DECISION

The actual issue before the House of Lords was very narrow: *"it is whether the communications between the BIU and Freshfields or counsel relating to the Inquiry are protected by legal advice privilege"*.

The House of Lords robustly restated the policy on legal advice privilege as being an absolute privilege which can only be overridden by statute or waived by the client. It disapproved of the narrower approach of the Court of Appeal in rejecting privilege for advice given for presentational purposes. The House of Lords reasoned that legal advice privilege must also cover advice and assistance to public law rights and liabilities, and took the view that there should be no distinction between presentational and substantive legal advice for the purpose of legal privilege.

Accordingly, the House of Lords reversed the Court of Appeal decision in *Three Rivers (No. 6)* and held that that communications between the BIU and Freshfields or counsel regarding the presentation of the "*overarching statement*" and all internal notes relating to it, qualified for legal advice privilege.

Question not answered by the House of Lords

The House of Lords declined to address question of who is the client for the purpose of legal privilege, and held that the decision of the Court of Appeal in *Three Rivers (No. 5)* was still good law until further review.

THE SINGAPORE POSITION

The law on privilege in Singapore is first and foremost statutory. Section 128 of the Evidence Act ("the Act") expressly *"prohibits"* an advocate and solicitor from disclosing communications between him and his clients *"made in the course and for the purpose of his employment, or disclosing contents of documents which he became acquainted with in the course and for the purpose of his employment or disclosing advice given by him to his client in the course and for the purpose of his employment"*.

As the privilege is the client's, Section 131 of the Act also provides protection for the client. However, if the client *"offers himself as a witness"*, he is entitled to refuse to disclose confidential communications with his solicitor unless it appears to the Court *"necessary to explain any evidence which he has given but no others"*. It is an absolute privilege but he can be obliged to disclose privileged

discussions if his earlier evidence has somehow touched on those discussions. There is no exact correspondence between the English common law position and the Singapore statutory position.

It has been accepted by the Singapore Court of Appeal in *Brink's Inc & Anor v Singapore Airlines Ltd & Anor [1998] 2 SLR 657* that the common law of litigation privilege exists in Singapore, stating that *"[i]t is established law that communications between client and third parties attract legal privilege only if the document was obtained for the dominant purpose of obtaining legal advice upon pending or contemplated litigation"*.

Given that the Singapore position is statutory, the question that arises is whether we need to follow the decision of the Court of Appeal in *Three Rivers (No. 5)* or the House of Lords in *Three Rivers (No. 6)*. As Section 128 of the Act applies only to judicial proceedings and not to affidavits, the correct view is probably that the ambit of privilege in Sections 128 to 131 of the Act is confined to Court hearings, and that the common law position on legal privilege is a necessary complement to our law.

As the focus in Section 128 of the Act is on the advocate and solicitor, then whether he obtained the information from employees or ex-employees or the BIU or gave his advice to them, the crucial question to consider when determining if legal privilege applies is whether the communication was *"made or given in the course of and for the purpose of his employment."*

While the House of Lords decision has clarified the law in some respects, an unconsidered application of the Court of Appeal decision in *Three Rivers (No. 5)* would run contrary to the express words and objective of Section 128 of the Act. It remains to be seen the extent to which the UK position will be adopted here.

CONCLUSION

The *Three Rivers* case is significant because it raises practical issues for companies wishing to maintain legal privilege for certain communications. In the event that companies have a problem concerning the employees' conduct in relation to third parties, they should be cautious about commencing an internal inquiry since such an inquiry may fall within the fact situation as in *Waugh v British Railways Board (1980) AC 521*. There, an internal report was required to be disclosed because it was clearly the best evidence and it was not produced for the dominant purpose of litigation but for internal quality control purposes.

Companies should also give careful thought before instructing third parties such as accountants to commence an inquiry, since that might fall within the fact situation in *Price Waterhouse v BCCI Holdings (Luxembourg) SA (1992) BCLC 583*. In this case, Price Waterhouse ("PW") was appointed as a committee by BCCI to investigate problem loans made by BCCI. PW was required to report to BCCI's solicitors to enable them to give legal advice to BCCI, and legal advice privilege was claimed in respect of documents prepared by PW in the course of its investigations. It was held that legal advice privilege did not apply, one of the reasons being that PW was a third party.

Instead, the company should immediately seek lawyers' advice (for legal advice privilege purposes) and it is for the lawyers to direct the inquiry and to obtain documentation from the company or third parties on the basis that litigation is pending or anticipated (for litigation privilege).

While labels such as *"private and confidential"* for legal advice will always be useful to demonstrate the purpose of such documentation, it is not conclusive. Conversely, the absence of such labels may lead to a withdrawal of privilege, such as in the *Brink's* case.

Editor's Note:
"Developments In Legal Privilege" was first presented in a speech by Mr Jimmy Yim, *Senior Counsel*, at the Law Society of Singapore in February this year.

JIMMY YIM, *SENIOR COUNSEL* joined Drew & Napier in 1989, after a four-year stint in Hong Kong with a Paris-based international organisation. He is currently the Managing Director of the Litigation & Dispute Resolution Department. His areas of practice include a broad spectrum of civil and commercial litigation involving contractual and tortious claims, real property claims and intellectual property litigation. He has also been instructed in leading criminal appeals and white-collar criminal cases. He is a "*lawyer's lawyer*" having acted for numerous other lawyers in disciplinary proceedings. Jimmy is recommended by name in the *Asia Pacific Legal 500 2004/ 2005 Edition* in the area of Dispute Resolution. He is also listed in *AsiaLaw Leading Lawyers 2004* in the area of Dispute Resolution.

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The Singapore Budget 2005: Creating Opportunity, Building Community

EXECUTIVE SUMMARY

This article discusses some of the significant tax changes announced in the Singapore Budget 2005 ("Budget"). The changes include, among others, the introduction of the loss carry-back system, incentives for the treatment of Real Estate Investment Trusts to encourage its growth, concessions for specific Islamic products and various refinements aimed at promoting an economy brimming with opportunities and fostering a stronger sense of community among Singaporeans.

INTRODUCTION

The Budget was delivered on 18 February 2005 with the underlying theme of "*Creating Opportunity, Building Community*" in Singapore. While it may not be as exciting as earlier years, its substance merits attention as significant refinements were introduced to sharpen Singapore's international competitiveness in meeting the challenges of globalisation. It contains a comprehensive package of measures and includes specific measures to spur the growth of the services sector and encourage the development of small and medium enterprises. Below are some of the more interesting tax changes announced in the Budget.

PERSONAL TAX

Reduction in personal tax rates

To make Singapore's personal income tax regime more competitive and attractive to foreign talent, the top marginal tax rate for individuals will be reduced in two phases from 22 per cent to 21 per cent in Year of Assessment ("YA") 2006 and to 20 per cent in YA2007 respectively. The marginal tax rates for other income bands will also be correspondingly reduced.

Contribution cap for Supplementary Retirement Scheme ("SRS")

The rules on SRS contribution caps were simplified such that a common absolute cap of 17 months of the prevailing Central Provident Fund ("CPF") wage ceiling will now apply to both employees and the self-employed. This change will take effect from YA2006 and minimises the administrative process pertaining to the SRS.

CPF contribution cap and tax relief cap for self-employed individuals

To encourage self-employed individuals to save for their retirements, the CPF tax relief cap allowable to a self-employed individual will be increased to align itself with the mandatory 17 months (instead of 12 months) of the CPF salary ceiling. The tax relief on voluntary CPF contributions by the self-employed will also be raised to be aligned with the tax relief cap for employees. Both changes will take effect from YA2006.

CORPORATE TAX

Enhancing the Financial and Treasury Centre ("FTC") incentives

In reinforcing the Government's commitment to develop and strengthen Singapore's position as a premier financial centre, the FTC incentives were further refined and expanded. For instance, the removal of the Singapore dollar restriction would enable income derived by an approved FTC from approved qualifying services and activities denominated in Singapore dollars to qualify for the concessionary rate with effect from 18 February 2005.

Tax incentive to facilitate growth of Start-up Fund Managers ("SFM")

To encourage the growth of SFMs in Singapore, a grace period of 12 months will be given to meet the requirement that 80 per cent of the share capital or value of their funds must come from foreign investors. This change took effect from 18 February 2005.

Incentives for Real Estate Investment Trusts ("REITS")

In order to strengthen Singapore's bid to be the preferred location for REIT listings in Asia, three key changes were introduced:

(i) Stamp duty on the instruments of transfer of Singapore's immovable properties into REITs to be listed, or already listed on the Singapore Exchange, will be waived for instruments executed from 18 February 2005 to 17 February 2010.

(ii) Reduction in withholding tax rate from 20 per cent to 10 per cent on distributions out of taxable income made to foreign non-individual investors during the period from 18 February 2005 to 17 February 2010.

(iii) Most of the stringent conditions imposed in obtaining a tax transparency ruling (e.g., the requirement of a letter of indemnity to the Comptroller of Income Tax and the investments made by the REITs must be solely in property and property-related assets) have been removed.

Introduction of Loss Carry-back System

In addition to the existing regime for carry-forward losses, a loss carry-back system will be introduced to provide relief for small businesses in managing their cash-flow problems, especially in a cyclical downturn.

A company will be allowed to carry-back its current year unutilised capital allowances and trade losses to the preceding YA (subject to a maximum of $100,000). The carry-back is granted on a due claim basis and will similarly be subject to the shareholder continuity test and the same business test. This newly introduced loss carry-back system will be available to all businesses, including sole proprietors and partners having partnership losses (except for investment holding companies under Section 10E of the Income Tax Act) and will take effect from YA2006. Implementation details will be released by IRAS shortly.

Removal of double stamp duties and extension of tax exemptions to payouts from Islamic Bonds

To make the Singapore tax system more conducive for transacting in Islamic financial products, the double imposition of stamp duty for Islamic transactions which involve real property will be removed. This tax treatment shall apply to instruments related to the transaction which are executed on or after 1 January 2005.

In addition, the concessionary tax treatment under the Qualifying Debt Securities Scheme ("QDS") is now extended to Islamic Debt Securities. This will apply to the Islamic securities which are QDS issued from 1 January 2005 to 31 December 2008. ("Islamic Debt Securities" mean debt securities where there is endorsement by a *Sharia* council, body or any committee formed to provide guidance on compliance with *Sharia* laws; and the amount payable from such securities are periodic and supported by a regular stream of receipts from underlying assets).

Moreover, the tax exemption on Singapore-sourced investment income has also been extended to the amount payable from Islamic Debt Securities, with effect from 1 January 2005.

OTHERS

Further enhancements were also unveiled for the Approved International Shipping Enterprise ("AISE") Scheme, the Global Trader Programme ("GTP") and the Bonded Warehouse Scheme ("BWS") to expand the scope of the existing incentives. Additional concessions were granted to deepen and broaden capital markets in Singapore. Industry-specific incentives targeted at the tourism and retail sectors were also announced in this Budget. Besides these, other measures include:

> "Overall, many expectations were met by the Budget, given that our tax rates (both personal and corporate) remain to be one of the most competitive in the region."

Stamp duty changes
Stamp duties paid on aborted property transactions will also be refunded (subject to a $50 administrative charge) from 18 February 2005. Further enhancement to stamp duty relief under Section 15(1)(a) of the Stamp Duties Act were also introduced.

Relief for estate duty
A new relief in estate duty for successive deaths within a short span of time was introduced. Depending on the time period between the two deaths, the relief ranges from full 100 per cent relief to 25 per cent (if the two deaths are 24 months' apart) and the assets passed on from the first death to the second death must remain in the same form (as they are on the first death) on the second death. This relief is effective for assets transferred on first deaths occurring on or after 1 January 2006.

Promoting community development and philanthropy
To encourage volunteerism and philanthropy, double deductions will be granted for all donations which carry naming opportunities made to Institutions of Public Character on or after 1 January 2005. The definition of "*charitable purposes*" by which organisations may qualify as charities will be expanded to explicitly include the advancement of health, citizenship, the arts, heritage or science, environmental protection and animal welfare, and a new purpose will be added, the advancement of sport.

In addition, a new tax incentive is proposed for qualifying foreign charitable trusts where tax exemption will be allowed on the specified income derived by the trust.

CONCLUSION

Overall, many expectations were met by the Budget, given that our tax rates (both personal and corporate) remain to be one of the most competitive in the region. The Budget introduced industry-specific measures and incentives (e.g., REITS and Islamic financial products) to spur growth in the particular areas. Many regard the Budget as a fine-tuning budget and others view it as a tidying-up budget with loose ends neatened and addressed accordingly. It is envisaged that the measures announced in the Budget will continue to propel Singapore forward amidst the challenges of globalisation ahead.

TEOH LIAN EE is a Director with the Banking & Corporate Department and heads the Tax, Trusts, Estate Planning & Probate Business Group. Prior to joining Drew & Napier, she worked in the Legal Department of the Inland Revenue Department where her last held post was Assistant Commissioner. Lian Ee specialises in and advises on all aspects of tax law including corporate tax, personal tax, estate duty, property tax, goods and services tax, and stamp duty. She has also represented clients in both civil and criminal litigation against the Revenue. Lian Ee is also involved in setting up trusts and foundations for local and foreign clients for commercial as well as private family purposes. She is listed in Euromoney's *Guide to the World's Leading Tax Lawyers*, Law Bureau Research's *An International Who's Who of Corporate Tax Lawyers* and Practical Law Company's *Global Counsel* as a leading tax lawyer in Singapore.

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KAREN TAN is an International Lawyer with Drew & Napier LLC and is a member of the Tax, Trusts, Estate Planning & Probate Practice Group. Her area of practice includes a wide range of cross-border tax and trust planning issues. She has advised extensively in Malaysian corporate and tax advisory matters and is a regular contributor to *Tax Nasional* (Official Journal of the Malaysian Institute of Taxation). She has presented at both, local and international conferences and her articles have also been published in numerous local and international tax journals including the *Journal of International Taxation* and the *IBFD Asia-Pacific Tax Bulletin*.

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VOLUME 6 ISSUE 4 : JUN05

Insider Trading

EXECUTIVE SUMMARY

Does insider trading relate only to privileged insiders? Is there a breach of the law if there was no intention by the insider to make a profit? Does the prohibition extend to shares in a foreign company or in a private company? How does it affect the due diligence process?

The recent slew of prominent professionals being charged for insider trading has put the spotlight firmly on the broad reach of insider trading legislation in Singapore and, in particular, the Securities and Futures Act ("SFA").

Whilst the focus of the previous regime was on the connection of the insider to the company and the connection between tipper and tippee, the focus of the current regime under the SFA is on the possession of price sensitive information. The present law also expressly provides that it is not necessary for the prosecution to prove that the accused intended to use the inside information or to benefit from doing so.

WHAT IS INSIDER TRADING?

The law prohibits three classes of insider trading conduct:

(i) dealing in *securities* while in possession of *inside information*;

(ii) causing or procuring another person to deal in *securities* while in possession of *inside information*; and

(iii) communication of *inside information* to another person who is likely to deal, or to procure a third person to deal, in those *securities*.

"*Securities*" does not refer only to shares

It is important to remember that "*securities*" does not refer only to shares but also includes, *inter alia*, debentures, rights, options or derivatives in respect of debentures or shares, units in a unit trust and a futures contract on a share or share index.

The Amtek Engineering case decided in March this year illustrates this. There, the founder and former executive chairman of the listed precision parts maker was convicted and fined $50,000 of one count of insider trading under the SFA. He was alleged to have bought Amtek warrants on 3 September 2003 while in possession of undisclosed price sensitive information.

To what extent are private company securities caught?
The prohibitions against dealing or procuring another to deal apply also to shares in an unlisted company. On the other hand, the prohibitions against communicating inside information to another person who is likely to deal, applies only to securities which are traded on a Singapore stock exchange or futures exchange.

The above distinction highlights an issue that arises in connection with the due diligence process, particularly in merger and acquisition transactions where it is normal for information to be compiled and disclosed to potential buyers.

There is a difficulty with this in the case of listed companies because the insider trading laws prohibit the disclosure of any price sensitive information which is not generally available. One way in which this can be dealt with is for the potential buyer to give an undertaking that it will not deal in the relevant securities or otherwise breach any insider trading laws. However, such an undertaking would only assist the parties to the extent that the information disclosed can be publicly announced before any deal is done.

WHAT CONSTITUTES "*INSIDE INFORMATION*"?

"*Inside information*" is information that is not generally available but, if it were generally available, a reasonable person would expect it to have a material effect on the price or value of securities.

Definition of "*information*"
The legislative definition of "*information*" is very wide and may conceivably include matters not specifically relating to a corporation. Under the SFA, "*information*" includes matters relating to the intentions of a person, matters relating to negotiations or proposals with respect to commercial dealings or dealings in securities, information relating to the financial performance of a corporation, information that a person proposes to enter into or had previously entered into transactions or agreements in relation to securities or matters relating to the future.

When is information "*generally available*"?
The SFA provides that information is generally available if:

(i) it is readily observable matter that has been made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities of a kind whose price or value might be affected by the information and, since it was made known, a reasonable period has elapsed for it to be disseminated among such persons; or

(ii) it consists of deductions, conclusions or inferences made or drawn from either or both readily observable matter and information made known in a manner that would, or would be likely to, bring it to the attention of persons who commonly invest in securities.

In the Australian case of *R v. Firns [2001] NSWCCA 191*, the issue arose as to whether a judgment handed down by the Supreme Court of Papua New Guinea was "*readily observable*" in Australia. The New South Wales Court of Appeal had to interpret this phrase and held that "*readily observable matter*" is not limited to perceptibility by persons in Australia as the insider trading legislation is not confined to protecting the interests of resident Australian investors or dealings in Australian shares. It does not matter how many people actually observe the relevant information. Information may be readily observable even though nobody observed it. On the facts, the information embodied in the court judgment was, at the relevant time, available, understandable and accessible to a significant group of the public and was readily observable on that basis even though only in Papua New Guinea.

No local cases have yet dealt with this issue, but in view of the stark similarities between the insider trading provisions under the SFA and those found in Australian legislation, Singapore courts are likely to find the *Firns* case highly persuasive.

WHO CAN BE MADE LIABLE?

"Information-connectedness" and "*person-connectedness*"
The current insider trading laws are predicated on an "*information-based*" approach, unlike the old laws which adopted what was commonly known as the "*connected-person*" approach. In brief, the latter approach assumed that insider trading would be carried out by persons who hold office or are somehow related to a corporation, while the former approach recognises that insider liability need not arise from privileged connections alone. Under the present regime, *anyone* who possesses inside information and transacts in a company's securities, whether connected to the company or not, can be found guilty of insider trading.

> "Under the present regime, *anyone* who possesses inside information and transacts in a company's securities, whether connected to the company or not, can be found guilty of insider trading."

What knowledge is required?
The SFA, however, draws a distinction between connected insiders (i.e., those who are in some way connected to the corporation) and unconnected insiders. A connected insider must know, or ought reasonably to know, that the information he possesses is not generally available and is price sensitive, i.e., either actual or constructive knowledge. In contrast, an unconnected insider needs to actually know the information is non-public and price sensitive, i.e., actual subjective knowledge.

There is also a difference in the method of proof. In the case of a connected insider, once the prosecution establishes that the insider had the information at the material time and the information was not generally available, then it is rebuttably presumed that the insider knew that information was not generally available and that it might have a material effect on the price or value of securities if it were available. This presumption does not apply to unconnected insiders.

The practical effect of the presumption is to shift the burden of proof to the connected insider so that he has to prove that he did not know, or ought not reasonably to have known, that the information he possessed was non-public and price sensitive. In the case of an unconnected insider, the burden in all instances remains on the prosecution since the presumption never applies.

A corporation is attributed with possession of information that comes into the possession of one of its officers in the course of his duties as an officer. A corporation is presumed to know any matter or thing which its officers knows or ought to know because he is an officer of the corporation. Such attribution of knowledge similarly applies to partners of partnerships.

Is intention to deal in securities required?
As opposed to the old insider trading laws which required an intention to use the undisclosed information knowing that such information was price-sensitive and generally unavailable *(PP v. Ng Chee Kheong [1999] 4 SLR 56)*, the current regime under the SFA expressly provides that proof of such an intention is no longer necessary. Furthermore, profit is not a factor in determining whether an offence has been committed.

Most recently, the former executive director and chief financial officer of Asiatravel.com Holdings was fined $60,000 after pleading guilty to a charge of insider trading. On 16 October 2003, she sold 100,000 Asiatravel shares while in possession of undisclosed information relating to the company's negotiations about a tie-up with budget airline Valuair. This case is notable in that unlike the others, she had neither profited nor avoided a loss from the sale of the shares.

EXTRA-TERRITORIAL JURISDICTION OF THE SFA

The SFA provides for the extra-territorial enforcement of the insider trading provisions. This means that even if the offence was committed in relation to a company that is not incorporated in Singapore, the fact that the insider trading took place in Singapore or that the effects of the trade are felt here makes the insider liable. The law also applies to offences that are committed outside Singapore but which relate to companies which carry on business here or which are listed on the SGX.

In the first case to be tried under the new insider trading laws last year, three senior employees of the Government of Singapore Investment Corporation ("GIC") were found guilty of insider trading by using material, non-public and price-sensitive information about a proposed share offering by Sumitomo Mitsui Financial Group ("SMFG") to sell to GIC shares in SMFG. By selling the Japanese shares before the proposed share issue was announced, a possible $710,000 loss to GIC was avoided as the price of SMFG shares fell after the news was made public. This case is also notable for being the first successful action involving cross-border insider trading. The three were fined a total of $715,000 under the civil penalty regime and each was suspended without pay for between three and six months even though none had personally benefited from the transactions.

PENALTIES AND CONSEQUENCES OF INSIDER TRADING

A person who is found guilty of insider trading faces criminal liability, civil penalty and civil liability.

Criminal penalty
Anyone found guilty of insider trading is liable to a fine of up to $250,000 or imprisonment for up to seven years, or

both. No criminal proceedings may be instituted in respect of a contravention after an order is made for payment of a civil penalty in respect of that contravention.

Civil penalty

The new insider trading regime gives the Monetary Authority of Singapore ("MAS") the option to bring an action for a civil penalty in respect of a contravention of the insider dealing provisions instead of bringing criminal proceedings, subject to the consent of the Public Prosecutor.

The standard of proof in such an action is lower than for criminal proceedings. The court need only be satisfied on a balance of probabilities rather than beyond reasonable doubt.

There are two levels of penalties. Where the person contravening the provisions gained a profit or avoided a loss, the penalties ordered can be set at a sum of up to three times the amount of profit gained or loss avoided, or a sum equal to $50,000 for a natural person and $100,000 for a corporation, whichever is greater. Where the person contravening the provisions did not gain a profit or avoid a loss, a civil penalty of between $50,000 to $2 million may be ordered.

Provision is made for settlement by court order (if the Public Prosecutor consents) or by agreement between the MAS and the person against whom a civil penalty action has been brought. The civil penalty liability can be settled with or without the defendant admitting liability. All civil penalties are payable to MAS. A civil penalty action cannot be commenced if there has been a criminal action resulting in a conviction or acquittal (except for an acquittal by reason of withdrawal of the charge) or if a criminal action is continuing.

Civil liability

In addition to criminal or civil actions brought by MAS, an insider may face potential civil suits initiated by the corporation affected by the insider dealing and any person who dealt contemporaneously with the contravention and suffered a loss.

CONCLUSION

In summary, under the current regime, any person who possesses inside information and trades in the securities of a corporation may be prosecuted for insider trading. He need not be a person connected with the corporation and need not have transacted the securities with a view to making a profit.

Additionally, the law no longer requires the prosecution to prove that such person intended to use the inside information knowing that it was inside information. The extraterritorial reach of the SFA also means that insider trading can extend to acts relating to foreign companies committed in Singapore or which has an effect in Singapore or, acts relating to Singapore companies committed overseas. The penalties for breach of the insider trading laws may now be criminal or civil and may, additionally, involve civil liability.

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Islamic Banking: Basic Principles And Common Financial Products

EXECUTIVE SUMMARY

In recent years, Islamic banking has attracted an increasing amount of global attention, and demand for Islamic financial products has been growing. In this article, we introduce the basic principles of Islamic banking, and examine some common Islamic financial products.

INTRODUCTION

Islamic banking has, until recent times, had dominant presence principally in the Islamic economies. It is only in recent years that the contemporary practice of Islamic banking and finance has received global attention as a strong performer and an emerging growth market. According to the Report of the Islamic Capital Market Task Force of the International Organisation of Securities Commissions, there are currently over 265 Islamic banks with a market capitalisation of more than US$13 billion. Total assets are estimated at over US$262 billion with financial investments above US$400 billion. Deposits in Islamic banks are estimated to be over US$202 billion worldwide and the average annual growth rate of the Islamic banking industry range between 10 per cent and 20 per cent over the past decade.

Against this backdrop, financial institutions around the world have been developing separate Islamic banking units to cater to this segment of the market. More established banking institutions like Citigroup and Standard Chartered Bank have already established their presence in the lucrative Islamic economies. For example, Citigroup's Islamic banking arm, based in Bahrain, is almost a decade old.

Consistent with Singapore's aspirations to be an integral and indispensable centre for a broad range of full-service financial services, Singapore has now joined in the worldwide quest to become a centre for Islamic financial services, with the provision of Islamic banking and financial services.

Mr Ong Chong Tee, deputy managing director of the Monetary Authority of Singapore ("MAS"), expressed Singapore's confidence in the growth of Islamic financial services, when he opined that: "We [MAS] believe that there is some momentum for Islamic financial services to become increasingly a globally recognised and accepted form of financing".

THE ISLAMIC BANKING SYSTEM

The Islamic financial system aims to eliminate exploitation and to establish a just society by the application of *Sharia* or Islamic law to the operations of financial institutions.

Islamic law draws from four main sources: *Koran* (the holy book of Islam where God's revelations were recorded), *sunna* (traditions based on the life of Prophet Muhammad which provides the model behaviour), *qiyas* (juristic reasoning by analogy) and *ijma* (consensus of Muslim scholars). Islamic law contains guidelines which must be complied with in structuring financial transactions.

The basic guidelines applicable to the conduct of economic activities under *Sharia* laws are as follows:

(i) not to charge or pay interest (*riba*), or, prohibition against interest-based lending;
(ii) not to take excessive risk (*gharar*);
(iii) recognise that money is not a commodity; and
(iv) recognise that money has no time value, that is to say, money does not change in value as time passes.

FEATURES OF ISLAMIC ECONOMICS

Halal versus *Haram*

While an individual has the right to seek economic well-being, Islam makes a distinction between what is *halal* (lawful) and what is *haram* (forbidden) in pursuit of such

economic activity. In broad terms, Islam forbids all forms of economic activity which are morally or socially injurious.

Allocation of wealth
While acknowledging an individual's right to ownership of wealth that is legitimately acquired, Islam makes it obligatory for an individual to spend his wealth judiciously and not to hoard it, keep it idle or to squander it.

***Zakat* (Charity)**
While allowing an individual to retain surplus wealth, Islam seeks to reduce such margins of surplus for the well-being of the community as a whole and to achieve an equitable distribution of wealth, in particular to the destitute and deprived sections of society, by participation in the process of *Zakat* (charity).

Inheritance
Islam seeks to prevent the accumulation of wealth in a few hands to the detriment of society as a whole by the application of the principles of the law of inheritance.

Treatment of *riba*
The basic tenet of Islamic financing is the prohibition of the payment and receipt of *riba* (usury) in all forms of transaction. The literal interpretation of *riba* from Arabic language is "*increase or excess*". *Riba* has been defined by a noted scholar of Islamic banking as simply a "*loan with the condition that the borrower will return to the lender more than and better than the quantity borrowed*".

Prohibition against *gharar*
Another key feature of Islamic finance is the prohibition against *gharar*, which is commonly referred to as a lack of specificity in the terms of a financial contract. For *gharar* to result in legal consequences, such *gharar* must be excessive and not trivial, and it must pertain to the subject matter of the sale/transaction in question.

COMMON ISLAMIC FINANCIAL PRODUCTS

***Al Wadiah* (Savings and current account)**
Al Wadiah is an account that operates in accordance with Sharia principles. The bank uses the banking concept known as *"Al Wadiah Yad Dhamanah"* or guaranteed custody. The core of this arrangement is that the bank is authorised to use its customer deposits under a guarantee to return it to the customer upon demand. The customer will periodically obtain a share of the profits earned by the bank when it utilises the customer's deposit to invest in business ventures. The bank determines at its absolute discretion the portion of profit to be shared with the customer. In this way, the customer enjoys interest-free safekeeping services for the deposit in question, yet gets rewarded a profit-sharing portion which is an alternative to interest that the customer would have received from a conventional bank deposit.

***Murabaha* (Financing on a "cost-plus" basis)**
A *murabaha* is a sale contract where the financial institution acts as a middleman and purchases goods requested by its customer. The financial institution subsequently sells the goods to the customer at the purchase cost plus a profit. The customer pays for the goods over a stated period through instalments. In the event of a default, the customer is only liable to the financial institution for the contracted sale price.

A key component of *murabaha* is the requirement that the financial institution must own the goods before it transfers title to its customer. This is because the financial institution assumes some risks to justify its profit making, making the profit more than just in the form of disguised interest. For the transaction to be valid, there must be an actual contract of sale.

***Ijara* (Lease financing)**
Ijara is a form of leasing arrangement whereby the financial institution purchases an asset and then leases the asset to the customer. This form of lease financing is typically used for the financing of equipment.

The financial institution will own the relevant asset throughout the contracted lease period and the customer pays the financial institution a rental fee. The customer may purchase the asset from the financial institution either during or at the end of the lease period. There is no legal requirement for the customer to exercise this right to purchase.

***Musharaka* (Partnership arrangement)**
Musharaka is similar to a joint venture. *Musharaka* is typically a business undertaking where the financial institution provides a portion of capital required by its customer, with the understanding that the financial institution and the customer will share the profits in accordance with a pre-agreed ratio. The ratio is usually proportionate to the amount invested by each party, which is agreed upon before the transaction is consummated. It should be noted that the profit sharing portion is negotiable by contract and does not necessarily reflect the ratio of the equity participation of parties. Similarly, any losses are also shared in the agreed proportion of the capital contribution. Although the financial institution has the right to participate in the management of the project, it may also waive such rights.

When used in home financing, the customer typically partners with the financial institution to purchase a

property. The portion of the property owned by the bank is rented to the customer. Rental is typically based on a mutually agreed fair market value. The customer then pays to the financial institution rental as well as additional amounts to increase the share of the customer in the property and correspondingly reduce the share of the financial institution over time.

Takaful **(Islamic insurance)**
Takaful, in the broad sense, is a scheme of mutual support which offers insurance to people against the dangers of falling into unexpected and dire need. *Takaful* is commonly perceived as cooperative insurance, where members contribute a certain sum of money to a common pool. The purpose of this system is not to profit from the venture but to uphold the principle of *"bear ye one another's burden"*.

The principles of *Takaful* insurance are as follows:
(i) policyholders co-operate among themselves for their common good;
(ii) every policyholder pays his subscription to help those who are in need of assistance;
(iii) losses are divided and liabilities spread according to the community pooling system; and
(vi) it does not derive advantage at the expense of others.

PROPOSED REGULATION OF ISLAMIC BANKING UNITS

The MAS has recently commented that the preferred approach in the regulation of Islamic banking units is to refine existing regulations to accommodate the Islamic banking regime, rather than to establish a separate and distinct financial system for the supervision of Islamic banking units. This approach is similar to the approach adopted by the Financial Services Authority ("FSA") in the United Kingdom.

The MAS has indicated that it is open to reputable Islamic banks setting up in Singapore, provided such banks meet Singapore's prudential requirements. In other words, the MAS will treat applications from Islamic institutions no differently from any other, bearing in mind that there has to be a level playing field for all financial institutions operating in Singapore. However, it is foreseeable that, in order for the same rules to apply to Islamic banks, the Singapore regulatory requirements will need to be fine-tuned to suit the particular demands of an Islamic bank.

The Singapore budget has also recently achieved two milestones to make the Singapore tax system more conducive for the growth of Islamic financial products, by (i) the removal of double imposition of stamp duties incurred in Islamic transactions which involve real estate, and (ii) to accord payouts from Islamic bonds the same concessionary tax treatment as that currently granted to interest arising from conventional financing.

CONCLUSION

Indeed, the emergence of Islamic banking units and the development of Islamic financial services will be an area of development which will be keenly observed in Singapore.

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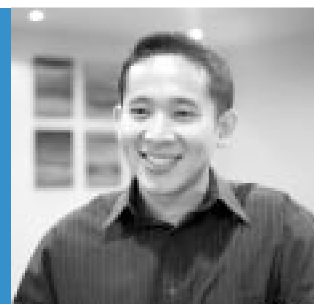

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