WONG PARTNERSHIP

LAW WATCH

MARCH 2024

In Brief

DEALS

WONGPARTNERSHIP LLP ACTED IN …
Sale by Frasers Property Limited of its Stake in Retail Mall NEX to Frasers Centrepoint Trust

Frasers Property Limited (**FPL**), a real estate company listed on the Main Board of the Singapore Exchange Securities Trading Limited (**SGX-ST**), owns, develops, and manages a diverse, integrated portfolio of properties. The group's assets range from residential, retail and commercial properties and business parks, to industrial and logistics properties, in Singapore, Australia, Europe, China, and Southeast Asia.

FPL sold its stake in retail mall NEX to Frasers Centrepoint Trust (**FCT**). NEX is the largest suburban retail mall in northeast Singapore and was valued at S$2.1 billion as at 31 December 2023. The transaction has raised FCT's effective interest in NEX from 25.5% to 50%, and the estimated total cost of the acquisition is S$523.1 million.

FCT, a real estate investment trust (**REIT**), is a leading developer sponsored REIT and one of the largest suburban retail mall owners in Singapore. FCT is listed on the Main Board of the SGX-ST and is managed by Frasers Centrepoint Asset Management Ltd.

The partners involved in the transaction were Andrew Ang and Soong Wen E from the Mergers & Acquisitions Practice, and Monica Yip and Jerry Tan from the Corporate Real Estate Practice.

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Other recent matters that WongPartnership is or was involved in:

DESCRIPTION	PRACTICE AREAS
Acting in relation to the partnership between a global investment firm and Seviora Capital for the Seviora T3F Strategy.	Asset Management & Funds
Acting in the extension of fund duration and increase in fund size to S$450 million by the general partner and investment manager of Titan Dining LP, a private equity fund investing in Asia, with support from Jollibee Worldwide Pte. Ltd., which is part of the Jollibee Group from the Philippines and the anchor investor.	Private Equity
Acted in the grant of S$400 million term and revolving credit facilities by DBS Bank Ltd. as lender to Seatrium Financial Services Pte. Ltd. (**SFSPL**) to refinance its existing loan facility with DBS Bank Ltd., with Seatrium Limited as guarantor for SFSPL. The facility includes a sustainability-linked conversion option aligned to sustainability-linked loan principles.	Banking & Finance
Acted in the S$535 million syndicated financing by DBS Bank Ltd., Oversea-Chinese Banking Corporation Limited, United Overseas Bank Limited and Standard Chartered Bank (Singapore) Limited as lenders and mandated lead arrangers to Singtel's data centre subsidiaries. DBS Bank Ltd., Oversea-Chinese Banking Corporation Limited, United Overseas Bank Limited and Standard Chartered Bank (Singapore) Limited are also the green loan coordinators for the financing. This marks the first green loan obtained by Singtel.	Banking & Finance Corporate Real Estate
Acting in relation to the sale of D'Crypt Pte Ltd (**D'Crypt**), a cryptographic technology company, by an indirect subsidiary of StarHub to ST Engineering for at least S$67.5 million. D'Crypt specialises in cryptographic technology design and also offers solutions in encrypted communications, single-chip crypto tokens, secure computing and high-performance computing.	Corporate/Mergers & Acquisitions
Acted in relation to the establishment of a US$3 billion multi-currency debt issuance programme by SATS Ltd. The net proceeds from the programme will be used to refinance existing borrowings, finance potential acquisition and investment opportunities as well as working capital and capital expenditure requirements and other general corporate purposes.	Debt Capital Markets
Acted in the US$5 million series seed funding round of Climate Alpha, a Singapore-based artificial intelligence (AI)-driven analytics platform for the real estate, asset management and insurance industries, with Jungle Ventures as lead investor.	WPGrow: Start-Up/Venture Capital

CONTRACT I RESTRAINT OF TRADE

Restraint of Trade Clauses: Perspectives on *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29

In *Shopee Singapore Pte Ltd v Lim Teck Yong* [2024] SGHC 29, the General Division of the High Court of Singapore (**High Court**) dismissed an attempt by a major e-commerce platform operator to obtain interim injunctions to restrain a former employee from accepting employment with a competitor.

Our Comments

This case demonstrates the difficulty of seeking to enforce restrictive covenants based on present case law where the only legitimate proprietary interest to protect is confidential information, as well as the time sensitivities in bringing an application to restrain an employee from working for a competitor since the balance of convenience may weigh more in favour of the ex-employee the longer that the employee has worked for the new employer.

It also serves as a timely reminder that refusal by an ex-employee to provide undertakings not to breach his/her restrictive covenants may not in and of itself be sufficient to justify the grant of an injunction. Evidence of the ex-employee's positive acts of breaching (or threatening to breach) such restrictive covenants may be required.

Background

The claimant, Shopee Singapore Pte Ltd (**Shopee**), is in the primary business of running an e-commerce platform.

The defendant, one Mr Lim Teck Yong (**Lim**), was a senior employee of Shopee from August 2015 to August 2023. Over the course of his employment, Lim held various senior positions in Shopee, beginning with the role of Head of Regional Operations, HQ from 17 August 2015, and ending with the role of Executive Director, Head of Operations for Shopee Brazil on 31 August 2023.

In mid-May 2023, Lim resigned from his position as Executive Director, Head of Operations for Shopee Brazil. After serving his two-month notice period which ended on 31 August 2023, Lim commenced employment with ByteDance Pte Ltd (**ByteDance**) as the "Leader for TikTok Shop Governance and Experience (GNE), Middle Platform" on 11 September 2023. The TikTok Shop was the label for the e-commerce platform launched under the social media platform TikTok operated by TikTok Pte Ltd.

Shopee sought to restrain Lim from accepting employment with ByteDance and from soliciting Shopee's clients and employees, in reliance on several contractual clauses under a Restrictive Covenants Agreement (**RCA**) dated 17 August 2015 as well as an Employee Confidentiality Agreement (**ECA**) dated 17 August 2015 entered into between Lim and Shopee.

Non-competition Restriction

Clause 2.1(a) of the RCA provided, among other things, that Lim would not, save with Shopee's prior written consent, "*seek or accept employment with or engagement by or otherwise perform services for or engage in business as or be in any way interested in or connected with a Competitor*" (**Non-competition Restriction**).

The term "Competitor" was defined in the RCA as "*any person, concern, undertaking, firm or body corporate which as at the Termination Date is engaged in or carries on within any part of the Restricted Territories any business of a kind carried on by Shopee or any Group Company thereof and with which the Employee has been involved on behalf of Shopee or such Group Company at any time within twelve (12) months immediately preceding the Termination Date*".

Non-solicitation Restrictions

Clauses 2.1(c) and (e) of the RCA set out non-solicitation restrictions in respect of clients and employees respectively (collectively, **Non-solicitation Restrictions**). They provided, among other things, that Lim would not (save with Shopee's prior written consent):

(a) *"seek, solicit, or endeavour to entice away from Shopee all or part of the account of any business of any Client"*; or

(b) *"solicit or procure the services of or endeavour to entice away from Shopee or employment or assist in or procure the employment by another of any officer, employee or consultant of Shopee where that person is someone with whom he/she has had material dealings or contact during the twelve (12) months immediately preceding the Termination Date".*

Alleged breaches

Shopee alleged that Lim was in flagrant breach of the Non-competition Restriction and demanded that Lim immediately cease employment with ByteDance and, among other things, provide undertakings to comply with the Non-competition Restriction and Lim's obligations under the ECA.

Lim rejected Shopee's allegations and demands on the grounds that Shopee had not demonstrated that it had any legitimate proprietary interest in respect of the "confidential information" protected under the RCA that was not already protected under the ECA. He also asserted that clause 2 of the RCA was unreasonable both in scope and duration and amounted to an unlawful restraint of trade. Lim therefore refused to provide the undertakings and accede to Shopee's demands.

Shopee also alleged that Lim's role in ByteDance was "*substantially similar*" to the roles he had undertaken in Shopee, a charge that Lim denied.

On 24 November 2023, Shopee commenced legal proceedings against Lim, seeking a declaration, among other things, that clause 2.1 of the RCA (which contained the Non-competition Restriction and the Non-solicitation Restrictions) was valid and enforceable and that Lim had breached them, as well as damages to be assessed.

Shopee also sought, among other things, interim injunctions to prohibit Lim from: (a) seeking or accepting employment with any of Shopee's competitors in Brazil, Indonesia, Malaysia, the Philippines, Singapore, Taiwan, Thailand and Vietnam; and (b) soliciting or endeavouring to entice away from Shopee all or part of the account of any business of any of Shopee's clients and/or soliciting any of Shopee's employees, officers or consultants with whom Lim had material dealings or contact during the 12 months preceding termination of his employment with Shopee.

The High Court's Decision

The High Court dismissed Shopee's application for the interim injunctions.

It held that an applicant seeking an interim injunction in respect of a restraint of trade clause must show:

(a) A serious question to be tried that the restraint of trade clause is valid and enforceable, namely that it protects a legitimate proprietary interest and that it is reasonable in the interests of the parties and the public;

(b) A serious question to be tried (with a real prospect of success) that a restraint of trade clause has been breached; and

(c) If there are serious questions to be tried, that the balance of convenience lies in favour of granting the interim injunction.

This, the High Court found, Shopee failed to do in respect of the Non-competition Restriction as well as the Non-solicitation Restrictions.

No serious question to be tried that the Non-competition Restriction was valid and enforceable

Shopee's case was that Lim was privy to confidential information regarding Shopee's business. As such, the legitimate proprietary interest sought to be protected through the Non-competition Restriction was the protection of confidential information. However, on the test set out in *Man Financial (S) Pte Ltd (formerly known as E D & F Man International (S) Pte Ltd) v Wong Bark Chuan David* [2008] 1 SLR(R) 663 (***Man Financial***) at [92], Shopee had to demonstrate that the Non-competition Restriction covered a legitimate proprietary interest *over and above* the protection of confidential information or trade secrets, since the confidential information in question was already protected under the ECA.

The High Court took the view that the confidential information sought to be protected by Shopee was "*fairly generic*", i.e., growth and business plans; seller and listing management, customer satisfaction, pricing and marketing strategies, and detailed statistics on orders, financial metrics, users and gross merchandise value. Shopee did not plead or point to any specific confidential information, and stated that it was more concerned about the general knowhow that Lim was exposed to, rather than any specific information. However, such general knowhow appeared to be more akin to the "*general character and principle*" type of confidential information which the House of Lords in *Herbert Morris, Limited v Saxelby* [1916] 1 AC 688 considered could not be a trade secret meriting protection. In addition, the court in *Man Financial* observed (at [91]) that any trade secrets or confidential information sought to be protected had to be specifically pleaded; a general assertion would not suffice.

The generality of the information sought to be protected by Shopee affected the geographical scope of the restraint sought in the Non-competition Restriction. Shopee submitted that Lim acquired the confidential information by participating "*in regularly held regional operations meetings*" where Shopee's "*strategies and priorities for all markets would be shared and discussed*". In essence, Shopee's contention was that Lim should not be employed in all the markets that Shopee operated in -- even those that Lim had not worked in or had no responsibilities for, or had no specific information about, in the 12 months preceding Lim's last day of employment with Shopee. Put another way, Lim would simply be restrained from working for any competitor of Shopee who had been in Shopee's markets.

The High Court therefore doubted that it could be said that there was a serious question whether this would be regarded as reasonable as between the parties or reasonable in the interest of the public.

No serious question to be tried that the Non-solicitation Restrictions had been or were about to be breached

While the High Court accepted that Shopee had a legitimate interest in respect of the Non-solicitation Restrictions, Shopee failed to establish that Lim had breached, or was about to breach, those restrictions.

The High Court rejected Shopee's argument that Lim's refusal to provide undertakings to comply with the Non-solicitation Restrictions and his obligations under the ECA showed a proclivity for breaching those restrictions. Lim had, by signing the RCA, already provided those undertaking; it was therefore not apparent why he should have to provide further undertakings and it could hardly be said that he was unreasonable in refusing to do so, or that in so refusing, he had shown a proclivity to breach those restrictions.

As Shopee had not shown that there were serious questions to be tried as to whether the Non-competition Restriction was valid and enforceable or the Non-solicitation Restrictions had been or were about to be breached, the High Court found that it could not be said that those negative covenants had been or were about to be breached.

Finally, in assessing the balance of convenience, the High Court took into account the relative strength of the parties' cases and the *status quo*. In light of the serious doubts about the likelihood of Shopee's eventual success and given that Lim had already started work for ByteDance, the High Court held that it would not be in the interests of justice to disturb the *status quo*.

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FAMILY LAW I JUDICIAL INTERVIEWS I CHILD WELFARE REPORTS

Singapore Court of Appeal Gives Guidance on Judicial Interviews of Children and Use of Child Welfare Reports in Child Proceedings

In contentious family proceedings involving children, the welfare principal is paramount. The role of the child's views in legal proceedings for custody, care and control, and access issues has often proved controversial. In *WKM v WKN* [2024] SGCA 1, the Court of Appeal has given guidance on the roles of judicial interviews with children and child welfare reports in determining custody, care and control and access arrangements in proceedings in the Family Justice Courts (**FJC**).

In a rare move, the Court of Appeal reversed the order made by the General Division of the High Court (**High Court**) that had granted care and control to the mother (**Mother**) and held that care and control should be returned to the father (**Father**). The Court of Appeal further held that, in light of strong evidence that the Mother had engaged in a pattern of parental alienation against the Father, the Mother was to have no contact with the child for a minimum period of four weeks and that contact could only be re-established in stages subject to: (a) the Mother's satisfactory progress in restoring stability in the child's life; and (b) both parents making progress in fostering a cooperative attitude towards the child's future.

Our Comments

This decision underscores the importance of a multi-faceted approach in determining what kind of care and control would be in a child's best interests. In laying out the various tools available to the court to make such an assessment, the Court of Appeal has given timely and valuable guidance on the standards that the FJC would hold itself to in determining what would be in a child's best interests under which the child's views would only be one factor. In a heartening move, the Court of Appeal recognised the limitations of over-reliance on the child's views, given the possibility that in certain instances a child may have been unduly coached by a parent.

This decision further demonstrates the courts' commitment to joint parental responsibility, as set out in section 46 of the Women's Charter which states that a husband and wife are mutually bound to cooperate with each other in caring and providing for any children of the marriage. Where necessary, the courts have been inclined to take strong measures to re-establish appropriate parental involvement in a child's life, such as in the present decision where the Mother was ordered to have no contact with the child pending counselling progress.

Background

The Father and Mother divorced in 2016 when the child (**C**) was four years old. In the initial orders, which were reached by consent, the Father and Mother agreed that they would share joint custody of C, with care and control to the Father and liberal access to the Mother.

The post-divorce arrangements for C appeared to have been fairly uncontentious until October and November 2021, when the Mother lodged a series of police reports against the Father and his mother's helper alleging neglect, physical, emotional and sexual abuse of C. On 9 November 2021, the Mother took C to her home and refused to return her to the Father while seeking further police assistance. The Father thus

sought a mandatory injunction on 21 November 2021 to compel the Mother to return C to his care and to vary the interim judgment orders to replace the Mother's liberal access with supervised access at the Divorce Support Specialist Agency (**DSSA**). The Mother subsequently cross-applied for care and control and sole custody of C.

The FJC's Decision and Events After the FJC's Decision

The FJC declined to interview C, relying instead on three child welfare reports (**Welfare Reports**) from the DSSA and the Child Protective Service (**CPS**). On 6 January 2023, the FJC held that the Father should continue to have care and control of C, and that the Mother should have dinner access on certain days and overnight access from Friday to Saturday. The FJC concluded that, as no further action had been taken by the CPS or the Attorney-General's Chambers against either party, there had been no material change of circumstances that would warrant a variation of the custody arrangements and a reversal of care and control. The Mother appealed against the FJC's decision.

Between March and April 2023, the Father alleged that the Mother attempted to disrupt his exercise of care and control over C. For instance, the Mother called C's school and reported that C was suicidal. She called for police attendance at the Father's residence by raising concerns about C's safety, which caused C to be conveyed to hospital for having self-harmed.

In the course of the appeal to the High Court, both the Father and the Mother urged the High Court to hold a judicial interview of C, albeit with the Father requesting that the judicial interview be conducted in the presence of a psychologist who was known to C.

The High Court's Decision

On 4 May 2023, a Judge of the High Court conducted a judicial interview with C. On the same day, he allowed the Mother's appeal and reversed the order on care and control from the Father to the Mother. The High Court's decision was largely based on C's responses during the short judicial interview, where C had "*made it clear*" that she preferred to live with the Mother. The Judge found that C, being 11 years old, was sufficiently mature to make this decision. The Father's application for a stay of execution of the orders was dismissed. The Judge further observed that C had articulated her opinions with firmness and maturity and was "*adamant that she would be happier if the care and control arrangements were reversed*", and opined that C did not appear to have been coached or under the influence of either parent.

The Father appealed against the High Court's decision. The case was transferred to the Court of Appeal, which directed that updated child welfare reports be submitted and an oral hearing convened.

The Court of Appeal's Decision

The Court of Appeal allowed the Father's appeal and reversed the High Court's decision, granting sole care and control of C to the Father.

In determining what would be in C's best interests, two important legal questions of public interest arose:

(a) The use of judicial interviews in Singapore *vis-à-vis* other sources of information available to the court (**Judicial Interview Question**); and

(b) The significance and weight to be accorded to the contents of reports prepared by child welfare professionals (**Child Welfare Reports Question**).

The Judicial Interview Question

The Court of Appeal affirmed that, while ascertaining the wishes of the child may be facilitated through a judicial interview with the child, whether this process should be employed is a matter for the court to decide in the exercise of its discretion.

Despite the benefits of the process, the Court of Appeal noted that concerns persisted regarding the reliability of the views expressed by the child during judicial interviews, where for instance a child might have been coached by his or her parent. Further, the Court of Appeal acknowledged that judges are not trained to ascertain the views of children, and that there are concerns regarding reliability as the views expressed by a child at a judicial interview have to be understood in the context of what is currently going on in the child's life. In this context, a judge may not have had the time to establish a relationship of trust with the child in order for the child to feel safe in expressing his or her own views. The Court of Appeal further referred to recent parliamentary debates where it was said that, each case being unique, different considerations would apply to each family and child, and that in certain cases judicial interviews of children would not be appropriate and an objective assessment of the child's best interests could be performed by a trained professional, for instance a Child Representative.

The Court of Appeal further noted that, to ensure that children are able to freely express their honest views without worrying about hurting either parent or being torn by a conflict of loyalty, it is crucial that the court keeps these sessions confidential. Children should not be subjected to parental pressure (whether by express coaching or unspoken coercion) to say what the parents desire them to tell the judge. Even if there is no such pressure to assume a certain position, they should not bear the burden and responsibility for any decision ultimately reached.

In line with this, judges should be circumspect and avoid quoting directly what was said by the child in judicial interviews. Any observations or conclusions about the child's views should be expressed sensitively.

Guidance on the conduct of judicial interviews

The Court of Appeal held that the assessment of whether a judicial interview should be conducted must be made with utmost sensitivity to the facts of each case. The court should be mindful of such factors as:

(a) The age and emotional and intellectual maturity of the child;

(b) The relationship between the child's parents and whether there are concerns about excessive gatekeeping or the conduct of one parent alienating the child from the other parent;

(c) The child's general well-being and the consequences for the child should such an interview be conducted;

(d) The nature of the dispute and the stage of the proceedings, including the specific matters in issue; and

(e) The availability of other relevant material, such as reports by social workers and mental health professionals.

How a judicial interview should be conducted

The Court of Appeal stated that, where a judge suspects that there has been excessive gatekeeping or possible alienating conduct, it would be prudent for the judge to consider conducting the judicial interview with a court family specialist from the FJC's Counselling and Psychological Services (CAPS).

It noted that, during a judicial interview:

(a) It is of utmost importance that the judge conveys clearly to the child that the judge decides the case, based on his or her assessment of what is in the child's welfare;

(b) The judge should explain that, while the child's views expressed during the interview will be considered, they are not determinative of the outcome. This may alleviate, to some extent, the stress suffered by children who are pressured by their parents to "take sides", and may also encourage a more honest sharing of their views;

(c) The judge should pose open-ended questions that "*allow the child to respond by using his or her free recall of events or give unencumbered responses in relation to feelings and emotions*";

(d) Where children express their preferences in custody, care and control or access arrangements, it is important for the judge to explore the underlying reasons, to allow a proper evaluation of those preferences; and

(e) It is also important that judges make confidential notes, which serve as crucial records, not only for the judge, but also for the appellate court reviewing the matter.

Reliance on contents of a judicial interview

In respect of the weight a judge places on the content of a judicial interview, the Court of Appeal highlighted the following factors:

(a) The specific facts and circumstances of the case should be considered, for instance the age, and emotional and intellectual maturity, of the child, the relationship of the child's parents, whether there were concerns of alienating conduct and whether there was existing material before the court such as child welfare reports;

(b) Where there is any suspicion of alienating conduct, children may articulate strongly negative views about one parent. It is for the judge to ascertain the root of the negative emotions and whether these originate from the children themselves based on their lived experience, or from the influence of the other parent. If the latter, it may be appropriate for the judge to discount the child's stated views in forming a decision; and

(c) Judges should also exercise special care when the child's views expressed in the judicial interview contradict other evidence before the court, such as the observations of the child welfare professionals in their reports.

Importantly, the Court of Appeal cautioned that the judicial interview should not become a step where the court takes a snapshot of an emotional position at a particular point in time and reaches a decision based on

that momentary picture. Information obtained through other sources would enable the court to have a longitudinal view of the history of the case and a fuller understanding of the family's relationships and issues.

The Child Welfare Reports Question

Pursuant to section 130 of the Women's Charter and section 11A of the Guardianship of Infants Act, there exists in the Singapore legal system a range of investigative and therapeutic reports that the courts may obtain to aid in their decision-making on children's issues. The Court of Appeal listed the following examples:

(a) The Custody Evaluation Report (CER), Access Evaluation Reports (AER), and Specific Issues Reports (SIR) prepared by the FJC's counselling and psychological services arm;

(b) Child Protection Social Reports (CPSR) prepared by the Child Protection Services (a government body);

(c) Supervised Visitation (SV) or Supervised Exchange (SE) Reports prepared by government-linked community facilities known as the Family Service Centres;

(d) Reports by a Child Representative;

(e) Reports by a Parenting Co-ordinator; and

(f) Court expert reports.

With regard to the contents and findings of these reports, the Court of Appeal reaffirmed the long-held position that these should remain confidential (i.e., not disclosed to the parties). The Court of Appeal held that there continue to be strong reasons not to disclose child welfare reports to the parties, chief of which is the desire to provide a safe environment for the child to express his or her views honestly and to prevent parent-child or parent-parent resentment from ensuing from reading candid reports that are unfavourable to a parent. Further, reports sometimes also contain sensitive information that could impact ongoing criminal investigations, and open reports that allow for the cross-examination of their writers may give the parties the opportunity to turn child proceedings into a destructive battlefield against the other party.

Reliance on child welfare reports

The Court of Appeal observed that, given their expertise, professionals are well suited to identify issues, such as excessive gatekeeping behaviour by the parents and even possible signs of abuse. The court should nevertheless be very mindful that information in child welfare reports remains untested by cross-examination and consider carefully whether the observations in such reports are clearly explained and their factual bases furnished. The court may seek clarification from the professionals who submitted the report or ask questions about its content.

Thus, if the judge chooses to place reliance on child welfare reports in making its decision, this should be included in the court's grounds of decision. References to the content of the confidential reports must be made in an appropriate manner that will not compromise the child's interests.

Application to the facts of the case

As mentioned above, the critical factor in the High Court's decision had been C's answers in the judicial interview. The Court of Appeal emphasised that great caution should be exercised when reflecting a child's

views expressed during a judicial interview in the court's grounds of decision. Had C's views expressed in the judicial interview been considered against existing Welfare Reports, it would have been clear that C's answers had been strongly influenced by the Mother, and that it would have been appropriate to direct updated reports given the level of conflict and instability surrounding C in the two years' of the parties' dispute.

Having considered the updated Welfare Reports, the Court of Appeal noted that it was "*deeply troubled by the picture of instability and conflict they revealed and the negative consequences it has had on C's life*". The Mother was found to have engaged in unreasonable gatekeeping and "*wilfully carrying out a campaign*" through unfounded allegations of abuse and neglect in the slew of police reports she filed, and her polarising behaviour, all which aimed to seriously undermine C's relationship with the Father. The Mother was found to have actively sought to turn C against the Father, instilling in C an unwarranted fear and distrust of him by peddling a constant negative narrative of the Father, while insisting that her actions were necessary for C's protection. Ultimately, the Court of Appeal found that the Mother's behaviour had only served to damage C's emotional and psychological well-being and perpetuated feelings of divided loyalty towards her parents. It was in C's best interests to be given an opportunity to heal and rebuild her relationship with the Father without any interference from the Mother. C needed structure, stability and order in her life.

The Court of Appeal therefore ordered care and control and access arrangements for C in four phases to enable the family to progressively work towards re-establishing each parent's relationship with C, while providing her with a strong and stable structure in her life. Initially, the Mother was to have no contact with C for at least four weeks from the handover of care and control to the Father. This could be increased gradually, subject to her progress in gaining insight into how her destructive conduct and the conflict had adversely affected C, and in committing to cooperative co-parenting with the Father.

Key Takeaways

The Court of Appeal's decision underscores the court's commitment to the child's best interests as being paramount in child proceedings. The court's willingness to utilise a range of investigative and therapeutic reports to determine what would be in a child's best interests should provide some comfort to litigants concerned about inappropriate parental influence or alienation techniques being used on a child.

While the judicial interview remains a useful and vital tool in allowing the children at the centre of disputes to have some say in decisions affecting their lives, this decision reminds parents that the views of the children constitute just one of the factors to be taken into consideration.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or the following Partner:

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PATENTS I AI INVENTORSHIP

Man versus Machine: UK Supreme Court Upholds Requirement for Human Inventorship to Secure Patent Protection

Following the position adopted in various jurisdictions, the United Kingdom Supreme Court (**UKSC**) has held that an artificial intelligence (**AI**) machine cannot be an "inventor" within the meaning of the United Kingdom Patents Act 1977 (**UK Patents Act**). An owner of any such machine is not entitled to apply for a patent for any technical advances made by the machine if the machine is said to be the inventor.

Our Comments

This decision forms part of a largely unsuccessful global test-litigation strategy by Dr Stephan Thaler (**Dr Thaler**) to test the limits of AI inventorship for patent applications in various jurisdictions, including major patent jurisdictions such as the European Patent Office, the United States and Australia.

Background

Dr Thaler filed two patent applications (**Applications**) at the United Kingdom Intellectual Property Office (**UKIPO**) naming an AI-powered machine known as DABUS as the inventor instead of a human inventor. The UKIPO requested Dr Thaler to file a statement of inventorship and to indicate the derivation of his right to the grant of the patents in accordance with section 13(2) of the UK Patents Act. Dr Thaler took the position that DABUS was the inventor and that he (Dr Thaler) was entitled to the grant of the patents because he was the owner of DABUS.

The Applications were rejected and deemed withdrawn. The UKIPO held that, since DABUS was not a human inventor, it could not be named as an inventor for the purposes of section 13 of the UK Patents Act.

On appeal to the English Court of Appeal, Dr Thaler argued that:

(a) He was entitled to apply for and secure the grant of patents for DABUS' inventions and, more generally, that the owner of a machine which embodies an AI system is entitled to inventions created or generated by the machine, and to apply for and secure the grant of patents for those inventions if they meet the other statutory requirements for patentability in the UK Patents Act;

(b) An applicant for such patents is not required to name a natural person as an inventor to meet the requirements of the UK Patents Act;

(c) He had satisfied the provisions of section 13(2) of the UK Patents Act; and

(d) In any event, the Hearing Officer for the Comptroller-General of Patents (**Comptroller**) had no basis under the UK Patents Act for refusing the Applications.

The UKSC's Decision

Dr Thaler's arguments turned on three main issues which the UKSC considered but eventually dismissed.

Meaning of "inventor" under the UK Patents Act

On the first issue, the UKSC held that an "inventor" within the meaning of the UK Patents Act must refer to a natural person. Section 7(3) of the UK Patents Act provides that an "inventor" means the "*actual deviser of the invention*". The UKSC clarified that the only interpretation of this word must follow its ordinary meaning, in that the deviser is the person who devises a new and non-obvious product or process that is capable of industrial application.

While the UKSC accepted Dr Thaler's assertions that DABUS did in fact create and generate the technical advances described and disclosed in the Applications and did so autonomously using AI, this did not render DABUS an inventor under the UK Patents Act. As Dr Thaler had applied for the patent on the basis that the invention was autonomously created by DABUS, the Applications failed because DABUS was not a person, let alone a natural person, and did not devise any relevant invention.

Despite this, the UKSC noted that it was never Dr Thaler's case that "*he was the inventor and used DABUS as a highly sophisticated tool*". Had Dr Thaler done so, the UKSC took the view that "*the outcome of these proceedings might well have been different*" but did not elaborate further on this point.

Ownership of an intangible invention

The second issue concerned whether, despite there being no identified inventor, Dr Thaler could still apply for and obtain a patent with respect to any technical advances made by DABUS by virtue of his ownership of the machine.

The UKSC noted that, since DABUS was not an inventor, Dr Thaler failed to meet the requirements of section 7 of the UK Patents Act, which provides an "*exhaustive code for determining who is entitled to the grant of a patent*". The UKSC further observed that section 7 "*does not confer on any person a right to obtain a patent for any new product or process created or generated autonomously by a machine, such as DABUS, let alone a person who claims that right purely on the basis of ownership of the machine*" and that the UK Parliament did not intend section 7 to confer such rights when it enacted the UK Patents Act.

Dr Thaler also attempted to rely on the doctrine of accession by asserting that the DABUS "inventions" were the "*fruits of the DABUS machine that he owns*" and that such a situation is analogous to one where a farmer owns the calf produced by the cow. The UKSC rejected this argument for two reasons. First, this argument was premised on the incorrect assumption that DABUS would be considered an "inventor" within the meaning of the UK Patents Act. Second, the doctrine of accession only applies to "*new tangible property produced by existing tangible property*".

Finally, the UKSC reiterated that, while an applicant for a patent need not be the inventor, he/she must fall into one of the following categories: (a) a person who was, in preference to the inventor, entitled to the whole of the property in it in the UK; or (b) a person who is a successor in title to either the inventor or the person who is entitled to the whole property. Since Dr Thaler did not fall into either of these categories, he was not entitled to apply for a patent for any technical advances made by DABUS as the "inventor".

Withdrawal of the Applications by the UKIPO

On the third issue, the UKSC considered whether the Hearing Officer for the Comptroller was entitled to hold that the Applications would be taken to be withdrawn for a failure to satisfy section 13 of the UK Patents Act.

As Dr Thaler had failed to fulfil both grounds prescribed in section 13 of the UK Patents Act (i.e., he failed to name an inventor and failed to state the derivation of his right to apply for the patent), the UKSC held that the Hearing Officer for the Comptroller was indeed entitled to hold that the Applications would be taken to be withdrawn.

As all of Dr Thaler's arguments failed, the UKSC dismissed Dr Thaler's appeal to name DABUS as the "inventor" under the UK Patents Act. It also ruled that Dr Thaler, as DABUS' owner, was not entitled to apply for a patent for any technical advances made by DABUS as the "inventor" or patents for any inventions described in the Applications given that, on Dr Thaler's case, they were made autonomously by the machine.

If you would like information and/or assistance on the above or any other area of law, you may wish to contact the Partner at WongPartnership whom you normally work with or any of the following Partners:

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