

SEPT 06

DREW & NAPIER LLC

LEGAL UPDATE

A DREW & NAPIER PUBLICATION

We are pleased to bring you five articles covering a range of interesting cases and legal developments.

Recently, there have been some regulatory developments to encourage Indian companies to list in Singapore. Up till now, only one Indian company has listed on the SGX. It is hoped that the efforts of the SGX will lead to a growth of interest in Singapore by Indian companies. These developments are discussed in the article [“Singapore as a Listing Destination for Indian Corporations”](#).

Drew & Napier LLC’s Mr Jimmy Yim SC successfully argued that the defence of diminished responsibility applied in a case where an Indonesian domestic worker, Juminem, was charged (jointly with another domestic worker) with the murder of her employer. This is the first case in Singapore in which the defence succeeded for a charge of murder and is discussed in [“Succeeding in the Defence of Diminished Responsibility”](#).

In [“Real Estate Investment Trusts \(REITS\) in Singapore – Recent Developments”](#), we look at the recent changes in the regulatory and legal framework relating to REITS. We also discuss the steps taken by the relevant authorities to strike a balance between the conflicting interests of investors and issuers.

Our Mr Tony Yeo and Ms Joanna Koh were engaged in a full assessment enquiry on behalf of the plaintiff in a case which went to the Court of Appeal. There was no written judgment by the Court of Appeal but the pertinent issues relating to the assessment enquiry are discussed in [“Assessment of Damages in IP Cases”](#).

Our final article in this issue, [“Keeping a Watch on Infringement”](#), deals with the infringement of a registered trade mark and discusses the defences put forth by the defendant.

We hope you’ll find these articles interesting and useful.

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SINGAPORE AS A LISTING DESTINATION FOR INDIAN CORPORATIONS

EXECUTIVE SUMMARY

Singapore is one of the preferred markets in the region for raising capital and finance. Amongst the many factors that attract companies is the fact that Singapore boasts of a mature financial system that is supported by a sound legal system. Thanks to the efforts of the Singapore Exchange Limited ("SGX"), foreign players are lining up to seek listings on SGX in Singapore. While there have been and continue to be a number of companies from the People's Republic of China (the "PRC") that have listed or are seeking to list on SGX, little activity has been seen from Indian entities. However, this may be set to change as recent regulatory developments, both in India and Singapore, are likely to encourage Indian entities to list in Singapore. This article briefly explores these recent developments.

CHINA VS INDIA

About 105 companies from the PRC are now listed on SGX and these make up a substantial portion of the foreign listings in Singapore. Retail and institutional investors in Singapore have snapped up these stocks with enthusiasm. The former ban on new initial public offerings imposed by the regulators in the PRC (lifted only in May 2006), coupled with the favourable investment climate in Singapore, has resulted in companies from the PRC choosing Singapore as a venue to raise capital. On the other hand, leaving aside the bonds market, there has been only one Indian company that has listed in Singapore so far -- *Meghmani Organics Limited*, which listed its Singapore Depository Receipts ("SDRs") in August 2004. Recent developments in India and Singapore have, however, encouraged a number of Indian companies to consider raising capital in Singapore.

METHODS OF RAISING CAPITAL OVERSEAS BY INDIAN COMPANIES

In accordance with Indian exchange control law, a company registered in India is prohibited from listing its shares on a foreign stock exchange. Other mechanisms are therefore used by Indian companies to raise capital from overseas markets. The *Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depository Receipt Mechanism) Scheme, 1993* issued by the Government of India provides for two methods, namely:

- i. Foreign Currency Convertible Bonds ("FCCBs"), being debt instruments issued in a currency that is different from the issuer's domestic currency and which provide the holder with a return or yield along with an option to convert them into ordinary shares of the issuer company at a predetermined price; and
- ii. Global Depository Receipts ("GDRs"), being certificates representing an issuer's underlying shares. An Indian company is permitted to issue underlying shares to an overseas depository for the purpose of issuing depository shares.

FCCBs and GDRs are particularly useful for companies that seek to raise capital to fund their activities in South-east Asian markets. A large number of Indian companies, including Reliance

Energy Ltd, Bharti Tele-Ventures Ltd, Tata Motors Ltd, and Zee Telefilms Ltd have listed their FCCBs in Singapore, making Singapore the market of choice for the issue of FCCBs by Indian companies.

LISTING REQUIREMENTS

The *Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) (Amendment) Scheme, 2005* (the “2005 Amendment”) issued by the Government of India stipulates that an unlisted Indian company must either: (i) already be listed on a stock exchange in India before it may raise capital in an overseas market; or (ii) pursue simultaneous listings on a stock exchange in India and a foreign stock exchange. The rules for the listing of GDRs issued by SGX on 22 June 2006 (found in Part XII of Chapter 2 and Practice Note 2.2 of the Listing Manual of the Singapore Exchange Securities Trading Limited (the “SGX-ST Listing Manual”) also contain a similar requirement, in that a company seeking to list its GDRs on SGX has to have its underlying shares already listed, or must concurrently list its underlying shares, on a stock exchange (referred to in the rules as the “home exchange”).

The regime in India with respect to FCCBs and GDRs has been further liberalised recently. Unlisted Indian companies are now allowed to sponsor the issue of GDRs. The *Amendment to the “Issue of Foreign Currency Convertible Bonds and Ordinary Shares (Through Depositary Receipt Mechanism) (Amendment) Scheme, 2006* (the “2006 Amendment”) issued on 28 June 2006 by the Government of India allows unlisted Indian companies to sponsor GDRs with an overseas depository against shares held by its shareholders. The 2006 Amendment also governs unlisted Indian companies that have already issued FCCBs or GDRs before 31 August 2005. Such companies are allowed to sponsor GDRs with an overseas depository against shares held by their shareholders, provided that they list in a domestic stock exchange within three years of making profits.

There is an unmistakable rationale behind the liberalisation of norms for Indian companies listing abroad. Foreign listings expand the international liquidity of Indian equity and allow Indian companies to fuel their overseas corporate activities and expansion plans. It also advances the visibility of the company in the global market. With “India Inc.’s” global aspirations and growing appetite for overseas acquisitions, it became necessary for Indian authorities to allow companies to source capital from foreign markets. These changes also respond to the growing interest in “Indian paper” in foreign markets.

SINGAPORE’S OFFERINGS

Singapore offers more than one mechanism for an Indian company to raise capital. Until recently, apart from foreign debt instruments like FCCBs, SGX only offered SDRs. SDRs are depository receipts that are issued against underlying shares held by a depository bank. As the listing and trading rules imposed by the Securities and Exchanges Board of India (“SEBI”) have been determined to be in line with international standards, the listing requirements for an Indian company seeking to list securities on SGX have recently been brought on par with those applicable to companies from Australia, Europe and the United States of America. Besides the mandatory disclosures under the relevant Indian regulations (including those imposed by SEBI), SGX has indicated that it will only require compliance with the provisions of Chapters 9 and 10 of

the SGX-ST Listing Manual relating to interested person transactions and acquisitions and realisations respectively. Based on a case-by-case assessment of the board of directors of each company applying for listing, SGX may consider relaxing the requirement of a "Resident Director".

A key development in Singapore has been the introduction of GDRs with effect from 22 June 2006. The introduction of this instrument will significantly improve and hasten the process of raising capital in Singapore for a foreign company. Whereas SDRs are a retail product offering, GDRs are targeted at institutional and accredited investors. As a result, companies that choose to list GDRs on SGX are not burdened with cumbersome listing requirements. An Indian company that lists its GDRs in Singapore will only be required to make those disclosures that are required by the exchange on which its shares are traded in India. Further, the fixed costs of listing GDRs are considerably lower than that for the listing of SDRs in Singapore. These factors make SGX's listing facility in respect of GDRs a very attractive and cost effective proposition.

CONCLUSION

A number of Indian companies are looking to expand their operations in South-east Asia due to India's warming ties and impending trade pact with ASEAN. The recent developments discussed above significantly improve the range of options available to Indian companies that are looking to tap foreign capital in Singapore. They also afford foreign investors (including venture capitalists and private equity investors) greater flexibility in acquiring and disposing of their stakes in Indian companies.

The fruits of India's rapid economic growth and the security of Singapore's sound financial environment come together through listed instruments like FCCBs, SDRs and GDRs. Regulatory relaxations in both Singapore and India have set the stage for Indian companies to leverage the many advantages that Singapore has to offer as a premier regional financial hub.



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SUCCEEDING IN THE DEFENCE OF DIMINISHED RESPONSIBILITY

EXECUTIVE SUMMARY

The decision of the Singapore High Court in *Public Prosecutor v Juminem and another* [2005] 4 SLR 536 is a landmark decision two main reasons. For one, this was the first time that the State had assigned Senior Counsel to defend persons accused of a capital offence under the Assigned Counsel Scheme. Drew & Napier LLC's Mr Jimmy Yim SC acted for the first accused, Juminem. Secondly, this was the first case in which the defence of diminished responsibility succeeded for persons accused of murder under Section 300 of the Penal Code, Cap. 224.

THE FACTS

The accused persons were two Indonesian maids, Juminem and Siti Aminah, who were 18 and 15 years old respectively at the time of the offence. They were jointly charged with the murder of Juminem's employer (the "deceased") who was strangled to death in her bedroom on 2 March 2004.

Juminem had formed the intention to kill the deceased a week before the actual event and had asked Siti Aminah for her help. However, the plan was deferred for a week as Juminem wanted to see if the deceased's treatment of her would improve. Unfortunately, this did not happen and Juminem then asked Siti Aminah to come over to the deceased's residence to carry out the plan to kill her.

After strangling the deceased, both Juminem and Siti Aminah unlocked the drawers and took \$8,020.00 in cash, a bank account book, and credits cards belonging to the deceased. Juminem also forged the deceased's signature on a cheque for the sum of \$25,000.00 made payable to Siti Aminah. She also took two rings and handed them to Siti Aminah as well. This was part of the plan to give the impression that a robbery had taken place.

In seeking to reduce the charge to one of culpable homicide not amounting to murder, both accused persons relied on the special defence of diminished responsibility which is Exception 7 under section 300 of the Penal Code. This defence must be proven to exist based on a balance of probabilities. It "*behooved the court to examine the possibilities and probabilities of individual facts congealed together, and, concurrently, envisage what kind of picture that mass had produced.*"

The defence of diminished responsibility will succeed where it can be shown that the accused person suffered from a disease that the Court could find as leading to, or causing, an abnormality of mind. The court then had to decide whether this abnormality of mind "*substantially impaired*" the accused person's mental responsibility for the offence. This is a mixed question of fact and law.

In investigating the existence and the cause of any abnormality of mind, the court has to rely on psychiatric evidence which "*is an area of medical science least amenable to precise and objective diagnosis*". The Court also noted that its preference of one medical opinion to the other is not a criticism of the competence or fairness of the other medical expert.

ABNORMALITY OF MIND

Whether an abnormality of mind is found depends on the medical evidence before the court. In this case, the Court was faced with a conflict of opinion between the medical experts called by the Prosecution and the Defence respectively. Faced with this divergence in opinions, the Court approved of the decision in *Regina v Bryne* [1960] 2 QB 396 in which the English Court of Appeal held that:

“Whether the accused was at the time of the killing suffering from any ‘abnormality of mind’... is a question for the jury. On this question medical evidence is no doubt of importance, but the jury are entitled to take into consideration all the evidence, including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence if there is other material before them which, in their good judgment, conflicts with it and outweighs it.”

The First Accused, Juminem

With respect to Juminem, the Court found that she was suffering from a depressive disorder. This was due mainly to the way in which the deceased had treated her. She was also suffering from loneliness, fear, and money woes. Juminem kept a journal during the six months of her employment. This was significant in displaying her state of mind. The Court noted that the entries in her journal were *“the unpublished plea for help that went unheeded because no one knew about them.”*

Having found that there was an abnormality of mind, the Court then had to determine if there was a substantial impairment of Juminem’s mental responsibility. The Court cited Ashworth J’s summation to the jury in *Regina v Lloyd* [1967] 1 QB 175 as a *“useful working guide”* in determining the term *“substantially impairs his mental responsibility”*:

“I am not going to try to find a parallel for the word ‘substantial.’ You are the judges, but your own common sense will tell you what it means. This far I will go. Substantial does not mean total, that is to say, the mental responsibility need not be totally impaired, so to speak, destroyed altogether. At the other end of the scale substantial does not mean trivial or minimal. It is something in between and Parliament has left it to you and other juries to say on the evidence, was the mental responsibility impaired, and, if so, was it substantially impaired?”

Although Juminem had planned to kill her employer and behaved rationally after the commission of the offence, the medical evidence did not indicate that a person suffering from a depressive disorder would not be able to think or function normally. The Court observed that on the medical evidence, it indicated that *“the disorder affects patients differently, and with varying consequences”*. The Court also noted that a depressive disorder is a mood disorder that affects the mood and not the intellect or motor skills of the afflicted person. On the facts, the depressive disorder was found to have distorted parts of Juminem’s rational self.

The Court was of the view that Juminem’s loneliness, her age, the unfamiliar place and nature of work, had troubled her mind and magnified words and actions by people such as the deceased to unrealistic proportions. This was what ultimately caused her to form the decision to kill.

In the circumstances, she was found to have suffered from an abnormality of mind that substantially impaired her mental responsibility at the time the offence was committed. Therefore, the defence of diminished responsibility succeeded in her case.

The Second Accused, Siti Aminah

The Court found that, like Juminem, Siti Aminah was also not adjusting well to the changes she had to face since starting work in Singapore.

With respect to Siti Aminah's state of mind, the Court found that she failed to cope with the change of environment between her home in Indonesia and her place of work here in Singapore. It was this failure to cope that increasingly placed stress on her mental stability. Furthermore, she was intellectually and psychologically immature, and was someone who was likely to be "led along". She also exhibited features of a depressive disorder such as depressed mood, crying, weight loss, fatigue and poor concentration a few months prior to the commission of the crime.

On the balance of probabilities, the Court came to the conclusion that she was suffering from an abnormality of mind at the time of the offence. The Court also observed that Siti Aminah was unable to rationalise or will herself out of the crime due to her youth, sedate personality, low intellectual capacity and depressive state.

CONCLUSION

After taking into consideration that Juminem had earlier formed the intention to kill the deceased and to create a false impression that there had been a robbery (by forging a cheque and taking away cash, credit cards, and jewellery), she was sentenced to life imprisonment.

For Siti Aminah, the Court took into account that her youth, immaturity, low intellect, and depression were all relevant considerations and consequently, sentenced her to ten years' imprisonment.



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REAL ESTATE INVESTMENT TRUSTS (REITS) IN SINGAPORE - RECENT DEVELOPMENTS

EXECUTIVE SUMMARY

The uptrend in the listing of real estate investment trusts (“REITs”) on the Singapore stock exchange continues this year. Recent examples include Allco REIT, Fraser Centrepoint Trust, and CDL Hospitality Trusts and the Cambridge Industrial Trust.

REITs are an example of financial disintermediation that is fundamentally more efficient than property development companies funded by banks or other financial institutions. With the favourable tax and regulatory regime in Singapore, the REITs in Singapore are keeping pace with the continuing trend in the United States, Australia and Canada towards the holding of properties via REITs and/or other asset-backed special purpose structures.

The Cambridge Industrial Trust was listed on the Singapore stock exchange on 25 July 2006. It is Singapore’s first independent industrial REIT in that it is not sponsored by any property developer. This independent strategy bodes well as property vendors often prefer to sell and leaseback from entities which are not property developers. The rapid spread of REITs in other leading jurisdictions has been primarily due to independent REITs.

Drew & Napier LLC was the counsel to the offering and listing of the units in the Cambridge Industrial Trust and to Cambridge Industrial Trust Management Limited, the manager of the Cambridge Industrial Trust.

RECENT REGULATORY CHANGES AND OTHER DEVELOPMENTS

Amendments to Legal Framework

With the downturn in the prices of REITs in Singapore, Malaysia and Hong Kong, some of which traded below their initial public offering prices, and the recent cautionary speeches on the risks of financial engineering in REITs (for example, see the Business Times article on 29 July 2005: “Temasek Chief warns of hazards of REITs market”), the regulators have approached applications for listing of new REITs with a finer-toothed comb.

Recent changes in the legal and regulatory framework of real estate investment trusts include:-

- i. amendments to the Securities and Futures Act (Chapter 289) (the “SFA”) with effect from 15 October 2005; and
- ii. amendments to the Code on Collective Investment Schemes and the Property Funds Guidelines (the “PFG”) with effect from 20 October 2005.

Apart from these changes, the Monetary Authority of Singapore (the “MAS”) has also issued a consultation paper in June this year on the applicability to REITs of the Singapore Code on Takeovers and Mergers.

More Rigorous Scrutiny

Whilst it is made clear that the REIT manager need not be a holder of a capital markets services license, the approval process for the REIT manager is no less rigorous than that for a licensee. The approval of the REIT manager extends to approval of each existing and incoming director and each member of the management team. The background of the directors and key management personnel as well as the shareholding structure of the controlling shareholders of the REIT manager also comes under closer scrutiny.

The valuation of the properties as well as the reasonableness of the leaseback rentals comprised in the REIT would also be rigorously scrutinized and in the event of any doubt, a further independent valuation would need to be obtained. All independent valuers should be prepared with statistics regarding comparable valuations and be able to justify the various discount rates and terminal amounts used in such valuation models.

Legal Title

Amongst other things, the PFG provides that the trustee should exercise reasonable care in ensuring that the property fund has proper “legal” and good marketable title to the real estate assets owned by the property fund. The question arose whether the word “legal” in the abovementioned context refers to a “strictly legal” (as opposed to “equitable” title) or whether it could refer to a “legally enforceable” or “lawful” title.

This issue is important as there are many properties in Singapore which are in the form of building agreements or agreements for lease, particularly properties contracted to be purchased from entities such as:-

- i. the Jurong Town Corporation;
- ii. the Housing and Development Board; and
- iii. the Singapore Land Authority.

The lease (which constitutes the strict legal title) is not issued by the relevant government bodies until several years later, notwithstanding that the Certificate of Statutory Completion has been obtained and that the relevant vendor has been occupying and using the premises for many years with the full knowledge and consent of the owners and relevant government bodies.

These properties would be considered to have a “legally enforceable” or “lawful” title but not a “strictly legal” title. Furthermore, properties in foreign countries which do not follow the English common law tradition would not sit easily within the legal - equitable title classification.

Differential Pricing of Units

Neither the SFA nor the PFG contain any prohibitions in relation to the differential pricing of units of a REIT to be listed on the Singapore stock exchange. The PFG, however, require that the MAS be consulted regarding any proposal to implement differential pricing of units of a REIT to be listed on the Singapore stock exchange.

Given that the financial advisers and sponsors structuring the REITs would aim towards comparable market pricing and would not wish to leave too much on the table for the public offering, it would be interesting to see whether a strict approach against differential pricing would significantly deter foreign REITs from listing in Singapore.

Independent Valuation

The PFG requires two independent valuations of each of the properties which would constitute “Interested Party Transactions” to be conducted in accordance with paragraph 8 of the PFG.

Paragraph 8 of the PFG requires that a valuer should not receive payments of more than \$200,000 aggregated over the current financial year from the manager, adviser or the other party/ parties whom the property fund is contracting with. A valuer would not be considered to be independent should such valuer not be able to satisfy such threshold.

However, where a valuer itself does not receive such payments but a member of its parent group of companies such as its real estate brokerage receive such payments, it is an open question as to whether the corporate veil would be lifted such that payments received by such real estate brokerage would be regarded as being “received” by the valuer, resulting in the valuer being deemed to have received payments in excess of the relevant threshold.

Experts’ Consent of Credit Rating Agency

The revised PFG provide that the aggregate leverage of a property fund may exceed 35.0% of the deposited property (up to a maximum of 60.0%) only if a credit rating of Cambridge Industrial Trust from Fitch, Inc., Moody’s or Standard & Poor’s is obtained and disclosed to the public.

It should be noted that written consent as an “expert” would be required in relation to such statements in the prospectus from the relevant credit rating agencies. As the credit rating agencies would not as a matter of practice agree to give such consent as an “expert”, the regulatory authorities may need to consider whether further refinement is required in the regulatory requirement for such “expert consent”.

Sub-letting by REIT Tenant

Both the Jurong Town Corporation and the Housing and Development Board have strict policies against sub-letting beyond the second tier. The policy concern is that while it may be feasible to control the lessee and the sub-lessee through contractual provisions and subletting approvals, it is difficult to exert control beyond this tier as the sub-sub-lessees are often less responsive to the requirements regarding the use of the premises.

Such a policy creates a problem for the REIT as the REIT trustee is regarded as the lessee and the REIT tenant regarded as the sub-lessee, and hence the REIT tenant would be prohibited from sub-leasing part of the premises. In the Cambridge Industrial Trust, this policy underwent several rounds of review. Sub-letting by the REIT tenant is now permitted subject to certain strict conditions.

CONCLUSION

It is never easy to balance the public interest in protecting investors against the public interest of facilitating the quick and unimpeded access of issuers to the capital markets and of the promotion and development of Singapore as an international financial centre. With the relative success of the listings of the recent REITs, it is fair to say that a good balance has been struck by Singapore’s

regulatory authorities between these conflicting interests. The discussion above indirectly pays tribute to this as the issues raised are not major roadblocks but mere bumps in the road to the listing.

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ASSESSMENT OF DAMAGES IN IP CASES

EXECUTIVE SUMMARY

In intellectual property infringement cases, it is common for parties to agree that the issues of liability be dealt with at the trial first, leaving the quantum of damages to be assessed later by the Assistant Registrar. In the event that the IP Right owner is successful in establishing its case, an injunction will usually be granted against the infringer. Parties will then usually settle on the issue of quantum of damages. In some cases, the IP Right owner may not even want damages to be assessed as an injunction would already serve its purpose.

Since it is rare for IP cases to proceed to a full Assessment enquiry, this article will discuss the case of *Mopi Private Limited v Central Mercantile Corporation (S) Ltd* [2005] SGHC 183 where parties were engaged in a full Assessment enquiry, right up to the Court of Appeal level. The Court of Appeal pronounced its decision in March 2006, but there is currently no written judgment from the Court of Appeal.

This article will look at the procedure behind such an enquiry and some of the interesting issues that arose in the Assessment enquiry.

INTRODUCTION

In this case, the winning party, Central Mercantile Corporation (S) Ltd (“CMC”) sought damages against Mopi Private Limited (“Mopi”) after it was successful in its counterclaim against Mopi for passing off four trade marks (namely, Hi-Bond, Kawasaki, Nikko, Senisui) and infringing one trade mark (namely, Star). The trade marks were applied on adhesive tapes like masking tapes, double-sided tapes, etc.

The Assessment enquiry took place before the learned Assistant Registrar (“AR”) Ms Amy Tung over a period of six days in 2004. Both parties appealed against the learned AR’s order (on different grounds) and the appeal was heard before the Honourable Justice Choo Han Teck in 2005. On 30 September 2005, Justice Choo upheld the decision of AR Tung. CMC appealed against the order of Justice Choo and on 27 March 2006, the parties appeared before the Court of Appeal which dismissed the appeal.

PROCEDURE FOR ASSESSMENT OF DAMAGES

The assessment enquiry is akin to a “mini trial” with discovery of documents and exchange of affidavits of evidence-in-chief. The procedural rules are similar to those for a trial.

If the plaintiff is successful in establishing the defendant’s liability, it has to decide whether it wants to have damages assessed based on an account of the defendant’s profits, or based on the damage it suffered as a result of the infringement. This decision is important as it will impact on the amount of damages that the winning party can recover from the infringer and the type of discovery to be given. For example, if the plaintiff opts for an account of the defendant’s profits, discovery would primarily be of the defendant’s profit and loss reports, sales and supplier’s invoices. On the other hand, if the plaintiff chooses to have damages assessed, then discovery would likely be based on the plaintiff’s own documents, for example, the sales projections of the product in question, management accounts, etc.

In the present case, CMC opted for an assessment of damages, as opposed to an account of Mopi's profits.

HEADS OF DAMAGES

Unlike a trial, the Assessment of Damages procedure does not provide for pleadings to be filed. It is therefore important for both parties to decide and agree (if possible), at an early stage in the proceedings, the heads of damage that the plaintiff is relying on. These heads of damage will then provide the basis of its claim against the defendant.

In this case, CMC's heads of damages were as follows:-

- i. lost sales arising from Mopi's infringing activities;
- ii. loss of reputation as a result of quality differences;
- iii. damages due to CMC as a result of price reduction; and
- iv. general damages.

It is important to note that the Assessing party (in this case, CMC), has the burden of proving each and every head of damage.

LOST SALES

The method of calculating CMC's damage due to lost sales was this formula: CMC's net profits % x Mopi's sales.

Mopi's Sales

With regard to Mopi's sales, the Court calculate the damages due to CMC based on 100% of Mopi's sales. Both the learned AR and Justice Choo (upheld by the Court of Appeal) followed the decision in *Draper v Trist* [1939] 3 AER 513 that in an action for passing off, the court is not entitled to assume that every one of the sales of deceptive articles by the defendant would have been obtained by the plaintiff.

In this case, the Court was of the view that "*CMC is not a unique trader in adhesive tapes*" and declined to award damages to CMC based on 100% of Mopi's sales. The Court took into account the evidence showing that even during the period of the infringement, CMC's sales had not been affected, and there was no marked drop in its market share. In the end, the Court attributed 45% of Mopi's sales to CMC.

CMC's Net Profits: Appointment of a Court Assessor

CMC's net profits were subject to a greater scrutiny by the Court. This was due in part to CMC tendering six different methods of calculating its net profits. In comparison, Mopi tendered two different methods.

At the hearing before the learned AR, the parties did not engage the assistance of any expert in dealing with CMC's calculations. Instead, they relied on the accountant employed by Mopi and CMC.

At the Registrar's Appeal, however, Justice Choo was of the opinion that the Court would be greatly assisted by a Court Assessor who was an independent accountant jointly appointed by the

parties. Two accountants from Pricewaterhouse Coopers were appointed by the Court as Court Assessors. After reviewing all the methods of calculations submitted by CMC and Mopi respectively, they met with the learned Judge (without the presence of counsel for both parties). The learned Judge came to the decision that the learned AR was correct in adopting one of Mopi's method in calculating CMC's net profits. Upon further appeal, the Court of Appeal did not disturb Justice Choo's finding despite a strong challenge by CMC.

It should be noted that a Court Assessor is appointed for the sole purpose of assisting the Court in its decision making. Parties are not entitled to cross-examine the Court Assessor nor are they entitled to copies of any documents that may be given by the Assessor to the Court. The Judge makes his/her decision after consultation with the Court Assessor and parties are precluded from appealing against the decision of the Court Assessor.

LOSS OF REPUTATION

CMC alleged that there were two instances where Mopi's tapes were of such inferior quality that it tarnished CMC's reputation. First, Mopi's tapes delaminated at a lower temperature, and second, Mopi's water-based tapes were not of as high a quality as CMC's solvent acrylic-based tapes.

The learned AR found that CMC had not discharged its burden of proof in relation to any loss of reputation. Justice Choo agreed with her and held that:

"I do not agree with [CMC's counsel's] argument that where a difference in quality is established, damage must be presumed. On the specific complaints raised, some surer evidence would be required. Damages for loss of reputation is not synonymous with damages for differences in quality. A presumption of damage is not a strict norm. The nature of the product and the nature of the inferior quality are important factors in the court's determination whether a presumption of damage ought to be inferred."

At the Court of Appeal hearing, the Judges of Appeal enquired what further evidence was needed for CMC to discharge its burden of proof in relation to its claim of loss of reputation. Drew & Napier LLC submitted that evidence like quality test reports on the two types of tapes sold by CMC and Mopi would be relevant. Evidence from customers in the industry testifying to the difference in quality must also be shown. The Court of Appeal agreed with these submissions and upheld the finding of the Court below that CMC had not discharged its burden of proof.

CMC thus failed in obtaining any damages for alleged loss of reputation arising from Mopi's infringing acts.

DAMAGES FOR PRICE REDUCTION

It was alleged by CMC that it had to lower its price of "Hi-Bond" masking tapes because of competition from Mopi's infringing products. However, even though CMC had to lower its price, no evidence was tendered by CMC to prove that the price reduction was due to Mopi's "undercutting". In contrast, Mopi adduced evidence to show that the price reductions were due to many other factors during the relevant period.

Both AR Tung and Justice Choo (subsequently upheld by the Court of Appeal) followed the decisions of *Alexander and Co v Henry and Co*, *Mitchell Henry and Waller and Co* (1895) 12 RPC

360 as well as *Draper v Trist* (1939) 56 RPC 429 which demonstrated the court's reluctance to award damages for loss of sales or alleged forced price reductions in the absence of unambiguous evidence.

The dicta of Justice Choo is worth repeating here:

"The fact that a customer buys a product from X does not mean that he would have bought the same product from Y. Hence unambiguous evidence does not require a higher burden of proof than would normally be required in a civil trial but merely that there must be clear evidence to take the place of assumptions unless the assumptions can reasonably be made."

GENERAL DAMAGES

As a "catch all", CMC also sought "general damages" from Mopi. Their claim was for general damages for loss of goodwill on account of an "*intentional and calculated*" damage to CMC's goodwill.

No award of damages under this head was granted to CMC. Justice Choo held that there was no evidence that Mopi had engaged in an "*intentional and calculated*" damage to CMC's goodwill. He also took into account the fact that both parties were (and still are) using the same trade mark "Hi-Bond" for their various products – Mopi used it for glues and sealants and CMC used it for adhesive tapes. In the circumstances, there was no basis for making any award for loss of goodwill.

INDEMNITY COSTS

In a usual Assessment of Damages enquiry, the paying party should pay the costs of the proceedings. However, in this case, even though Mopi was the paying party, the costs order was reversed.

Mopi used a procedural mechanism called an "offer to settle" to its advantage. After reviewing all the documents given in discovery and evaluating all the evidence, Mopi made an offer to CMC which was higher than the eventual amount due to CMC that was quantified by the Court.

Under the rules governing offers to settle, since CMC did not accept the offer made by Mopi, CMC had to pay indemnity costs to Mopi starting from the date of the offer until the conclusion of the proceedings.

Although CMC tried to argue that this was unfair because it should not be made to pay the costs of a losing party, the Court held that the Offer to Settle made by Mopi was a serious and genuine offer and there was no reason why the rules governing costs consequences should be departed from.

CONCLUSION

This decision is a welcome addition to the jurisprudence in Singapore concerning the Assessment of Damages for IP cases. The written judgment of Justice Choo sets out clearly the heads of damages and the burden of proof under each head. It also dealt with procedural issues like the Court Assessor; and the costs consequences of a successful Offer To Settle. Parties involved in IP disputes should remember that in the course of assessing damages, the burden of proof is high

and no assumptions (for example, poor quality or reductions in price) should be made as to the quantum of such damages.

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KEEPING A WATCH ON INFRINGEMENT

EXECUTIVE SUMMARY

In the decision of the Singapore High Court in *Richemont International SA v Da Vinci Collections Pte Ltd* [2006] SGHC 150, Da Vinci Collections Pte Ltd (the “Defendant”) was found to have infringed the Singapore registered trade mark “DA VINCI” in respect of “watches” belonging to Richemont International SA (the “Plaintiff”). On the hearing of the Plaintiff’s summary judgment application, the Court granted an injunction to restrain the Defendant from infringing the Plaintiff’s registered trade mark (the “DA VINCI” trade mark”). The Defendant has appealed against the High Court’s decision and a partial stay of execution pending appeal has been allowed.

Drew & Napier LLC’s Mr Dedar Singh Gill and Mr Paul Teo acted for the Plaintiff.

BACKGROUND

The Plaintiff was part of the Richemont group of companies which owned many well-known brands of luxury watches and accessories, including Cartier, Baume & Mercier, Piaget and Jaeger-LeCoultre. The Richemont group of companies acquired the International Watch Company (“IWC”) in 2000. As part of the group’s post-acquisition restructuring, all the trade marks of IWC and the goodwill in the business under the marks (including the “DA VINCI” trade mark) were transferred to the Plaintiff. The “DA VINCI” trade mark had been registered in Class 14 of the International Classification of Goods and Services since 1 April 2002.

The Defendant was a Singapore company that had started off selling luxury furniture and light fittings for residential, commercial and office premises in 1994. In 2004, the Defendant branched out into the retail of fashion accessories like watches, jewellery and leather goods under the “DA VINCI” brand.

The Defendant used the mark “DA VINCI” in respect of watches and watch straps in 3 ways:

- i. as a word mark “DA VINCI”;
- ii. as a composite word-and-device mark; and



- iii. as a device mark.

DA  VINCI

The Plaintiff commenced an action against the Defendant in November 2005 for infringement of the “DA VINCI” trade mark and applied for summary judgement in respect of the Defendant’s use of the “DA VINCI” word mark on watches. The Defendant filed an amended defence and counterclaim denying infringement and counterclaiming for: (i) an order for revocation of the “DA VINCI” trade mark on the basis of, among other things, non-use; and/or (ii) a declaration of invalidity of the registration on the basis that the mark was devoid of any distinctive character.

THE LAW

The Plaintiff brought its claim under Section 27(1) of the Trade Marks Act (Cap. 332)(the “Act”) which states:

“A person infringes a registered trade mark if, without the consent of the proprietor of the trade mark, he uses in the course of trade a sign which is identical with the trade mark in relation to goods or services which are identical with those for which it is registered.”

In its amended defence and counterclaim, the Defendant relied on Section 22(1)(a) of the Act which provides that the registration of a trade mark may be revoked if:

“...within the period of 5 years following the date of completion of the registration procedure, it has not been put to genuine use in the course of trade in Singapore, by the proprietor or with his consent, in relation to the goods and services for which it is registered, and there are no proper reasons for non-use”.

The Defendant also relied on Section 7(1)(b) which prohibits the registration of a trade mark devoid of any distinctive character as well as Section 23(1) read with Section 23(2), which provides that the registration of any such trade mark may be declared invalid unless it has, after registration, acquired a distinctive character in relation to the goods or services for which it is registered.

THE DECISION

Infringement

The Court, finding for the Plaintiff on the question of infringement under Section 27(1) of the Act, held that there was no doubt that the Defendant had used a sign in the form of the words “DA VINCI” in respect of watches and watch straps and that the sign was identical to the “DA VINCI” trade mark.

Therefore, the key issue before the Court was whether the Defendant could establish its defence.

First Defence: Non-Use

With regard to the “non-use” defence, the Defendant argued at two levels.

First, the Defendant argued that the Plaintiff’s use of the “DA VINCI” trade mark was not in the form in which it had been registered because: (i) the Plaintiff always used the words “DA VINCI” in conjunction with the trade mark “IWC”; and (ii) the use of the “DA VINCI” trade mark was in cursive form whilst the trade mark registration was in block letters.

Both submissions were soundly rejected by the Court. As to the first submission, the Court noted that it was well established in trade mark law that a product may carry more than one trade mark.

Thus, secondary or even third level product identifiers may function as trade marks if they indicate to the consumer that the product originates from a particular undertaking. Examples cited included “Oyster” (in conjunction with the house mark “Rolex”), “Royal Oak” (in conjunction with the house mark “Audemars Piguet”) and “Constellation” (in conjunction with the house mark “Omega”).

Secondly, the Court held that, apart from the fact that the Plaintiff had furnished evidence showing use of the mark in block letters, it was also clear from the authorities that the use of the words “DA VINCI” in cursive form constituted use of the “DA VINCI” trade mark. The registration of a word mark in block letters conferred protection in a very wide range of typefaces.

The judge was satisfied on the evidence that there were ample instances of use of the “DA VINCI” trade mark in relation to watches.

Second Defence: Devoid of Distinctive Character

With regard to the Defendant’s argument that the “DA VINCI” trade mark was devoid of any distinctive character, the judge held that the words “DA VINCI” was a meaningless or inappropriate word when used in relation to watches / watch straps. Thus, the words were clearly distinctive to the goods in question.

The Defendant also contended that the “DA VINCI” trade mark was used by the Plaintiff to designate a particular line or family of watches in order to distinguish these watches from the Plaintiff’s other lines of watches. However, the Court held that this did not mean that the mark was descriptive of the goods. Whilst the “DA VINCI” trade mark had the effect of differentiating the “DA VINCI” line of the Plaintiff’s watches from the Plaintiff’s other lines of watches, the mark also served to distinguish the Plaintiff’s watches in the “DA VINCI” line from those of its competitors. As such, the mark was an indicator of origin.

On the facts of this case, it was held that the Defendant had not satisfied the Court that there was any issue or question in dispute which ought to be tried. Further, in view of the fact that the Defendant’s counterclaim was identical to the Defence, the Court noted that, if it been for the Court to decide, the Defendant’s counterclaim in relation to the watches would similarly have to fail.

The Court accordingly granted the Plaintiff’s summary judgment application and ordered an injunction restraining the Defendant from, among other things, selling and advertising its watches using the word mark “DA VINCI” in breach of Section 27(1) of the Act. The orders were stayed pending appeal. However, pursuant to further arguments, the Court partially lifted the stay to restrain the Defendant from advertising its watches using the word mark “DA VINCI” in breach of Section 27(1) of the Act.

CONCLUSION

The Defendant in this case is a home-grown Singapore company which has expanded retail operations into the region, including Hong Kong. The Plaintiff, on the other hand, is part of a successful retail group which is internationally renowned for its luxury watches and accessories. A similar action for trade mark infringement has been commenced by the Plaintiff against the

Defendant in Hong Kong. The Plaintiff succeeded in obtaining summary judgment against the Defendant in Hong Kong but the Defendants are likewise appealing the decision.

**DEDAR SINGH GILL**

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

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