

# LEGAL UPDATE

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We are pleased to bring you notable legal developments that have taken place in the first three-quarters of this year. Drew & Napier LLC is proud to have played a lead role in many of these developments.

With global attention focused on good corporate governance after the spate of accounting scandals that have rocked investor confidence worldwide, the local case of *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng* demonstrates the firm stance taken against corporate fraud. The Singapore Court in this case demonstrated a savvy business sense when it struck a balance between judicial interference and the need to preserve the integrity and reputation of local companies. The case, which was prosecuted by our very own Cavinder Bull and his team, earned notable praise from VK Rajah JC when he cited Cavinder as a "*persuasive advocate*" who "*prosecuted a factually complex and somewhat emotively charged case with conspicuous fairness*".

We also report on other cases in which our lawyers have represented and won, namely, the recent Court of Appeal decision on product liability in the Slim 10 case; a decision on judicial management; as well as an IPOS

decision concerning an opposition of a trade mark application by the domain owner.

The introduction of a new piece of legislation designed to regulate business trusts in Singapore has created an additional structure for investments offered to the public. We bring you a sneak preview of the features of this recent legislation.

In our ongoing efforts to deliver up-to-date information in a user-friendly manner, we are pleased to introduce two new features in this issue of Legal Update: (i) an Executive Summary at the beginning of each article providing you with a brief synopsis and the highlights of the article, and (ii) a contents page (on page 2) containing the keywords of our line-up of articles.

We hope you find these features useful.

We will be back in December with more updates.

**Directors**  
**Drew & Napier LLC**

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# Corporate Fraud And Creative Accounting

## EXECUTIVE SUMMARY

Following a two-month trial, the High Court granted judgment in favour of the Vita Health group of companies against their former managing director (“the Defendant”) for breaches of fiduciary duties and breaches of contractual warranties.

The Court found that the Defendant had created and maintained false receivables in the books in order to portray Vita Health’s accounts in a better light and to bait and reel in investors. The Defendant was subsequently ordered to pay damages and to return hundreds of thousands of shares he had obtained from outside investors.

In his written judgment, the learned VK Rajah JC provided significant guidance on the business judgment rule, the damages payable in cases of fraudulent conduct and the role of expert witnesses in investigating frauds.

## THE SCHEME REVEALED

The Vita Health companies were a home grown business owned by a Singaporean family. The Defendant, the eldest son in the family, was the majority shareholder and by 1997 was its controlling mind. It was the Defendant who took Vita Health into the region, establishing apparently profitable business in the Indonesian and Philippine markets.

As the Judicial Commissioner noted, “*These were heady times. A shoestring and somewhat pedestrian family operation had evolved into a regional business all because of his vision, efforts and drive to expand Vita Health’s business horizons. He harboured visions of building a pan-Asian business anchored in Singapore. To do this, he would have to attract investors to inject substantial capital into the family business*”. This he achieved in 1997. Notably, Vita Health’s accounts reflected a dramatic increase in receivables from just \$2.5 million in 1996 to \$10.2 million in 1997.

The outside investors had been persuaded that Vita Health could achieve a stock exchange listing. The Defendant achieved this by selling the entire Vita Health business to Vita Life Sciences (“VLS”), a company listed on the Australian Stock Exchange. The Defendant even became the managing director of VLS through this “*backdoor listing*”.

However, the foundation of Vita Health’s regional business was flawed. The books and accounts of Vita Health showed millions of dollars of receivables due from entities called PT Vitaton and Vita Health Laboratories Philippines Inc (“VHLP”). These entities were portrayed as independent third parties but, at trial, they were exposed to be far from independent.

The Court found that PT Vitaton did not conduct any business at all. Sales to PT Vitaton were a charade. Vita Health shipped goods to PT Vitaton but reflected this as a sale to a third party. The Court found that this was done in order to portray Vita Health’s accounts in better light to bait, reel in and then reassure outside investors of Vita Health’s overall financial health and prospects.

The Defendant had a similar *modus operandi* in the Philippines with VHLP. It was portrayed by the Defendant as an independent third party entity but the Court found that VHLP was a *de facto* subsidiary of Vita Health. Inter company “*debts*” were reflected in Vita Health’s accounts as sales and booked as third party receivables at all material times. This, the Court said, was “*nothing short of a deception*”.

Not surprisingly, the Court found that the Defendant had breached his fiduciary duties and was liable for damages: “*Between 1996 and 1998, he orchestrated a dizzying ascending spiral of impressive “sales” culminating in the entry of corresponding receivables from entities in the Philippines and Indonesia. The initial concealments led in turn to a smokescreen of creative accounting with corrosive results*”.

The Defendant was also in breach of a warranty that he had given VLS when he sold his shares in Vita Health to VLS. It was a warranty that the receivables were “good debts” and would produce “the full amount of the debts without deduction”. The Court imposed damages on the Defendant for this breach as well.

At the end of the day, the Court awarded the Plaintiffs \$3.4 million in damages and ordered the cancellation of hundreds of thousands of bonus shares issued to the Defendant on the basis of falsified financial performance.

### DIRECTORS' DUTIES - THE BUSINESS JUDGMENT RULE

While the Court ultimately found that the Defendant had breached his fiduciary duties, the starting point for the Court's analysis was the business judgment rule and the traditional reluctance of courts to interfere with commercial decisions made by directors.

The business judgment rule is recognised in various jurisdictions. In English law, judicial reluctance to second guess directorial decisions dates back to *Charitable Corp v Sutton* 2 Atk, 400, 404 (1742) and in American jurisprudence to *Percy v Millaudon* 8 Mart (n.s.) 68 (La. 1829).

In American jurisprudence, the rule has been formulated as “a presumption that in making a business decision, the directors of a corporation acted on a informed basis, in good faith and in the honest belief that the action taken was in the best interest of the company”. The effect of the rule is that the “presumption shields corporate decision-makers and their decisions from judicial second-guessing where the elements of the rule are present: (i) a business decision (ii) disinterestedness (iii) due care (iv) good faith and (v) according to some courts and commentators, no abuse of discretion or waste of corporate assets”: see *The Business Judgment Rule - Fiduciary Duties of Corporate Directors*, by Dennis J. Block, Nancy E. Barton and Stephen A. Radin, 3rd Edition at pp 4, 8 and 12.

The Court expressly approved the rationale of the business judgment rule which recognises that it is the role of the marketplace, and not the court, to censure directors who have in good faith made incorrect commercial decisions since excessive legal interference would invariably dampen or stifle the appetite for commercial risk and entrepreneurship. However, a balance has to be struck and the Court emphasised that it is of great importance that the “ordinary norms of commercial morality” be observed.

Beyond the need for honesty, the Court also emphasised that the standard of diligence required of a Director

continues to evolve: “A director cannot now be viewed as a mere sentinel who may occasionally doze off at his post...Directors ought to have an inquiring, though not necessarily suspicious, mind in discharging their supervisory functions”.

The Judicial Commissioner also cited *Re Barings plc (No 5)* [2001] BCLC 433 which departed from the traditional standard that directors were allowed to delegate their powers and trust to subordinates save in the instances which would excite the suspicion of a reasonable man. Instead, while directors are entitled to delegate functions to management, this does not absolve a director from the duty to supervise the discharge of the delegated functions.

### THE DUTIES OF AN EXPERT WITNESS

In litigation which involves complex issues, such as accounting improprieties in this instance, an expert witness' evidence is of great assistance to the Court. In order to ensure that this evidence is objective and unbiased, Order 40A rule 2 of the Rules of Court (Cap 322 R5) requires that the expert expressly acknowledge and accept that he owes a higher duty to the Court and not to the party that remunerates him.

The Court pointed out that an accountant expert discharges a unique role as he may be called to fulfil at least three roles in connection to litigation: (i) to act as an independent expert providing an opinion to the Court; (ii) to act as a consultant assisting in the preparation of a litigant's case; and (iii) to act in a supporting administrative role in managing the documentary information required for the litigation.

When the accountant acts as a consultant, he is assisting in the advocacy of the client's case which is a role that is inconsistent with an expert's need for independence. As such, when an accountant is hired in the initial investigative stage and then proceeds to appear as an expert in court proceedings, his evidence may be coloured by the different roles he has played.

However, the Court recognised that engaging two separate experts would not be practical and stressed the need to apprise the accountant, immediately upon his appointment, of his overriding obligation to the Court. The accounting expert should state in his report that he was aware of this obligation from the start of the initial investigative phase. He should also state in his report any problems faced and particularise in the report any reservations or qualifications he has about the reliability of facts presented or assumptions made.

## QUANTIFYING DAMAGES FOR BREACH OF FIDUCIARY DUTY

In quantifying the damages due to Vita Health, the Court adopted a broad brush approach. Vita Health was awarded the full amount of the false receivables which the Defendant had caused to be entered into their books less the actual sales that took place in the territories.

In reaching this decision, the Judicial Commissioner relied on *Doyle v Olby [1969] 2 QB 158* for the principle that a fraudulent party is responsible for all the consequences that directly result from the fraud. The Court also stressed the importance of deterrence in assessing damages for fraud.

## CONCLUSION

The Court concluded by stressing that “*Singapore companies wear the badge of integrity and good governance when they transact with foreign entities*

*... Good governance is synonymous with accountability. When matters such as those disclosed in these proceeding are drawn to the court’s attention, severe excoriation can be expected”.*

This case illustrates the firm stance that Singapore Courts take against corporate fraud. While being realistic about the standards which company directors have to meet in the discharge of their duties, the Court also demonstrated that it was willing to be firm in penalising a fraudulent party for “*conducting himself like a corporate tightrope walker without a balancing pole of integrity*”.

### Editor’s Note:

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Case: *Vita Health Laboratories Pte Ltd and Others v Pang Seng Meng [2004] SGHC 158*

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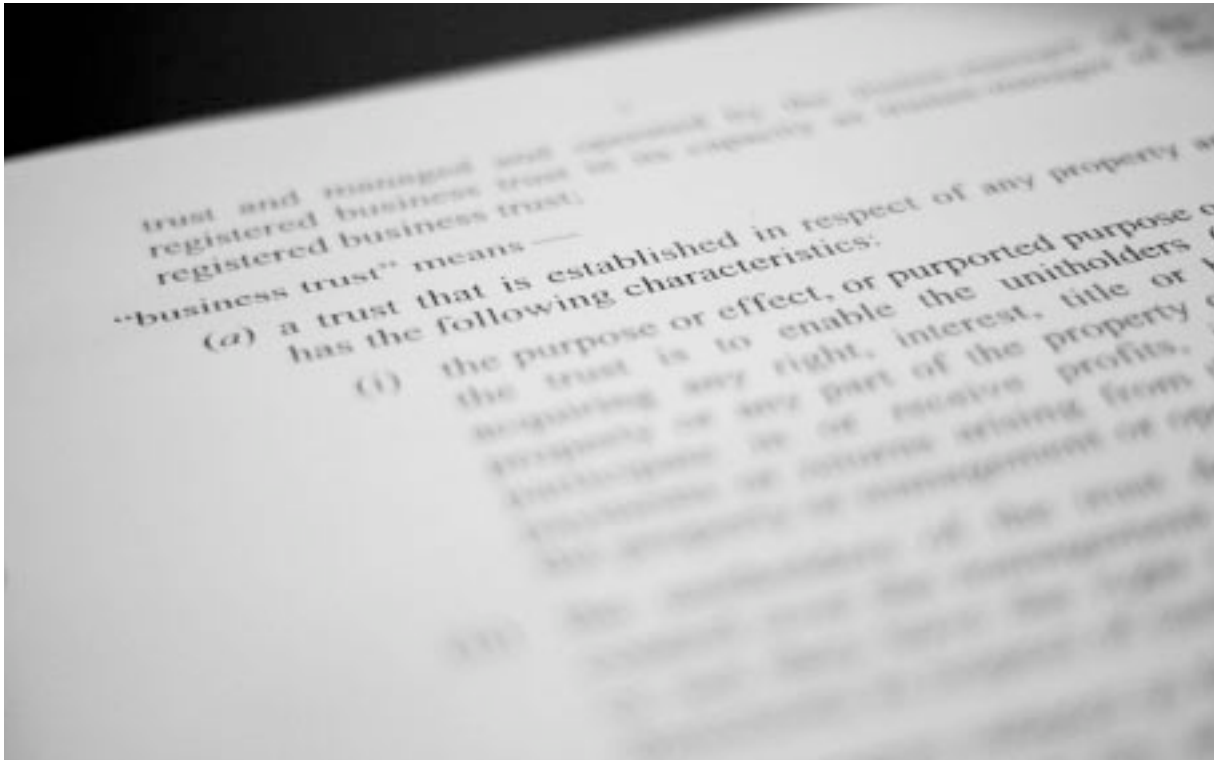


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# Navigating The New Business Trusts Bill



## EXECUTIVE SUMMARY

The Business Trusts Bill (the “BT Bill”), a new piece of legislation which regulates the governance of registered business trusts (the “BTs”), was moved for first reading in the Singapore Parliament on 20 July 2004. This article looks at significant aspects of the BT Bill and the use of BTs as a legal vehicle in Singapore.

## INTRODUCTION

BTs are business enterprises, set up as a trust structure, which actively undertake business operations. A BT does not possess the hallmark of a corporate structure as it is not a legal entity. It is constituted by a trust deed under which the trustee has legal ownership of the assets of the BT and manages the business for the benefit of the beneficiaries under the BT. A BT is therefore a hybrid structure with elements of trusts and companies.

## THE BUSINESS TRUSTS BILL

The BT Bill is the culmination of a public consultation exercise initiated by the Monetary Authority of Singapore

(the “MAS”) to seek public feedback on the proposed regulatory framework for BTs.

Traditional unit trusts take a dual-responsibility structure in which the business is managed by a manager while the interests of unitholders is safeguarded by a trustee. The BT Bill proposes that BTs be conducted by a single responsible entity, namely the trustee-manager (the “TM”).

To address the conflict of duties inherent in having the TM as a single responsible entity, the BT Bill contains a number of provisions that seek to achieve the dual objectives of safeguarding the interests of unitholders in the BT, as well as to clearly establish the duties and accountability of TMs and their directors to the BT and unitholders.

The following are some of the salient features of the BT Bill:

- (i) only BTs which are offered to the retail public in Singapore need to be registered under Section 4. BTs offered only to accredited and institutional

investors may be registered under the same section on a voluntary basis;

- (ii) the TM, a single responsible company incorporated in Singapore (not being an exempt private company), will conduct the business of the registered BT. Section 10 imposes a statutory duty on the TM to “*act honestly and exercise reasonable diligence*” by acting in the best interests of unitholders as a whole and giving priority to the interests of unitholders over its own interests in the event of a conflict of interest. To limit the contagion effects on other BTs managed by the same TM, a TM may only act for a single BT;
- (iii) the level of independence of the board of TMs is statutorily prescribed. There is a statutory requirement for an audit committee to be established;
- (iv) the liability of unitholders under a BT is limited to the amount which the unitholder has expressly agreed to contribute to the BT;
- (v) Section 28 prescribes the matters to be set out in the trust deed constituting the BT. Other than amendments to comply with any written laws or changes in laws in Singapore, amendments to the trust deed are also required to be approved by special resolution of the unitholders;
- (vi) although the BT Bill does not prescribe the proceedings for liquidation of BTs nor the priority ranking of creditors’ claims, the Court is given the power to give directions on the liquidation of BTs;
- (vii) the BT Bill contains provisions regulating the convening of annual general meetings and extraordinary general meetings of a BT; and
- (viii) the BT Bill also confers on unitholders the right to take civil action against the TM for loss or damage arising from the TM’s conduct. Any unitholder or debenture holder of the BT may also apply to Court on grounds of oppression or prejudice. The Court is given broad powers to adjudicate on the oppression or prejudice complained of, including the power to regulate the business affairs of the TM in relation to the BT and to authorise the winding-up of the BT.

### CONSEQUENTIAL AMENDMENTS: THE SECURITIES AND FUTURES (AMENDMENT) BILL

The Securities and Futures (Amendment) Bill (the “SF(A) Bill”) will amend the Securities and Futures Act, Cap 289 (“the SFA”) to provide for regulation of offers of units and derivatives of units in BTs, the take-over proceedings applicable to BTs and offers of property trusts.

The offer of units and derivatives of units in BTs will be regulated in the same way as offers of shares in corporations under the SFA.

The SF(A) Bill also seeks to amend the definition of “*take-over*” such that take-over offers of BTs are subject to the SFA and the Singapore Code on Take-overs and Mergers (the “Take-over Code”). In addition, in view of the policy to regulate the take-over of BTs, the Take-over Code will be reviewed to accommodate the BT structure.

### USE OF BTs AS A LEGAL VEHICLE

#### Active undertaking of business operations

Unlike collective investment schemes which engage in passive investments, BTs are essentially businesses set up in the form of a trust which actively carry out business activities within the scope of the relevant trust deed constituting the BT.

#### Ability to pay dividends from cash profits

One of the advantages of the BT structure is its ability to pay dividends out of cash profits. This is in contradistinction with the corporate structure where a company may only pay dividends out of its accounting profits. Accordingly, the BT structure is useful in businesses with stable growth and a high cashflow.

#### Freedom to contract for terms and conditions applicable to the BT

As BTs are commercial enterprises created by the act of parties and governed by the terms of the trust deed constituting the BT, the BT as a legal vehicle generally gives parties (subject to the restrictions prescribed under the BT Bill and the law in general) the freedom to contract for the terms and conditions applicable to the BT. Although Section 28 of the BT Bill prescribes certain terms and conditions which the trust deed constituting a BT must provide, these requirements are, in any case, provisions which are commonly found in trust deeds of this nature.

#### Freedom from some of the limitations imposed by law on companies

By way of a broad overview of the provisions of the BT Bill and the Companies Act, Cap 50 (the “Companies Act”), it can be said that BTs are generally subject to a less voluminous body of legislation and therefore enjoy

freedom from some of the restrictions and regulations generally imposed by law on companies. For example, unlike the restriction applicable to companies under Section 160 of the Companies Act, the BT Bill does not contain a corresponding statutory requirement for the disposal of the whole or substantially the whole of the BT's undertaking or property to be approved by unitholders.

#### Option for real estate investment trusts ("REITs") to be regulated as a BT

BTs can be used for property trusts or, as it is more commonly known, real estate investment trusts ("REITs"). Given the market interest REITs have generated in recent years, it is worth a special mention here.

It is MAS' intention that existing REITs (which invest only in real estate and real estate-related assets specified in the Code on Collective Investment Schemes (the "Code") and are listed on a securities exchange) be given the option to either continue to be regulated under Part XIII of the collective investment scheme regime of the SFA (the "CIS Regime") or be structured and regulated as a BT.

Therefore, property trusts that opt for the CIS Regime will be regulated under the SFA (including the requirement to appoint an approved manager and trustee) and be subject

to the investment guidelines (including the borrowing limits and valuation rules) and requirements of the Code. However, if the property trust should opt to be regulated as a BT under the Business Trusts Act, then it would be required to be registered and would need to be appointed a TM.

In order to avoid investor confusion, the BT Bill provides that a property trust regulated as a BT will be prohibited from being referred to as a "real estate investment trust".

#### CONCLUSION

The initiative to introduce a regulatory regime for BTs will create a new additional structure for investments offered to the public and will contribute towards a more sophisticated and vibrant capital market in Singapore.

#### Editor's Note:

The BT Bill was moved for a 2nd reading in Parliament on 1 September 2004 and was passed on the same day.

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# Slim 10: The Court Of Appeal Decision

## EXECUTIVE SUMMARY

Following the Court of Appeal ruling in the Slim 10 case, it is now clear that a distributor or wholesaler owes a duty to the ultimate consumer to take reasonable care in ensuring the safety of its products and that despite the company being a separate legal entity, a director may be held personally liable for its negligent acts.

This article is an update on our earlier report (December 2003 issue) of the High Court decision in the Slim 10 saga.

## THE BRIEF FACTS

Sometime in December 2002, MediaCorp artiste Andrea de Cruz purchased and consumed a drug advertised to promote weight loss called “Slim 10”. Following from that, Andrea suffered drug-induced massive hepatocellular neurosis (or massive liver cell death) with impending liver failure. A timely liver transplant saved her life but she is now on lifelong medication to prevent rejection of the transplanted liver.

## THE ACTION IN THE HIGH COURT

In her action in the High Court, Andrea sued to recover damages for the pain and suffering which she had and will continue to endure and the medical expenses which she had and will continue to incur.

At the end of a 28-day trial, the High Court held the following liable:

- (i) Health Biz Pte Ltd;
- (ii) Semon Liu; and
- (iii) TV Media Pte Ltd (“TV Media”).

These parties were ordered to pay Andrea, jointly and severally, approximately \$900,000 in damages.

## THE APPEAL

Dissatisfied with the decision of the High Court, TV Media and Liu appealed to the Court of Appeal. Health Biz did not appeal.

The two broad issues before the Court of Appeal were:

- (i) the liability of each Appellant; and
- (ii) the quantum of damages payable.

### TV Media’s liability

The High Court had found that TV Media was negligent in representing in its advertisements that Slim 10 was safe and effective.

The Court of Appeal upheld the High Court’s finding. TV Media knew that unmarked packages of Slim 10 were being distributed to MediaCorp artistes (such as Andrea) for product testing. By virtue of its public representations on Slim 10’s safety, TV Media had placed itself in a proximate relationship to buyers of Slim 10. Accordingly, it owed a duty of care to such persons.

In ruling that TV Media breached this duty of care, the Honourable Chief Justice Yong Pung How stated:

*“TV Media knew that Semon had no experience in the medical or pharmaceutical industry and that this was his first foray into Chinese proprietary medicine. [It] did not conduct any independent checks on Semon or on Health Biz...[it] omitted to conduct any independent checks on the Chinese manufacturer...Before distributing Slim 10 in Singapore, TV Media did not consult any expert herbalists or any legal experts...”*

*We do not think that a reasonable distributor would have been so slipshod in its approach to marketing a new drug... On the contrary, a reasonable distributor would at least have taken steps to deal with a reputable supplier and, if it knew that the importer had no experience with such products, would have done more to ensure the safety of the product”.*

Accordingly, the Court of Appeal upheld the High Court’s finding and found TV Media liable.



### Semon Liu's liability

The High Court found Liu personally liable for authorising, directing and/or procuring Health Biz's negligent importation of Slim 10.

Liu appealed against this finding. His main grouse was that this finding amounted to an indictment on all small or one-man firms where the directors are often dominant and linked to the firm's operations. The Court of Appeal was not persuaded by Liu's argument.

In dismissing Liu's appeal, Yong CJ acknowledged the doctrine of separate legal entity and the fact that the "*commission of a tort by a company does not automatically prove that the directors who manage its affairs are also guilty of the tort*". However, His Honour found that in this case, the evidence pointed to Liu's "*overwhelming personal involvement in the importation of Slim 10*". His Honour stated:

*"... it is patently clear to us that Semon, and Semon alone, had absolute control of Health Biz... Semon was the person directing its negligent acts or omissions. We find no reason to overturn the judge's finding that nothing was done without Semon's knowledge, and that Semon's involvement in the negligence of Health Biz was not merely very great, but total".*

### Quantum of damages

TV Media and Liu were partially successful in their appeal against the quantum of damages awarded. The Court of Appeal reduced the amount of damages awarded for pain and suffering from \$250,000.00 to \$150,000.00. The multiplier for calculating Andrea's future medical expenses was also reduced from 34 years to 17 years.

### CONCLUSION: SIGNIFICANCE OF THE COURT OF APPEAL RULING

With the final word by the Court of Appeal, it is now clear that distributors and wholesalers may be held liable to the ultimate consumer if they fail to exercise reasonable care. The exercise of reasonable care involves, at the very least, steps taken to deal with a reputable and competent supplier or, if the supplier or importer has no experience in the product, comprehensive measures taken to ensure the safety of the product.

As to the personal liability of directors, a company director may be held personally liable for a company's negligent acts if his involvement in the acts can be described as "*overwhelming*" or "*total*". This is a question of degree and is entirely dependent on the facts of each case. A director may be liable for a company's negligent acts of commission as well as its negligent acts of omission. There is no distinction between the two.

“ This landmark ruling from the highest court in Singapore leaves no room for doubt that it will have far-reaching impact in the conduct of consumer relations from now on. Suppliers and importers now have a clearly defined duty of care to the ultimate consumer and any breaches will surely carry consequences. ”

In respect of damages, the Court of Appeal’s decision sets the benchmark for future cases involving similar injuries and plaintiffs of similar age.

This landmark ruling from the highest court in Singapore leaves no room for doubt that it will have far-reaching impact in the conduct of consumer relations from now on. Suppliers and importers now have a clearly defined duty of care to the ultimate consumer and any breaches will surely carry consequences.

**Editor’s Note:**

Andrea De Cruz was represented by lead counsel R Raj Singam, Wendell Wong and Tan Siu Lin.

*Case : TV Media Pte Ltd v De Cruz Andrea Heidi and Another Appeal [2004] SGCA 29*

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# Judicial Management In Spite Of Majority Creditor Opposition

## EXECUTIVE SUMMARY

The Singapore High Court was recently faced with a creditor's petition to place a debtor company under judicial management. The petition was opposed by the debtor company and more than three-quarters of its creditors. The decision of the Court in this case reaffirmed the position that notwithstanding majority creditors' opposition (or support, as the case may be), the ultimate discretion whether to place a company under judicial management lies with the Court, and the Court will take into account all circumstances of the case.

## INTRODUCTION

It is not often that a creditor petitions the Court to appoint judicial managers over a company. Most petitions are usually filed by the debtor company or its directors. Additionally, it is rare for a petition to succeed when the majority of the company's creditors oppose the granting of such an order.

This occurred in the recent petition of Leun Wah Electric Co (Private) Ltd (the "Petitioner") to place Neo Corporation Pte Ltd ("the Company") under judicial management.

## FACTS

The Company is a leading construction company in Singapore. The Petitioner was a sub-contractor and a creditor of the Company for S\$1,700,000. Despite several demands for payment of its outstanding bills, the Company failed to pay the Petitioner. The Petitioner then petitioned to place the Company under judicial management.

One of the main reasons the Petitioner applied to place the Company under judicial management was for the judicial managers to inquire into the debt restructuring and acquisition agreements made between the Company and Presscrete Holdings Ltd in 2002/3. The net consequence of these transactions seemingly resulted in the Company becoming unable to pay its debts as they fell due. In particular, assets amounting to \$18 million had been divested from the Company to finance its parent company's acquisition of a 66 per cent shareholding interest in Presscrete Holdings Ltd. The Petitioner argued that the debt restructuring and acquisition agreements prejudiced the Company's creditors as it left the Company with practically no assets. The Company denied all allegations of wrongdoing.

## THE COURT'S DECISION

The petition to place the Company under judicial management was opposed by a majority (75 per cent in

value) of the Company's creditors. The Company produced standard letters of support from its creditors. These letters simply indicated that the named creditor opposed the petition. No reasons were furnished in these letters for the opposition. Furthermore, no affidavit was filed by any creditor opposing the petition to justify the reasons for the opposition.

The Petitioner submitted that the mere fact that the majority of the creditors opposed the granting of an order to place the Company under judicial management should not be an absolute bar as the Court retained the discretion to make such an order. In this regard, the English High Court case of *Re P&J MacRae Ltd [1961] 1 All ER 302* was useful. In this case, the English High Court decided that before a majority of creditors can claim to override the wishes of the minority, they must first show some good and cogent reasons for their position, which must stand up to scrutiny.

After hearing arguments from both sides, Lai Siu Chiu J granted the Petitioner's application. The Court also acknowledged the fact that there appeared to be certain disquieting features in the debt restructuring and acquisition agreements undertaken by the Company in 2002/3 which required an independent inquiry by the judicial managers for the benefit of the creditors. Her Honour noted that whilst the majority of the Company's creditors appeared to oppose the petition, the Court nevertheless had the final say in the matter.

The case was reported in *The Straits Times* on 6 May 2004.

## CASE COMMENT

This is one of the few petitions where it is not the company which sought to place itself under judicial management but a creditor of the company that sought to do so. While the Companies Act (Cap 50) allows for a petition of judicial management to be filed by the company or its directors or creditor(s), the actual number of creditor-applications being reported are few and far between.

From the onset, it is important to state that no matter who makes the application, there is no difference in the requirements which have to be met before the Court will agree to place a company under judicial management. The Court will need to be convinced that placing the company under judicial management will likely achieve one or more of the stated objectives of judicial management under Section 227B of the Companies Act, which include a more advantageous realisation of the

company's assets than in a winding up. The difficulty associated with a creditor's application to place a debtor company under judicial management lies in the amount of information that is readily available to the applicant creditor. In most such cases, as the debtor company is an opposing party to the petition for a judicial management order, there is practically no information that one can expect to receive from it to support any of the assertions made in the petition.

This was a real problem in this case. The information, especially on the debt restructuring and the reverse takeover exercise, available to the Petitioner was minimal. The Company capitalised on this and went on the offensive to assert that the entire petition was misconceived. The Company claimed that the Petitioner's intent in filing the petition was to go on a fishing expedition to inquire into baseless and false allegations of irregularities at the expense of the Company and its creditors.

In an ironic twist, despite the difficulties, it was fortunate for the Petitioner that the Company was less than forthcoming in providing information. The Court took judicial notice of the Company's failure to provide satisfactory responses to questions relating to the debt restructuring and acquisition agreements. This was an important factor which was considered in the granting of the petition.

## CONCLUSION

In conclusion, fairness and commercial morality prevailed. Amidst the perceived majority opposition to the petition,

the Court, in the exercise of its discretion, gave a platform to the minority creditors to have the affairs of the Company investigated. The Court recognised the fact that the minority creditors, including the Petitioner, had a legitimate grievance concerning the manner in which the interests of the creditors were disregarded in the debt restructuring and acquisition agreements.

The lesson to take away from this is two-fold. Clearly, the Company could have and should have been more open with the Court and the creditors when explaining the transactions concerned. Any affidavit filed by the Company must be prepared with special care. The Court would be inclined to take an adverse view if the Company is cagey on some issues which only the Company can explain.

Opposing creditors should also state clear and persuasive reasons why judicial managers should not be appointed. Standard letters drafted and executed in opposition to the petition may not be enough to persuade the Court to dismiss the petition. There is a need for creditors to show some good reasons for their opposition or support, whichever the case may be if they wish for the Court to give considerable weight to their position.

### Editor's Note:

The Petitioner, Leun Wah Electric Co (Private) Ltd, was represented by Manoj Sandrasegara, Sham Sabnani and Chan Wei Meng of Drew & Napier LLC.



Manoj Sandrasegara



Back row : (from left) Sham Sabnani (Associate Director), Chan Wei Meng (Senior Associate), Raymond Lam (Associate), Sushil Nair (Director)  
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Led by our Directors **SUSHIL NAIR** and **MANOJ SANDRASEGARA**, the Insolvency & Restructuring Practice Group has extensive experience in regional and Singapore insolvency and restructuring work. The group has worked on a number of high profile regional restructurings including the Asia Pulp & Paper and SK Global Corporation restructurings which involved cross-border issues. In Singapore, the group has acted for public-listed corporations in restructuring their business and debt positions through investments and reverse takeovers.

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# Defending The Mark “MTV”

## EXECUTIVE SUMMARY

Viacom successfully defended its trade mark application for the mark “MTV” filed in relation to the provision of on-line information services against an opposition by the owner of the website at [www.mtv.com.sg](http://www.mtv.com.sg). This is despite a decision from the Singapore Domain Name Dispute Resolution Policy (“SDRP”) in which it was found that the mark “MTV” was descriptive of entertainment and broadcasting services and that it was generic as it had entered the local Chinese language as an abbreviation of “music videos”.

## BACKGROUND

MTV Networks, a division of Viacom, had filed trade mark applications worldwide for the mark “MTV” in Class 42 to protect its online information services in relation to its MTV websites and portals (e.g., [www.mtv.com](http://www.mtv.com)). In Singapore, Viacom’s trade mark application was opposed by the owner of the domain [mtv.com.sg](http://mtv.com.sg), one Gary Lee Ongkowidjaja (“the Opponent”), was on the grounds that the mark “MTV” was not distinctive, was descriptive and/or had become customary to the trade.

The Opposition followed Viacom’s unsuccessful attempt under the SDRP to obtain the transfer of the [mtv.com.sg](http://mtv.com.sg) domain to Viacom.

The Opponent’s grounds for opposing the application were based primarily on the findings of the SDRP. In particular, the SDRP had found that the mark “MTV”, being a clear abbreviation of “Music Television”, was descriptive and therefore inherently unregistrable under Section 7(1)(c) of the Trade Marks Act (“TMA”). The SDRP had further found that the mark “MTV” had, on the evidence, become customary or generic in the local context and was thus unregistrable under Section 7(1)(d) of the TMA.

## RELEVANT LEGISLATION

Section 7(1) of the TMA provides:

“7(1) The following shall not be registered:

...

- (c) trade marks which consist exclusively of signs or indications which may serve, in trade, to designate the kind, quality, quantity, intended purpose, value, geographical origin, the time of production of goods or of rendering of services, or other characteristics of goods or services;
- (d) trade marks which consist exclusively of signs or indications which have become customary in the current language or in the *bona fide* practices of the trade.

7(2) A trade mark shall not be refused registration by virtue of subsection (1)(b),(c) or (d) if, before the date of application for registration, it has in fact acquired a distinctive character as a result of the use made of it”.

## DECISION

The Opposition was dismissed and the application allowed to proceed to registration. The Registrar found that the mark “MTV” was neither descriptive nor was there evidence to show that it had become customary or generic in the local context.

### Section 7(1)(c) of the TMA

The Registrar, in determining whether the mark “MTV” was descriptive, first considered whether the words it stood for, i.e., “Music Television”, were descriptive. The Registrar took the view that even though music television was arguably descriptive of music being shown on television, this did not mean that “MTV” was therefore descriptive of music being shown on television. The Registrar proceeded to give the example of CNA being the distinctive abbreviation of Channel News Asia which was somewhat descriptive.

1. The SDRP provides a framework for resolving “.sg” domain name disputes between a “.sg” domain name Registrant and any party other than the Singapore Network Information Centre (SGNIC) Private Limited. It is the local equivalent of the Uniform Domain Name Dispute Resolution Policy adopted by accredited registrars of the Internet Corporation for Assigned Names and Numbers.

The purpose of the SDRP is to provide a cheaper and quicker mechanism than Court proceedings for parties to resolve disputes concerning the use of “.sg” domain names.

The Singapore Domain Name Dispute Resolution Service manages the dispute resolution mechanism under the SDRP, and is run by a Secretariat jointly operated by the Singapore Mediation Centre and the Singapore International Arbitration Centre.

In this regard, the Registrar disagreed with the SDRP's interpretation of the case *Staph Guard TM [1967] RPC 165* and held that this case did not stand for the proposition that every abbreviation of a known word was not distinctive.

In any event, the Registrar stated that even if she was wrong (i.e., that the mark "MTV" was descriptive), she was prepared to hold that the mark had become distinctive through the use made of it pursuant to Section 7(2).

#### Section 7(1)(d) of the TMA

The Opponent failed on this ground largely because the evidence submitted was in Chinese and was either undated or dated after the application of the trade mark (which was irrelevant for the purposes of an opposition).

Without any English translations, the Registrar was restricted to noting only the letters "MTV" appearing on the Chinese articles and VCD covers and not the context in which the letters appeared. The burden was on the Opponent to establish his case. However, he was unable to show that the mark "MTV" had become customary to the trade. In any event, the Registrar held that even if the words "MTV" were taken to mean "music videos" as the Opponent alleged, she would be slow to perpetuate such a misconstruction.

In departing from the contrary finding of the SDRP, i.e., that the mark "MTV" had become generic to the Chinese speaking community, the Registrar held that she was constrained by the TMA regarding the scope of evidence she could consider. In particular, evidence submitted by the Opponent must pre-date the date of application and

must be translated into English. The Registrar commented that the SDRP was not similarly constrained by its rules of evidence.

#### COMMENT

This decision disperses the cloud of doubt which resulted from the SDRP decision on Viacom's rights in its mark "MTV" in Singapore. Although decisions under the SDRP may not be appealed against, the parties are not prevented from taking out proceedings in the Singapore Courts.

From the present IPOS decision, it is worth noting that having secured its "MTV" registration for the provision of online internet services, Viacom is now in a better position to go after, amongst others, cybersquatters in Singapore who misappropriate the mark "MTV" in their domain names.

A registered trade mark provides statutory protection for the trade mark owner. On the other hand, a registered domain name is merely a unique name that identifies an Internet site and does not confer any statutory protection to the domain name owner. Therefore, it is always advisable to file for trade mark protection prior to registering the trade mark as a domain name.

#### Editor's Note:

Viacom was represented by Dedar Singh Gill and Paul Teo of Drew & Napier LLC.

*Case: In Re Trade Mark Application By Viacom International Inc (TM Application No. T00/3154G. Decision dated 7 July 2004, by the Intellectual Property Office of Singapore)*

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

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