WONG PARTNERSHIP

LAW WATCH

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DEALS

WONGPARTNERSHIP LLP ADVISED IN…
The Secondary Listing of Comba Telecom Systems Holdings Ltd on the Mainboard of the Singapore Exchange Securities Trading Limited (SGX-ST)

Comba Telecom Systems Holdings Ltd (**Comba**), a Hong Kong Stock Exchange Mainboard listed company, has successfully completed its secondary listing on the Mainboard of the SGX-ST by way of introduction on 4 January 2023.

The secondary listing of Comba attracted media attention as it came at a time when the SGX-ST was widely marketed as a desired destination for such listings. Comba is the first company to list on the SGX-ST in 2023. At the time of its listing on the SGX-ST, Comba had a market capitalisation of more than S$688 million.

Comba has been included in the Hang Seng Composite SmallCap Index and Hang Seng Composite Industry Index – Information Technology since September 2020.

Comba is a global leading wireless solutions provider which researches, develops, produces, and sells wireless coverage products including repeaters, antennas, and radio frequency (RF) passive accessories.

The partner involved in the transaction was Chong Hong Chiang from the China Practice.

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Other recent matters that WongPartnership is or was involved in:

DESCRIPTION	PRACTICE AREAS
Acted in the launch of yuu Rewards Club, a free rewards platform created by Temasek-backed tech venture, minden.ai.	Corporate/Mergers and Acquisitions Intellectual Property, Technology and Data
Acting in the joint acquisition by Frasers Centrepoint Trust (**FCT**) and Frasers Property Limited of a 50 per cent stake in suburban mall Nex from a subsidiary of Mercatus Co-operative, a unit of NTUC, for S$652.5 million. The acquisition is in line with FCT's investment strategy, allowing for diversification and enhancing its market position in the suburban retail sector.	Corporate/Mergers & Acquisitions Corporate Real Estate Antitrust & Competition
Acted as Singapore legal advisor in the acquisition of Tulchan Communications LLP (**Tulchan**), a financial and corporate communications advisory firm, by global CEO advisory firm Teneo. Tulchan has a strong presence in Singapore where it has been established for over 10 years.	Corporate/Mergers & Acquisitions
Advised in legal matters regarding Prudential's set-up of a financial advisory firm.	Insurance Private Wealth
Acting in relation to the plan of a global investment firm for a partnership to decarbonise rice cultivation. The firm intends to build an agritech start-up to identify strategies to reduce greenhouse gas emissions in rice cultivation, which include economic incentives to drive the adoption of sustainable cultivation techniques.	Corporate/Mergers & Acquisitions
Acting in relation to ESR-Logos REIT's divestment of an aerospace training facility for approximately S$7.1 million. The divestment is expected to be completed in the second quarter of 2023, subject to the approval of JTC Corporation.	Corporate Real Estate
Acting in the interim judicial management of Hodlnaut, a Singapore-based crypto lender, and its US$300 million debt.	Restructuring & Insolvency

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DESCRIPTION	PRACTICE AREAS
Acting in the mandatory conditional cash offer by Tang Dynasty Treasure Pte. Ltd., for the shares of Chip Eng Seng Corporation Ltd. at S$0.75 per share. If entitled, Tang Dynasty intends to privatise and delist Chip Eng Seng from the Singapore Exchange.	Corporate/Mergers & Acquisitions Debt Capital Markets Antitrust & Competition Corporate Real Estate
Acting in an International Centre for Settlement of Investment Disputes (ICSID) arbitration between the Independent State of Papua New Guinea and a Singapore-incorporated company involved in telecommunications infrastructure in Papua New Guinea. The dispute arose out of the State's imposition of tax measures on companies in the telecommunications sector, resulting in a tax of over US$100 million being levied against the company's subsidiary in Papua New Guinea.	Corporate and Commercial Disputes
Acted in the syndicated financing of the acquisition and development of the conservation landmark Golden Mile Complex by the Borrower-consortium comprising Far East Organisation, Perennial Holdings Private Limited and Sino Land. This commercial building was the first modern, large-scale strata-titled development to be gazetted for conservation for its historical and architectural significance. DBS, Maybank and OCBC were the mandated lead arrangers.	Banking & Finance Corporate Real Estate

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BREACH OF CONFIDENCE

Singapore High Court Finds Former Senior Employees Liable in Paradigm Case of Breach of Confidence Involving Infringement of Wrongful Gain Interest

Authored by Partners Wendy Lin and Leow Jiamin with contribution from Senior Associate Phoebe Leau

In *Tritech Water Technologies Pte Ltd and others v Duan Wei and another* [2023] SGHC 23, the General Division of the Singapore High Court (**High Court**) found two former high-ranking employees liable for breach of their contractual and equitable duties of confidence as well as for the tort of unlawful means conspiracy after: (a) failing to surrender their company-issued devices and access to company emails / documents upon the cessation of their employment; and (b) starting a competing business to manufacture and sell similar products. The High Court additionally found that one of the employees had, in the course of his work on three abortive projects, made fraudulent statements to his employer and failed to perform his duties diligently.

Our Wendy Lin, Leow Jiamin and Leau Jun Li (Phoebe) acted for the successful plaintiffs before the High Court.

This update examines the High Court's decision.

Our Comments

An employee may owe various duties to his employer beyond the express terms of his employment contract:

(a) First, an employee should not take or make unauthorised use / disclosure of the employer's confidential information. While the law does not generally suppress competition, it draws a bright line against the deliberate taking and use of confidential information by:

   (i) **Existing employees**, especially for the purpose of setting up a direct competitor. An employee who does so during his employment runs the risk of breaching his duty of good faith and fidelity and his contractual or equitable duty of confidence; and

   (ii) **Ex-employees**, where the information is of a sufficiently high degree of confidentiality. While an ex-employee is not precluded from engaging in a competing business or using skill and knowledge gleaned from his employment, the law protects (by default) employers from the wrongful taking and use of trade secrets. Parties may however agree to widen the scope of information that continues to be protected after termination of the employment, e.g., by entering into non-disclosure agreements (**NDAs**) or by stipulation in the employment contract.

(b) Second, an employee should perform his duties with reasonable care and skill. Such an obligation may be implied by law even if it is not expressed in the employment contract. An employee who, for instance, undertakes a project should avoid misleading his employer as to the viability of the project, or concealing matters of significance (e.g. serious risks / issues affecting the viability of the project) from his employer. An employee who makes false statements without caring whether or not they are true to induce his employer to embark on a project may also be liable for deceit / fraudulent misrepresentation.

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This case also spotlights the need for expert evidence to be impartial and reasoned. Expert witnesses have an overriding duty to assist the court; they are not a mouthpiece for the parties and should not opine on matters beyond their expertise. An expert witness's report must also comply with the requirements under the Rules of Court 2021 and provide reasons for the conclusions drawn.

A final point of significance is that the similarity of the infringing product is often a key factor in establishing a breach of confidence. Where, as in this case, the actual products are not in evidence, potential claimants can consider taking the following steps if legal action is contemplated:

(a) Conduct a trap purchase of the defendant's product and keep records of the process;

(b) Document all similarities in the parties' respective products, and where necessary, conduct forensic analysis;

(c) Gather evidence of the defendant's production process; and

(d) Obtain marketing materials (product write-ups, brochures, etc.) in respect of the defendant's product.

It may be useful to also consider provisional legal remedies such as search orders and preservation orders under Order 13 of the Rules of Court 2021.

Background

The plaintiffs (**Tritech**) were subsidiaries of the listed Tritech Group Limited. Tritech's business included the production of class-leading column-style and curtain-style ultrafiltration hollow fibre membranes (collectively, **Hollow Fibre Membranes**), and forward osmosis (**FO**) and reverse osmosis (**RO**) membranes (collectively, **Flat Sheet Membranes**). Its research and development (**R&D**) and production activities were based in China.

The defendants were former employees and senior executives of Tritech. The first defendant, Dr Duan Wei (**Dr Duan**) had, from around 2012, been the Chief Technical Officer of the first plaintiff and the director of one of Tritech's factories that specialised in producing Flat Sheet Membranes (**Factory**). The second defendant, Mr Luo Zhuobiao (**Mr Luo**), was, among other things, the Chief Commercial Officer of the second plaintiff and Chief Supervisor of network marketing promotion.

Defendants' breach of confidence

Dr Duan resigned and left Tritech on 31 March 2017. Shortly before his departure, on 1 March 2017, Dr Duan, together with others, incorporated a competing business named Dreamem in China. Dreamem's shareholders included Dr Duan (22.5%) and Mr Luo's mother (22.5%). Without having conducted any R&D, Dreamem was able to produce Hollow Fibre Membranes by the end of 2017.

In June 2018, Tritech conducted a trap purchase of Dreamem's Hollow Fibre Membranes from Mr Luo, who was then (notwithstanding concurrent employment at Tritech) serving as Dreamem's manager. Tritech discovered that Dreamem's products were similar in terms of their physical characteristics and properties. Tritech's investigations revealed that, from March 2017 to March 2018, Mr Luo forwarded Tritech emails containing confidential information (e.g., pricing information, manufacturing processes) to his personal email address.

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On 31 August 2018, Mr Luo was summarily dismissed for misconduct. In September 2018, Tritech commenced legal proceedings, pursuing claims against Dr Duan and Mr Luo for breach of confidence (in contract and equity) and unlawful means conspiracy. In particular, it was Tritech's case that they had taken and misused information relating to Tritech's chemical formula, parameters, and processes for the production of Hollow Fibre Membranes, pricing information, and supplier and customer information.

Claims against Dr Duan

As against Dr Duan, Tritech brought claims additionally in the tort of deceit, negligent misstatement, and/or breach of his implied obligation to exercise reasonable skill and care in the performance of his duties as the director of Tritech's Factory. All the projects which he oversaw for the development and procurement of production lines / equipment for Flat Sheet Membranes failed abjectly.

Tritech also sued Dr Duan for breaching his duty of good faith and fidelity and/or fiduciary duties by misappropriating RMB 400,000. At his request, Tritech disbursed the monies to Dr Duan to engage technical consultants to reform the RO production line. However, Tritech never received any consultation services and the monies were never returned. It transpired that, pursuant to an illicit agreement with one Mr He, Dr Duan handed RMB 400,000 to Mr He to provide technical support and received a kickback of RMB 149,800. For this (and another similar incident), Dr Duan had been convicted of bribery in 2021 by the Chinese courts and imprisoned.

The High Court's Decision

The High Court gave judgment in favour of Tritech.

Defendants' breach of confidence and unlawful means conspiracy

The law on breach of confidence is now well-established:

- The plaintiff must show three elements. The information must have been: (a) confidential; (b) imparted in circumstances of confidence; and (c) used without authorisation and to the plaintiff's detriment.
- Where the defendant accessed / acquired information without the plaintiff's consent, the law recognises that the plaintiff has thereby suffered a **wrongful loss**. The breach of confidence is then presumed, and the burden shifts to the defendant to prove that his conscience was unaffected by the taking of information (i.e., the "taker" situation presumption).
- That presumption does not apply where information was not taken, or where element (c) can be clearly proven, in which case, the defendant would have made a **wrongful gain** from the confidential information.

Here, the High Court held that the defendants had breached their **equitable** obligations of confidence.

First, the emails which Mr Luo forwarded to his personal account were confidential and sufficient to replicate Tritech's production process. Such information was inaccessible by the public and restricted within Tritech to its senior management.

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Second, the information was imparted in circumstances of confidence. Both defendants were subject to confidentiality obligations under certain NDAs. Their employment contracts also incorporated Tritech's Service Guidelines, which prohibited the disclosure of confidential information and required employees to, upon cessation of employment, "*return all company properties and document*" and "*keep company information and business contacts (including… worksheet, spread sheets, list of suppliers, list of vendors, and all other information) confidential*".

Third, there was actual misuse by the defendants of Tritech's confidential information. While Tritech's and Dreamem's products were not in evidence, it was not disputed that Tritech acquired Dreamem's products in a trap purchase, and that most of the evidence concerning Dreamem's products / production process had been seized by the Chinese authorities for the purpose of Tritech's patent infringement claims against Dreamem in China. What was helpful was that Tritech had meticulously documented similarities in the respective products, based on specifications / properties recorded in Dreamem's marketing materials and test reports commissioned by the Chinese authorities, as well as comparisons conducted in-house. The High Court ultimately found that Dreamem's and Tritech's products were similar, because:

(a) Dreamem's Hollow Fibre Membranes were physically similar and bore similar properties to Tritech's Hollow Fibre Membranes, even in specifications for which Tritech was class-leading in China. This meant that Dreamem had used almost identical operating parameters and procedures, as any deviation from Tritech's would result in a difference in the membranes' properties. Indeed, photographs taken of Dreamem's factory showed similarities between Tritech's and Dreamem's production lines. Tellingly, Dr Duan was also one of two key engineers involved in Tritech's R&D work for Hollow Fibre Membranes.

(b) Dreamem's ability to produce and sell Hollow Fibre Membranes in a remarkably short time – less than a year of its incorporation without prior R&D – suggested that it used Tritech's confidential information. No one else in Dreamem had the relevant expertise. The timing at which Mr Luo took Tritech's information also coincided with the commencement of Dreamem's production.

(c) The High Court rejected the defendants' assertions that:

   (i) Dreamem did not produce column-style Hollow Fibre Membranes and instead resold products obtained from a third party to Tritech during the trap purchase – this was contrary to Dreamem's own marketing materials and photographs of Dreamem's factory which showed structures used in fabricating such membranes; and

   (ii) Dreamem was able to quickly produce curtain-style Hollow Fibre Membranes as it had purchased from third parties a production line as well as formula, operating procedures, and parameters. The contracts and invoices adduced in evidence by the defendants could not be verified and no further evidence was given of the items allegedly handed over by the vendors. The price paid for the formula (RMB 106,000) was also implausibly low.

The High Court reached its conclusion notwithstanding the defendants' reliance on an expert report, which asserted (based on test reports from an unknown third-party source) that Dreamem's products were not a copy of Tritech's. The expert failed to provide reasons for his bare conclusion or details of any literature relied on. He also did not explain the test reports or conduct those tests. Crucially, the report did not comply with

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requirements under Order 40A, rule 3 of the Rules of Court 2021, which meant that the High Court did not have the benefit of the expert's confirmation that he understood his overriding duty to assist the court.

In light of the clear evidence that the defendants had made a wrongful gain, it was unnecessary to consider whether the "taker" situation presumption was engaged. It also followed that the defendants had breached their **contractual** duties of confidence (as set out in the NDAs and their employment contracts).

The High Court also found the defendants liable for unlawful means conspiracy. They acted in concert through Dreamem and disclosed Tritech's confidential information to Dreamem in breach of their duties of confidentiality. Tritech suffered loss as a result of profit accruing to Dreamem, a direct competitor.

Dr Duan's failure to exercise reasonable care and skill

The High Court found that Dr Duan failed to exercise reasonable care and skill in discharging his duties as the director of Tritech's Factory and engineer responsible for various projects for Flat Sheet Membranes.

Dr Duan oversaw the development and procurement of the FO production line. When serious defects surfaced in early 2013, he began communicating privately with the vendor and kept defects hidden from Tritech for almost ten months. He later prepared a list of defects on 25 October 2013 for Tritech, which omitted key defects and downplayed others, even though he knew then that the production line was a hopeless failure. From 25 October 2013 to November 2016, Dr Duan continued working on the production line and failed to promptly and fully disclose all defects. This misled Tritech into thinking that the issues could be resolved and Tritech even went on (at Dr Duan's recommendation) to purchase membrane machines (**MR Machines**) from the same vendor.

Dr Duan displayed a similar want of care in respect of the MR Machines. He failed to act reasonably by arranging the purchase of the MR Machines in November 2013 (despite knowing by then that the FO production line was dysfunctional), and inducing Tritech to accept the MR Machines without fully testing them at the pre-delivery inspection. A reasonable employee in Dr Duan's position would have known there was a risk that the MR Machines would be: (a) of no use, unless the FO production line was functional; and (b) non-functional, if acquired from the same vendor. As things turned out, the MR Machines were defective.

Dr Duan's deceit and breach of his duty of good faith and fidelity

In respect of the RO production line (another project overseen by Dr Duan), the High Court found that he deceived Tritech by falsely and fraudulently (i.e., by not being concerned with the truth) stating that:

(a) The vendor had the capacity to design, manufacture and install the RO production line – Tritech later discovered that the vendor had almost no funds and its premises were unsuitable for manufacturing production line equipment. It ought to have been clear to Dr Duan, who had visited the vendor's premises twice, that they had no such capability;

(b) During his pre-delivery inspection, the production line was acceptable, free of defects, and met contractual specifications – Dr Duan should not have made such an unqualified statement when he did not check all features of the equipment, some of which in fact failed to comply with agreed specifications.

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Induced by and in reliance on these statements, Tritech purchased the RO production line and accepted its delivery. Tritech suffered loss when the RO production line turned out to be defective.

Finally, in breach of his duty of good faith and fidelity, Dr Duan used the RMB 400,000 for a dishonest and unauthorised purpose – for a transaction out of which he would receive a secret commission. Since Tritech did not receive any consultancy services, Dr Duan was liable to return the sum.

In the circumstances, the High Court ordered:

(a) An injunction to restrain the defendants from using Tritech's confidential information;

(b) The defendants to deliver up all Tritech documents;

(c) The sum of RMB 400,000 to be returned by Dr Duan to Tritech; and

(d) Damages to be assessed at the next stage of the proceedings.

If you would like information 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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CONSTRUCTION

Variations Without Written Instructions – Can a Contractor Still Get Paid?

Authored by Partner Lesley Fu with contribution from Senior Associate Rachael Chong

Can a contractor get paid on its variation claims where: (1) there are no written instructions for variation works; and (2) the construction contract states that variation works are to be carried out with written instructions from a designated person? This question often plagues construction industry players.

Much turns on how the contract is worded and the parties' conduct, as the decision of the Appellate Division of the Singapore High Court (**Appellate Division**) in *Vim Engineering Pte Ltd v Deluge Fire Protection (S.E.A.) Pte Ltd* [2023] SGHC(A) shows.

Background

The respondent, Deluge Fire Protection (S.E.A.) Pte Ltd (**Deluge**), was engaged by a main contractor (Samsung C&T Corporation (**Samsung**)) for plumbing, sanitary and gas work for a redevelopment project. Deluge in turn engaged the appellant, Vim Engineering Pte Ltd (**Vim**), to carry out a limited scope of its plumbing works. The agreement between Deluge and Vim was set out in a sub-subcontract (**Subcontract**).

Vim brought proceedings against Deluge in the General Division of the High Court (**High Court**) claiming, among others, payment for variation works (**Variation Claims**).

Clause 16 of the Subcontract provided that:

> *Any variation works such as addition[s] or omission[s] or modification[s], shall be on a back-to-back basis with the Main Contract.* ***Such variation shall be carried out only with written instruction[s] from [Deluge's] Project Manager*** *and the unit rates are in accordance with the agreed SOR for this Subcontract.* (emphasis added)

Each of Vim's Variation Claims comprised: (a) an invoice containing the breakdown of the cost of the variation; and (b) a variation work form which included a signed acknowledgement by either Deluge's project manager or site engineer (**Deluge's representatives**).

The High Court Judge at first instance[1] dismissed the Variation Claims on the basis that: (a) there were no written instructions from Deluge's project manager as required under the Subcontract; and (b) there was no waiver or estoppel by Deluge.

On appeal to the Appellate Division, Vim canvassed the same arguments made in the High Court, that it was entitled to be paid for its Variation Claims because:

(a) The drawings which Vim received from the main contractor Samsung constituted a written instruction;

(b) Alternatively, Deluge had given oral instructions for such variation works to be carried out, and clause 16 should not be regarded strictly as a condition precedent but as a procedural provision; and

[1] *Vim Engineering Pte Ltd v Deluge Fire Protection (SEA) Pte Ltd* [2021] SGHC 63.

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(c) The requirement of Deluge's written instructions under clause 16 had been waived.

Deluge maintained its position that:

(a) The Variation Claims were invalid as they were in fact original contract works;

(b) Deluge had never issued Vim any written instructions as required under clause 16 of the Subcontract, and clause 16 should be construed strictly as a condition precedent; and

(c) Deluge's representatives (who signed the variation work forms) did not have authority to waive the writing requirement under clause 16.

The Appellate Division's Decision

The Appellate Division largely overturned the decision of the High Court Judge, and allowed Vim's Variation Claims.

In arriving at this decision, the Appellate Division considered the following issues:

(a) Whether clause 16 of the Subcontract ought to be regarded as a condition precedent, i.e., whether it required strict compliance failing which a variation claim would fail;

(b) Whether Deluge had waived the requirement of written notice; and

(c) Whether the works under the Variation Claims formed part of the main works.

Whether clause 16 ought to be regarded as a condition precedent

While the Appellate Division did not overturn the High Court Judge's ruling that there was non-compliance with clause 16 (i.e., no written instructions from Deluge's project manager), the Appellate Division nonetheless found that clause 16 ought not to be regarded as a condition precedent and that non-compliance would not necessarily cause Vim's Variation Claims to fail.

Prior to the Appellate Division's decision, there had been two prominent and seemingly inconsistent decisions on whether non-compliance with the requirement for written notice would bar a contractor's claim for variations:

(a) In *Mansource Interior Pte Ltd v CSG Group Pte Ltd* [2017] 5 SLR 203 (***Mansource***), the subcontract provided that "*… there shall be no claim whatsoever unless it is a variation work authorised and approved by [the main contractor] only*". The High Court in this case found that the defendant's variation claims were without merit since the main contractor did not authorise or approve any of the variation works. The contractual conditions agreed between the plaintiff and defendant for a successful variation claim were therefore not satisfied.

Deluge contended that clause 16 should be construed strictly, as with *Mansource.*

(b) In the subsequent case of *Comfort Management v OGSP Engineering Pte Ltd* [2018] 1 SLR 979 (***Comfort Management***), the Court of Appeal appeared to take a more commercial approach, finding that "*it is not invariably the case that the absence of writing, or more generally, the failure to follow the*

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prescribed procedure, will disentitle the party who has performed the variation works from claiming payment for those works … All it means is that the contractor bears the risk of proving that the variation was ordered by the employer in the absence of a written variation order".

Unsurprisingly, Vim contended that the principles set out in *Comfort Management* ought to apply.

Ultimately, the Appellate Division found that clause 16 was "*not drafted in a stringent manner requiring strict compliance failing which a variation claim will fail*". Clause 16 did not state that if there were no written instructions for variations from Deluge's project manager, Vim would forfeit the right to any payment or would otherwise be barred from claiming payment for work that it considered a variation. Meaning to say, given the wording of clause 16, Vim's non-compliance with the requirement for written notice would not necessarily bar its claims for variations.

The Appellate Division also distinguished the case of *Mansource* on two bases: (a) the more stringent contract wording used in *Mansource*; and (b) the fact that the defendant in *Mansource* had not pleaded an alternative basis for its counterclaim for variations on the basis of *quantum meruit* under the law of unjust enrichment and/or waiver.

Whether Deluge had waived the requirements under clause 16

The Appellate Division found that Deluge had, by election, waived the requirement of written notice and could not demand its strict adherence.

At the outset, the Appellate Division emphasised that the contractual stipulation of written notice may be departed from to permit a claim for variation work where there is sufficient proof of waiver or estoppel. A waiver by election may be made out where: (a) a party unequivocally chooses not to exercise one of two inconsistent rights; (b) he communicates his election not to exercise one of those rights to the other party; and (c) he is aware of the circumstances giving rise to the existence of that right.

The Appellate Division took the view that Deluge had waived the requirement of written notice for the following reasons:

(a) Deluge's representatives had signed an overwhelming majority (32 out of 34) of the variation work forms, which formed part of Vim's Variation Claims.

(b) Importantly, Deluge's representatives had made written comments on 24 out of the 32 signed variation forms, stating that the claims would be subject to Samsung's approval.

(c) Even after the claims were passed into the domain of Deluge's administrators, there was no evidence that the administrators had rejected the variation work claims on the basis of the requirement of written notice. Neither did the administrators appear to have regarded Deluge's representatives to be in error for receiving and accepting the invoices and forms making up Vim's Variation Claims.

Given the factual circumstances set out above, the Appellate Division found that it was irreconcilable for Deluge's representatives to, on the one hand, sign Vim's Variation Claims and include written comments that these would be subject to Samsung's approval and, on the other hand, subsequently insist that the work ought to have been carried out only under written instructions from Deluge pursuant to clause 16.

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While the Appellate Division qualified that this is not to say that Deluge's signing and written comments alone amounted to an acknowledgement that Vim would be paid for the works, it was still satisfied that, in the totality of circumstances, Deluge had by election waived the requirement of written notice.

Further, the Appellate Division dismissed Deluge's contention that its representatives (i.e., its project manager and site engineer) had no authority to waive the requirement of written instructions. This was because Deluge did not include this point in its pleadings.

In any event, the Appellant Division was of the view that Deluge's representatives had the authority to waive the requirement of written instructions for variation claims. The following facts were considered relevant in this respect:

(a) Deluge's project manager had the authority to issue written instructions under clause 16, and had also signed the Variation Claims and written comments;

(b) Both the project manager and site engineer signed Vim's forms which had the words "VARIATION WORK" on a bold strip across the top of the forms; and

(c) Based on oral testimony from the site engineer, it was evident that Vim's employees had to abide by the site engineer's instructions, and that the site engineer would sign on the project manager's behalf when the latter was not around.

Whether the works under the Variation Claims formed part of the main works

The Appellate Division also found that the works under the Variation Claims were indeed varied works, and did not form part of the main contract scope of works.

In arriving at this holding, the Appellate Division took into account:

(a) The context of the Subcontract, which was essentially a sub-subcontract between Vim and Deluge to Deluge's subcontract with Samsung. In other words, Vim was only engaged to perform a *limited scope* of Deluge's work. For instance, while clause 4.1 in the Subcontract broadly provided that Vim was to "*[p]rovide construction management, site supervision and safety supervision*", the Appellate Division considered that this did not mean that Vim was to provide the same for the entirety of Deluge's works under Deluge's subcontract with Samsung. Instead, clause 4.1 related only to Vim's scope of work.

(b) The conduct of Deluge's representatives, which suggested that Deluge did not regard the varied works to be part of the main works. The Appellate Division stated that if Deluge had regarded the varied works as part of the main works, Deluge's representatives or contract administration team would have summarily rejected the claims on this basis. Deluge however did not do so, and instead signed the documents and wrote comments that the claims would be subject to Samsung's approval.

Concluding Observations

The following practical guidance for all construction industry players (including employers, contractors and contract administrators) may be derived from the Appellate Division's decision:

✓ **Importance of wording used in clauses governing variation works**: As can be seen from the decision, the type of contractual wording used can certainly make a notable difference to a party's

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right to payment. Consequently, if parties intend for strict requirements (e.g., a notice in writing) to be met before a claim for variation is allowed, they ought to ensure that the clauses governing variation works are drafted with stringent language to this effect.

- ✓ **Significance of parties' conduct and administration of contract**: The parties' conduct and administration of the contract is evidently significant. The Appellate Division considered Deluge's conduct to not just be relevant to the issue of whether there was waiver, but also the scope and quantum[2] of the Variation Claims. In another recent Appellate Division decision (*Diamond Glass Enterprise Pte Ltd v Zhong Kai Construction Co Pte Ltd* [2022] SGHC(A) 44), the court similarly found that based on the conduct of the parties, strict compliance with the contractual provisions (i.e., that variations had to be agreed by the Principal and/or Principal's representative as defined in the contract) had been waived. It is therefore important that parties' representatives are mindful of their conduct and administration of the contract, and do not act in a manner inconsistent with their contractual rights, if they wish to continue to insist on strict compliance with their contract.

- ✓ **Inclusion of material facts and/or relevant causes of action in pleadings**: The Appellate Division's decision drives home the importance of including material facts and/or relevant causes of actions in parties' pleadings. Deluge's belated argument on its representatives' lack of authority was not allowed because it did not plead this point. The Appellate Division also observed that the defendant in *Mansource* was unable to claim for variations because the defendant had not pleaded an alternative basis for its counterclaim for variations. Given potentially unfortunate consequences such as these, it would do a party well to adequately and comprehensively frame a claim and/or defence in its pleading(s).

If you would like information 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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2 The issue of quantum of the Variation Claims is not covered in this update; see [66] and [67] of the Appellate Division's decision for this point.

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BONDS

Keeping Bonds Trustees On Their Toes

Authored by Senior Associate Muhammed Ismail Noordin

Where bondholders are represented by a bonds trustee in a bond issue, they are typically bound by a "no-action clause" in the trust deed (which governs, among other things, the relationship between the bondholders and the trustee).

The "no-action clause" typically provides that only the trustee can take enforcement actions against the bond issuer on behalf of all bondholders save in very limited circumstances. This is to ensure as far as possible that the bond issuer is protected against frivolous actions by individual bondholders and that such actions represent the collective interest of the bondholders as a class.

Exceptions to the "No-action clause"

In *Lim How Teck v Laguna National Golf and Country Club Ltd and another matter* [2023] SGHC 32 (***Lim How Teck***), the General Division of the Singapore High Court (**High Court**) accepted that, where the trustee is in a position (or potential position) of conflict of interest or has shown unjustifiable unwillingness to act, the court will disapply the "no-action clause" and allow individual bondholders to commence actions in their name against the issuer. (For more details on *Lim How Teck*, please refer to our firm's earlier update: "No-action clause" Inapplicable Where Bond Trustee in Position of Conflict.)

There now appears to be more carve-outs from the "no-action clause" than before, when reliance was placed primarily on United States and English cases. Two such clear exceptions are where the trustee:

(a) May be in a position of conflict or potential conflict (and that conflict or potential conflict can be identified, rather than simply asserted without an explanation); and

(b) Has shown "unjustifiable unwillingness" to act.

Conflict of interest

On the facts of *Lim How Teck*, the issuer had in fact informed the trustee of its inability to pay at a time when some holders of certain notes (**Noteholders**) considered a breach should have already been called and there was a dispute with the Noteholders regarding the application of certain proceeds received by the issuer (which were known to the trustee).

The High Court took the view that, after the commencement of a winding-up, the trustee's "interest in protecting itself against [claims that Noteholders asserted against the trustee] would conflict with its duty to protect the interests of the [N]oteholders".

Unjustifiable unwillingness

The High Court found that there did not appear to be unjustifiable unwillingness by the trustee to act as the trustee had confirmed that it would act if so directed in writing by the requisite number of qualifying Noteholders. The trust deed provided the trustee some discretion as it did not have to comply with such

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direction unless it was indemnified "to its satisfaction" against all actions, proceedings, claims and demands and costs *etc.* that it may be liable for or incur.

The High Court noted that if the trustee had refused to accept an indemnity (the scope of which was consistent with the language used in in the trust deed) without good reason, the trustee's refusal would trigger the "carve-out" to the "no-action clause" in the trust deed and the "no-action clause" would cease to apply.

Practical Takeaways for a Bonds Trustee

For a bonds trustee, some practical takeaways gleaned from *Lim How Teck* include ensuring that:

(a) It actively insists (and continues to insist) on bondholders being updated on potential events of default or steps being taken to ensure that issuers keep to their obligations under the bonds issued if it doubts the veracity of statements from issuers; and

(b) It properly considers instructions from bondholders and, wherever possible, assists them in understanding the conditions in the bonds that they need to satisfy before the trustee is obligated to act.

Lim How Teck is a useful reminder that the "no-action clause" does not override fundamental duties of the trustee imposed by common law. Trustees need to be diligent in not exposing themselves to accusations of being in a position of conflict or potential conflict, as illustrated by this case.

If you would like information 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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WONG PARTNERSHIP

LEGAL HIGHLIGHTS

MARCH 2023	
23 March 2023	**Consultation Paper on the FI-FI Information Sharing Platform for AML/CFT**

The Monetary Authority of Singapore (**MAS**) recently published its Response to Feedback Received on the Consultation Paper on the Financial Institution (**FI**) Information Sharing Platform for Anti-Money Laundering and Countering the Financing of Terrorism (**AML/CFT**). This response clarifies the scope and operation of a proposed secure digital platform called "Collaborative Sharing of Money Laundering and Terrorism Financing Information & Cases" (**COSMIC**), which is intended to enhance information exchange between FIs to more effectively detect and disrupt criminal activities. Six prescribed banks will participate in COSMIC in the initial phase, and the MAS plans to progressively extend COSMIC to a wider segment of the financial sector and expand the key areas of focus in subsequent phases.

Participant FIs will share risk information with each other where a customer's unusual activities crosses the stipulated threshold criteria, and the participant FI knows or has reason to believe that another participant FI has the same customer or is linked to the customer's transaction. These obligations will apply in cases concerning former, current, and prospective customers of participant FIs. Participant FIs will also be conferred with statutory protection from civil liabilities, and carve-outs from the Personal Data Protection Act 2012 and Banking Act 1970 will be made in relation to the sharing of information on COSMIC. The MAS has cautioned that participant FIs should not rely solely on information obtained from COSMIC when making AML/CFT decisions, and that the sharing of information on COSMIC does not detract from their suspicious transaction reporting obligations under the Corruption, Drug Trafficking and Other Serious Crimes (Confiscation of Benefits) Act 1992.

Related information:

Consultation Paper on the FI-FI Information Sharing Platform for AML/CFT

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MARCH 2023	
10 March 2023	**Circular on Money Laundering and Terrorism Financing Risks in the Wealth Management Sector** The Monetary Authority of Singapore has issued a circular titled "Money Laundering and Terrorism Financing (**ML/TF**) Risks in the Wealth Management Sector" on 3 March 2023, which reminds all financial institutions (**FIs**) to remain vigilant to ML/TF risks in the wealth management sector, and to review existing controls to ensure that they keep pace with growth in their wealth management businesses. In particular, the circular highlights three main areas that FIs should take note of: (1) strengthening board and senior management oversight and risk and control functions (including keeping the board and senior management apprised of potential ML/TF risks arising from high growth areas); (2) taking steps to review customer due diligence practices in high growth areas and conducting quality assurance testing on such practices; and (3) maintaining vigilance over customers / transactions which present higher ML/TF risks. **Related information**: Circular on Money Laundering and Terrorism Financing Risks in the Wealth Management Sector **Contact our Partners**: Elaine Chan | Rosabel Ng | Chan Jia Hui | Tian Sion Yoong

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17 March 2023	Antitrust & Competition: What Lies Ahead in 2023
15 March 2023	Changes to the Global Investor Programme
10 March 2023	Arbitral Tribunal Rules on Scope of Arbitral Consent under PRC-Singapore BIT
7 March 2023	Quantifying Damages for Delayed Completion: Singapore Appellate Division Weighs In
3 March 2023	Singapore Court of Appeal Propounds Composite Approach to Determine Arbitrability of Disputes | A Tale of Matrimonial Discord Among Shareholders
24 February 2023	Implementation of MAS Due Diligence Requirements for Corporate Finance Advisers
23 February 2023	Budget 2023 – Employment Updates
22 February 2023	"No-action clause" Inapplicable Where Bond Trustee in Position of Conflict
20 February 2023	China Securities Regulatory Commission Released Regulations for Filing-based Administration of Overseas Securities Offering and Listing by Domestic Companies
9 February 2023	Liquidators Take Note: No Retrospective Authorisation for Exercise of Liquidators' Powers
8 February 2023	Enhanced Tripartite Guidelines on Exercising Sensitivity for Harmonious Workplace
18 January 2023	Data Protection Quarterly Updates (October - December 2022)
12 January 2023	Changes to Listing Rules: Tenure of Independent Directors Capped at Nine Years; Remuneration of Directors and CEOs Must Be Disclosed
11 January 2023	Alternative Arrangements for Conducting Electronic General Meetings to be Revoked on 1 July 2023
20 December 2022	Singapore High Court Outlines Factors for Granting Permission to Continue or Commence Proceedings Against Bankrupt Individuals
19 December 2022	Launch of Manpower for Strategic Economic Priorities Scheme

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