WONG PARTNERSHIP

LAWWATCH

OCTOBER 2018

In Brief

DEALS

WONGPARTNERSHIP LLP ACTS IN…

Sasseur REIT's IPO on the Singapore Stock Exchange

WongPartnership acted for Sasseur REIT and its sponsor, Sasseur Cayman Holding Limited, in an initial public offering ("**IPO**") of Sasseur REIT on the main board of the Singapore Exchange raising S$396 million and the financing relating to the IPO. The sponsor of Sasseur REIT counts L Catterton Asia Advisors and Ping An Real Estate Company Ltd among its strategic shareholders.

Sasseur REIT is the first outlet mall REIT to be listed in Asia. It is part of Shanghai-based developer and operator of retail outlet malls Sasseur Group, which runs nine outlet malls in eight major Chinese cities. Sasseur REIT's investment strategy is to invest principally, directly or indirectly, in a diversified portfolio of income-producing real estate, which is used primarily for retail outlet mall purposes, as well as real estate related assets in relation to the foregoing, with an initial focus on Asia.

Partners involved in the transaction were Christy Lim and Felix Lee from the Banking & Finance Practice, and Wong Ee Kean from the Capital Markets Practice.

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Other recent matters that WongPartnership was involved in were:

DESCRIPTION	TYPE
Acted in the Divestment of Sembawang Shopping Centre by CapitaLand Mall Trust to Lian Beng-Apricot (Sembawang) Pte Ltd.	Corporate Real Estate
Acted in the secondary sale (by way of an offering to the public in Japan as well as a Rule 144A/Regulation S global offering) by Danone Probiotics Pte Ltd of shares of Yakult Honsha Co, Ltd, which raised gross proceeds of ¥175 billion.	Equity Capital Markets
Acted in a voluntary conditional cash offer by Elidom Investment Co Ltd for CWG.	Corporate/Mergers & Acquisitions
Acted as Singapore counsel in the acquisition by Walmart Inc. of a 77% stake in Flipkart for US$16 billion.	Corporate/Mergers & Acquisitions
Acted in a joint investment worth US$177 million between Frasers Property Limited ("**Frasers**") and GIC and JustCo to develop a co-working space platform across Asia; and in Frasers' investment in subscribing up to 13.2 % of the issued and paid-up capital of JustGroup Holdings.	Corporate/Mergers & Acquisitions
Acted in Hyphens Pharma International Limited's initial public offering and listing on Catalist, the sponsor-supervised listing platform of the Singapore Exchange.	Corporate/Mergers & Acquisitions / Equity Capital Markets
Acted in the acquisition by Bain Capital Private Equity of DSM Sinochem Pharmaceuticals, a pharmaceutical joint-venture of Dutch chemicals firm Royal DSM NV and China's Sinochem Group.	Corporate/Mergers & Acquisitions / Corporate Real Estate

BUILDING & CONSTRUCTION

Court of Appeal Clarifies Principles on the Setting Aside of Adjudication Determinations for a Breach of Natural Justice

***Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGCA 39 (Singapore, Court of Appeal, 8 August 2018)**

The Court of Appeal has, with respect to the adjudication process under the Building and Construction Industry Security of Payment Act ("**SOP Act**"), affirmed that an adjudication determination may be set aside for a breach of natural justice if the adjudicator failed to consider an issue that was essential to the resolution of the adjudication: *Bintai Kindenko Pte Ltd v Samsung C&T Corp* [2018] SGCA 39.

The Court of Appeal's Decision

The Court of Appeal has affirmed that that the court has the power to set aside an adjudication determination if an adjudicator has acted in breach of his duty to comply with the requirements of natural justice. In essence, for an adjudication determination to be set aside on the basis of a breach of natural justice, an aggrieved party must show that:

- The adjudicator breached a rule of natural justice; and
- The breach was sufficiently material as to cause prejudice to the aggrieved party.

The facts of the case were as follows.

The subcontractor had served a payment claim with three main heads of claim -- (a) a claim for the works done under the contract; (b) a claim for variation works; and (c) a claim for retention monies. The main contractor served a payment response to the payment claim, stating a negative response amount, on the basis that it was entitled to (i) impose backcharges on the subcontractor, and (ii) recompute and reverse previous payments for variation works (collectively, "**Deductions**").

The subcontractor filed an adjudication application, and while confining its claims to a claim for the retention monies, it had also identified the Deductions as issues in dispute between the parties. In the adjudication response, the main contractor maintained its position that there were no sums due to the subcontractor, by virtue of the Deductions.

In the adjudication determination, the adjudicator granted the subcontractor's claim for the retention monies. Crucially, the adjudicator did not consider or address the main contractor's entitlement to the Deductions in the adjudication determination, and did not make any findings in that connection. Instead, the adjudicator took the view that the sole issue for his determination in the adjudication was the subcontractor's entitlement to the retention monies.

The High Court had granted the main contractor's application to set aside the adjudication determination, which decision was then upheld by the Court of Appeal on appeal by the subcontractor.

In arriving at its decision, the Court of Appeal stated that there are two aspects to the natural justice principles – first, the parties to the adjudication must be accorded a fair hearing, and second, the adjudicator must have been independent and impartial in deciding the dispute. The Court of Appeal also clarified that the principles developed by the courts in the context of challenges to arbitral awards for breaches of natural justice were also applicable in assessing challenges against adjudication determinations for breaches of natural justice under the SOP Act.

The Court of Appeal considered the relevant authorities, and found that an adjudicator will be found to have acted in breach of natural justice for having failed to consider an issue in the dispute before him only if:

- The issue was essential to the resolution of the dispute; and

- A clear and virtually inescapable inference may be drawn that the adjudicator did not apply his mind at all to the issue.

The Court of Appeal made clear that an inference that the adjudicator failed to consider an issue in the dispute should not be drawn if the issue was not essential to the resolution of the dispute, or if the adjudicator had considered the issue but had wrongly rejected the aggrieved party's submissions.

On the facts, the Court of Appeal agreed with the main contractor that the adjudicator had failed to consider issues which were clearly essential to the resolution of the adjudication commenced by the subcontractor.

First, the Court of Appeal found that the issues relating to the Deductions were clearly essential to the resolution of the Adjudication Application. The Deductions had been raised in the payment response and the adjudication response. Accordingly, for the subcontractor to prevail in the adjudication, it not only had to persuade the adjudicator in respect of its position on the retention monies, but it also had to persuade the adjudicator to rule against the main contractor in respect of its entitlement to the Deductions.

Second, the Court of Appeal also held that it was evident from the adjudication determination as a clear and virtually inescapable inference that the adjudicator had shut his mind to the issue of the main contractor's entitlement to the Deductions. As a result, the adjudicator had failed to consider issues that were in fact essential to the resolution of the dispute at hand.

The Court of Appeal ruled that the adjudicator's failure to consider the issues regarding the Deductions was sufficiently material as to prejudice the main contractor. Had the adjudicator properly considered the Deductions, he could reasonably have found that the main contractor was not liable to pay the subcontractor any sum of money.

In the circumstances, the Court of Appeal held that the adjudicator's failure to consider the issues regarding the Deductions was a breach of and contrary to the requirements of natural justice.

Our Comments

This is the first time that the Court of Appeal has upheld the setting aside of an adjudication determination for a breach of the principles of natural justice.

The Court of Appeal noted that the rough nature of justice that sometimes emanates from the adjudication process is something the courts tolerate given the intended function of adjudication as an inexpensive and efficient mode for the resolution of payment disputes to facilitate cash flow in the industry. However, the Court of Appeal made clear that there are limits in terms of what will be tolerated. Where critical provisions of the SOP Act are breached, including breaches of the principles of natural justice, the courts will intervene to set aside adjudication determinations.

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COMPANIES

Court of Appeal Clarifies Effect of Clauses Entitling Shareholders to Appoint Directors

***The Wellness Group Pte Ltd v Paris Investment Pte Ltd & Ors* [2018] SGCA 47 (Singapore, Court of Appeal, 29 August 2018)**

The Court of Appeal has clarified the effect of clauses entitling a shareholder to appoint a director to the board of directors of a company, where the company's constitution confers the power to appoint directors on the board of directors: *The Wellness Group Pte Ltd v Paris Investment Pte Ltd & Ors* [2018] SGCA 47.

Many shareholders' agreements and joint venture agreements contain provisions entitling shareholders to appoint one or more directors to the board of directors ("**Board**") of a company (each such provision, a "**Director Appointment Clause**"). This may be the case even if the company's articles of association expressly stipulate that the power to appoint directors lies with the board.

The following key questions arise: Does an "appointment" made pursuant to a Director Appointment Clause immediately, without more, constitute the shareholder's appointee a director of the company? Or does a Director Appointment Clause merely give the shareholder a contractual right to nominate (but not appoint) a director?

The answer sits between those two poles.

The Court of Appeal has held that a Director Appointment Clause gives the shareholder a right to *nominate* a person to be a director, with a corresponding *obligation* on the part of the Board to appoint that nominee as a director, subject to two important caveats:

- First, the Board would not be obliged to appoint a person who is statutorily disqualified under the Companies Act from assuming directorship, or who does not consent to act as a director. Any such nomination would be defective in and of itself.

- Second, even if the nomination is not defective, the Board would not be obliged to appoint the nominee if the Board can show that the nominee would be obviously unfit for office or that his appointment would be obviously injurious to the company. The burden is on the Board to prove the nominee's unsuitability. It will not suffice for the Board to simply assert that the nominee lacks relevant experience or skills. Rather, the Board must adduce clear evidence to show the shortcomings of the nomination, such as if the nominee would be placed in a position of conflict of interest or a breach of fiduciary duty.

The Court of Appeal observed that a Director Appointment Clause cannot be intended to enable the shareholder to constitute his nominee a director with immediate effect, as that would give rise to a host of practical problems:

- First, if the shareholder chooses someone obviously unfit for office, the nominee can nevertheless immediately exercise the powers and assume the duties of a director, even before being officially appointed by the company. Pending court action by the company, that person would be able to exercise directorial functions and powers to the company's detriment. By refusing to cooperate, he might hamper the other directors from managing the company, especially if directors' unanimity is required for particular decisions. Even if the company subsequently manages to remove that person as a director, it may not be able to recover its losses from the shareholder, who owes it no fiduciary duties.

- Second, it is unclear whether the company would have to treat such a person as a director if it had genuine reasons to object to the appointment. Pending the outcome of a court challenge, the company might be uncertain as to whether it is obliged to formalise his appointment, and remunerate him, as director, allow him access to the company's accounts, and allow him to exercise directorial functions and powers, including entering into transactions on the company's behalf, participating in directors' meetings and voting on resolutions.

- Third, the appointment of directors is accompanied by certain formalities prescribed in the Companies Act, which enable the public to know who the directors of a company are. If persons can be constituted directors in law even being formally appointed as such, this would generate commercial uncertainty for third parties dealing with the company.

On the other hand, a Director Appointment Clause cannot merely confer the shareholder a right to nominate a person for directorship with no corresponding duty on the part of the company to appoint him, as that would render the right redundant.

The Court of Appeal also rejected the contention that a Director Appointment Clause fetters the Board's absolute discretion to appoint directors whom it wishes, as is typically provided for in a company's Articles of Association. In this regard, the Court of Appeal recognised that a shareholder who has significant investment in a private company usually ensures that he has the right to appoint one or more directors, so as to safeguard his interest without having to be directly involved in the management of the company, and that commercial sense favours giving effect to the shareholders' desire to elect the Board.

Here, the Court of Appeal found that the respondent companies failed to appoint the appellant minority shareholder's proposed representative to the Board of the third respondent, despite having had ample time to do so. Further, the third respondent did not give "any legitimate reason to refuse [the proposed representative's] appointment". The respondent companies were found to be in breach of the Director Appointment Clause contained in the shareholders' agreement to which the respondents and the appellant were parties, and the Court of Appeal ordered that the director be appointed a director, and that the respondents execute or procure the execution of the documents necessary to give effect to his appointment.

Our Comments

This decision confirms that the right entitling shareholders to appoint a director to the board is a valuable right, which is enforceable against the company and its Board, if the company and its Board refuses to give effect to such right. More pertinently, it illustrates the Court's appreciation of commercial and practical considerations in the interpretation of shareholders' and joint venture agreements.

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TORT

No General Exclusionary Rule Against Recovery for Pure Economic Loss Affirmed by Court of Appeal

***NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] SGCA 41 (Singapore, Court of Appeal, 5 September 2018)**

The Court of Appeal has affirmed that there is no general exclusionary rule against recovery for pure economic loss and that it is therefore unnecessary to characterise the nature of the plaintiff's loss as consequential economic loss or pure economic loss before examining whether a duty of care arises in tort: *NTUC Foodfare Co-operative Ltd v SIA Engineering Co Ltd and another* [2018] SGCA 41.

The Court reiterated that it had, in its earlier decision in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100, laid down a **single** test for the establishment of a duty of care in tort. In doing so, it departed from English law which applies a general exclusionary rule against recovery for pure economic loss. Under Singapore law, a duty of care will arise in tort if: (a) it is factually foreseeable that the defendant's negligence might cause the plaintiff to suffer harm; (b) there is sufficient legal proximity between the parties; and (c) policy considerations do not militate against a duty of care ("**Spandeck test**").

In this case, the Court further highlighted that, in cases of pure economic loss, there may be sufficient legal proximity even if the defendant does not voluntarily assume responsibility to the plaintiff and the plaintiff does not specifically rely on the defendant not to cause it loss. Physical, circumstantial and causal proximity, including the defendant's knowledge in relation to the plaintiff and control over the situation giving rise to the risk of harm and the plaintiff's corresponding vulnerability, can establish a sufficiently close relationship between the plaintiff and the defendant to give rise to a duty of care in cases involving pure economic loss.

On the facts of this case, the Court reversed the finding at first instance that no duty of care arose and instead found that there was sufficient legal proximity for a duty of care to arise:

- The defendant airtug operator at Changi Airport had negligently caused the airtug he was driving to collide into a pillar which damaged, among other things, the floor near the food and beverage kiosk operated by the plaintiff. While the kiosk itself did not sustain material damage, the Building and Construction Authority issued a closure order in respect of the affected area where the kiosk was situated. As a result, the plaintiff was unable to operate the kiosk for the duration of the closure order. The Court held that the defendant was liable in negligence to plaintiff for its loss of profits during the period of closure;

- The requirement of physical proximity was satisfied as the airtug was operated close to the kiosk;

- The requirement of causal proximity was satisfied as the plaintiff's loss of profits arose because the kiosk was within the area affected by the closure order and therefore could not be operated while the closure order was in force; and

- The proximity factor of knowledge applied because the defendant knew that negligence on his part carried the risk of causing economic loss to occupiers of the floor flowing from their inability to use their premises.

Our Comments

This decision is a firm reminder that the question as to when a duty of care arises in tort under Singapore law is to be determined based on the Spandeck test, irrespective of the nature of the plaintiff's loss and unlike the position under English law.

It is a welcome development that our courts have recognised that there is nothing inherently objectionable about recovery for pure economic loss. As observed by the Court, the requirement of proximity would permit recovery of pure economic loss in deserving cases. The facts of this case amply demonstrate why a plaintiff under such circumstances should be entitled to pursue a claim for losses suffered in consequence of the defendant's negligent actions.

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SOME OF OUR OTHER UPDATES

DATE	TITLE
21 September 2018	CaseWatch: Landmark Court of Appeal decision: Tort of Malicious Prosecution Not Extended to Civil Proceedings and Tort of Abuse of Process Not Recognised in Singapore
18 September 2018	CaseWatch: SFO v ENRC (Part 2): Litigation Privilege in Internal Investigations Clarified
10 September 2018	ChinaWatch: China Amends its Individual Income Tax Law
24 August 2018	LawWatch: IPMT August 2018 Edition

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