

CRIMINAL LIABILITY OF AUDITORS FOR FINANCIAL
STATEMENTS

By:
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ABSTRACT

This article discusses the legal position of the auditors in Malaysia under the criminal law. It examines whether the legal principles under this law are able to address the scandals which have emerged in recent years pertaining to auditors. It also investigates whether the legal principles under criminal law impose additional duties and obligations on auditors as opposed to those duties and obligations imposed under the company law. The study finally discusses whether action can be brought against the auditors and the difficulties faced in doing so. These issues are extremely crucial because auditors' profession is becoming a high-risk profession. Therefore, principles of criminal law coupled with its intricate rules have to play its role effectively to ensure that the interests of all parties who have a stake in the matter are well-balanced with the role and duties expected of auditors. This study suggests that the current legal framework under criminal law governing auditors must be reassessed in the wake of the scandals involving auditors both in the domestic and international forefront.

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INTRODUCTION

This article examines the legal position governing auditors under criminal law. The article will then examine whether the legal principles under criminal law are able to address the scandals pertaining to auditors. The article will also investigate whether the legal principles under criminal law impose additional duties and obligations on auditors to those imposed under company law. Finally, this article will examine whether action can be brought and the difficulties faced in doing so.

BACKGROUND OF STUDY

It should be noted that auditors are appointed by a company either through the Board of Directors,¹ the general meeting of the company² or the CCM.³ The appointment constitutes a contract⁴ between the company and the auditors. This is because the auditors will be remunerated for their auditing services. Thus, they stand in a contractual relationship with the company. It is a professional contract for services since they are required to provide their services *i.e.* auditing the company's financial affairs. The appointment is set out in a 'letter of engagement'. Therefore, traditionally, duty is owed by the auditors to the company.⁵

Auditors must ensure that they do not make fraudulent statements. This is especially in cases where a representation was certified to be true, knowing that it is not true.⁶ This is so especially if the auditors know that the report is untrue. Therefore, in such a case the legal system should address the matter to determine whether criminal liabilities can be attached on auditors in such a situation.

¹ S. 172(1) of 'the Companies Act'

² S. 172(2) of 'the Companies Act'

³ S.172(10) of 'the Companies Act'

⁴ Pauline, Wallace. 1990. *Company Law in Hong Kong*, 2nd ed. Hong Kong: Butterworths. p.205.

⁵ Avtar, Singh. 1989. *Company Law*, 9th ed. Lucknow: Eastern Book Company. p.326.

⁶ Avtar Singh. 1989. p.330.

This is because fraud is a crime. Furthermore, it has been reported that cheating and criminal breach of trust has been on the rise in Malaysia.⁷ In a survey carried out by Pricewaterhouse- Coopers in 2007, it was found that 48% of the companies have become victims of economic crime.⁸ It should be noted that fraud has hit 62% of the listed companies.⁹ This will affect the capital market and the market stability of the country. The table below provides the statistics of various types of fraud which has been committed in Malaysia for the year 2006. Although, the table does not provide information as to who committed the fraud *i.e.* whether they are committed by auditors, it does show that the problem should be addressed before it becomes a bigger problem.

Offences	Number of Cases	Loss
Criminal Breach of Trust	1850	RM279,784,538.81
Cheating	4764	RM402,352,135.09

Source: Royal Malaysian Police

SCANDALS INVOLVING AUDITORS

In the international front, it was reported that two of the partners of PricewaterhouseCoopers¹⁰ India, have been detained by the Indian police for questioning.¹¹ This is in relation to the fraud committed by Satyam Computer Services Ltd amounting to US\$1 billion. In fact, the corporate scandal is the biggest in India in recent years. The founder-chairman B. Ramalinga Raju has admitted that the company's accounts had been falsified over a period of several years.¹² Thus, it is not just a single year fraud. The concern is why the

⁷ Datuk Hairuddin Mohamed, Deputy Director of Federal criminal Investigations Department, August 23rd, 2003.

⁸ Local firms facing up to corporate crime: PwC, October 25, 2007, New Straits Times, p 37.

⁹ Carolyn Hong, Fraud hits 62pc of listed firms, June 8, 2001, New Straits Times.

¹⁰ Hereinafter referred as PwC.

¹¹ Accountants detained for Satyam probe, January 26, 2009, New Straits Times.

¹² Special fraud team to probe Satyam affair, January 25, 2009, New Straits Times, p 42.

fraud was not detected by the auditors. As a result, doubts have been casted on the integrity of PwC.¹³ Thus, the concern is whether they failed to detect or they were part of the fraud. According to PwC, the opinions expressed by them on Satyam's accounts may be inaccurate and unreliable in view of the admissions made by the chairman. The point to be noted is whether PwC would have made such a statement if not for the admission made by the chairman. PwC has been the auditors for the said company over eight years.

Observably, the shares of Satyam have plunged more than 70% to an 11-year low.¹⁴ This affected the present shareholders. Thus, it will also affect the ability of the company to be involved in active market trading. It will also be cut from India's benchmark stock index. Consequently, the clients will stay away from the company. The scandal proves to show that fraud can take place even in emerging markets.¹⁵ Additionally, the new Board of Directors is concerned on the future of its 53,000 employees. The Chief Minister of Andhra Pradesh where Satyam is located has assured that the employees will be protected.¹⁶ It was also reported that there is a possibility of the government providing financial aid to the employees.¹⁷ The government will have to fork out money although the loss was not its fault. This will indirectly involve the tax-payers' money. Meanwhile, the Ministry of Corporate Affairs has dismissed the Board of Directors.¹⁸ This shows that the impact of the fraud is not only on the company and its shareholders but also on the employees of the company, the government and the members of the public. In fact, the new Board of Directors of Satyam had asked KPMG and Deloitte to review its finances. This shows that the company is unhappy with the performance of the earlier auditing firm.

It should be noted that the financial scandal should not be dismissed since the matter took place outside the jurisdiction of Malaysia. This is because

¹³ Scandal shakes confidence in accounting Big Four, January 9, 2009, New Straits Times, p.36.

¹⁴ Satyam future in doubt, January 10, 2009, New Straits Times, p 39.

¹⁵ Corporate fraud scandals can detonate anywhere, January 10, New Straits Times, p.39.

¹⁶ CM: Priority is to protect jobs, January 12, 2009, New Straits Times, p 41.

¹⁷ Satyam may seek bailout, tap clients for cash, January 13, 2009, New Straits Times, p.42.

¹⁸ Satyam board dissolved, 3 in custody, January 11, 2009, New Straits Times, p.45.

Malaysia has more than 600 Satyam associates and Malaysia is Satyam's largest global development centre outside India.¹⁹ It was opened in 2003 and was given MSC status. Hence, what happened in Satyam Computer Services Ltd of India will have an indirect effect on Satyam in Malaysia. Nevertheless, PwC which does audit work for over 100 listed companies in Malaysia do not see clients leaving them.²⁰ Thus, it can be seen that the auditing firm opined that fraud will not occur in Malaysia.

Nonetheless, this is not the case. This is because, in the Malaysian scenario, in the scandal involving Megan Media Holdings Bhd, there was a default close to RM900 million in bank loans and it has been described fraudulent. The Securities Commission (SC) has completed the investigation on the fraud. The SC will soon announce what action will be brought against those responsible.²¹ However, there have not been any developments so far.

CRIMINAL LIABILITY

Essentially, a distinction must be drawn whether it is a case of fraud or dishonesty. It should be noted that fraud and dishonesty is not defined in 'the Companies Act' or the Capital Market and Services Act 2007.²² Thus, reference will be made to the Penal Code before examining the provisions of the 'the Companies Act' or the CMSA to establish criminal liability on auditors.

Penal Code

S. 24 of the Penal Code explains that whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing dishonestly. Thus, to determine whether there is dishonesty, it is based on whether gain or loss is caused. The gain could have been to the

¹⁹ Satyam: Malaysia a critical pillar, January 9, 2009, New Straits Times, p.36.

²⁰ PwC unlikely to see client exodus, January 13, 2009, New Straits Times, p.35.

²¹ SC wraps up Megan probe, to announce action soon, November 14, 2007, New Straits Times, p.35.

²² Hereinafter referred as CMSA.

company, the management or the directors of the company. The loss could have been to the stockholders or the stakeholders of the company. Thus, in the context of auditors, if they did an act with the intention of causing loss to the stockholders or the stakeholders on one hand or causing a gain to the wrongdoers of a company, that is an act of dishonesty.

As regards to fraud, S. 25 of the Penal Code explains that a person is said to do a thing fraudulently if he does that thing with intent to defraud, but not otherwise. It can be observed that in order to prove that there is fraud there must be an element of intention to defraud. Hence, if it can be proved that the auditors had the intention to defraud the stockholders and the stakeholders of a company that is a case of fraud. In order to determine whether there is fraud, reference should be made to the auditors' report as to whether such an intention is manifested in the. Nonetheless, it is not easy to prove that there has been an intention to defraud.

It should be noted that S. 29(1) of the Penal Code provides that the word 'document' means any matter expressed, described, or howsoever represented, upon any substance, material, thing or article, including any matter embodied in a disc, tape, film, sound track or other device whatsoever. Hence, auditors' report falls within the purview of the meaning of document.

A point to be taken into account is that S. 24, 25 and 29 of the Penal Code merely explains the meaning of fraud, dishonesty and document. It does not lay out the criminal offences. However, the provisions are necessary in proving that there has been fraud and dishonesty with regards to a document and hence they are relevant in establishing an offence under other provisions.

Hence, reference should be made to S. 477A of the Penal Code. The provision provides that whoever, being a clerk, officer, or servant, or employed or acting in the capacity of a clerk, officer, or servant, willfully and with intent to defraud destroys, alters, mutilates, or falsifies any book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer, or has been received by him for or on behalf of his employer, or willfully and with intent to defraud, makes or abets the making of any false entry in, or omits or alters, or abets the omission or alteration of any particular from or in any such book, paper, writing, valuable security, or account, shall be punished with imprisonment for a term which may extend to seven years, or with fine, or with both.

Additionally, the explanation to S. 477A provides that it shall be sufficient in any charge under this section to allege a general intent to defraud without naming any particular person intended to be defrauded, or specifying any particular sum of money intended to be the subject of the fraud or any particular day on which the offence was committed. Hence, there is no requirement to identify a particular stockholder or stakeholder who has been defrauded.

Nonetheless, the concern is whether auditors can be considered as clerk, officer, or servant, or employed or acting in the capacity of a clerk, officer, or servant. On this point reference should be made to S. 4(1) of 'the Companies Act' which explains the meaning of officer. The provision does not include auditors to be within the meaning of officer. Furthermore, the auditors cannot be considered as clerks or servants of the company. This is because they are not employed by the company. In fact, they have been engaged by the company to audit the company's financial affairs.

Thus, S. 477A of the Penal Code should be amended to read "Whoever, INCLUDING²³ a clerk, officer, or servant, or employed or acting in the capacity of a clerk, officer, or servant..." In such a case the provision will not be exhaustive and therefore it can include an auditor of a company.

Moreover, the provision states that the book, paper, writing, valuable security, or account belongs to or is in the possession of his employer *i.e.* the company. Auditors' report does not belong to the company and neither is it in the possession of the company. It is a document prepared by the auditors. Thus, the provision is inapplicable in the context of auditors. Therefore the provision should be amended to read that the "...book, paper, writing, valuable security, or account which belongs to or is in the possession of his employer OR IS PREPARED²⁴ by such a person..." In such a case the provision is able to deal with auditors' report which has been prepared with the intention to defraud. Hence, the auditors can be prosecuted under S. 477A of the penal Code.

In the event auditors have detected fraud but decided not to report, it could be a case of abetting the commission of fraud. This is because the above provision *i.e.* S. 477A provides for abetting the making of any false entry in, or

²³ Emphasis added.

²⁴ Emphasis added.

omits or alters, or abets the omission or alteration in any book, paper, writing, valuable security, or account. Hence, if auditors are involved in abetting the false entry of financial information in the financial documents in order to assist them in preparing a fraudulent auditors' report, the provision is breached.

Observably, S. 107 of the Penal Code provides that a person abets the doing of a thing who first instigates any person to do that thing; or secondly engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or thirdly intentionally aids, by any act or illegal omission, the doing of that thing. Hence, it could be a case of the accountants, the management and the Board of Directors who are all involved in the commission of fraud whereby the auditors were abetting the commission. If that is so, then S. 107 and S. 477A of the Penal Code should be read together to attach criminal liabilities on auditors.

Be that as it may, the above provisions have never been used although there have been many scandals involving auditors namely Transmile, Oilcorp, Megan Media, Ocean Capital, etc. Nevertheless, the provisions have been used against directors, chief executive officers, chief financial officers and accountants.

Nonetheless, the disadvantage of prosecuting under the Penal Code is the discretion as provided under article 145(3) of the Federal Constitution. The Article reads that; "*The Attorney General shall have power, exercisable at his discretion to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.*" The Federal Court in *Johnson Tan Han Seng v. Public Prosecutor*²⁵ stated that the Article is not unconstitutional. This is a case of unfettered discretion. It is justified on the basis that the Attorney General must take into account many factors before charging. In *Teh Cheng Poh v. Public Prosecutor*²⁶ the Privy Council stated that the cases of all potential defendants to criminal charges are given unbiased consideration by the prosecuting authority and that the decision by him should not be dictated by some irrelevant consideration.

²⁵ [1977] 2 MLJ 66.

²⁶ [1979] 1 MLJ 50.

Capital Market and Services Act 2007

As regards to Capital Market and Services act 2007 (CMSA)²⁷, S. 136 provides penalty for destroying, concealing or altering books or sending books or property out of Malaysia. The penalty is imposed if there is an intention to prevent, delay or obstruct the carrying out of any examination. Thus, if it is found that the auditors have conspired with the accountants, Board of Directors or the management of the company, the auditors are in breach of the provision. It should be noted that the offence is a strict liability offence. This is because S. 136(2) of 'the CMSA' provides that the onus of proving that there is no intention to prevent, delay or obstruct the carrying out of an examination is on the person charged.

The spirit of the provision differs from S. 477A of the Penal Code. This is because there is a possibility of the auditors committing a wrong on their own. If that is so S. 130 of 'the CMSA' empowers the SC to appoint an independent auditor to examine, audit and report on the accounts of a company. If it has transpired that the existing auditors has prevented, delayed or obstructed the carrying out of any examination by the independent auditors, the existing auditors are in breach of the provision. The existing auditors may do so to make sure that their reputation is not affected and also the fact that they would want to protect themselves.

It was reported that Tan Kam Sang, who is the accountant of Kiara Emas Asia Industries Bhd²⁸ and Ravandran a/l Thangaveloo, who was a partner of Messrs Arthur Andersen & Co, were charged for furnishing false information to the Securities Commission.²⁹ This is with regards to the status of utilisation of KEAIB' rights issue proceeds.³⁰ Messrs. Arthur Andersen & Co. was engaged to audit KEAIB's accounts. The false information was pertaining to the financial years ended 31 March 1997, 1998, 1999 and 2000 on the status of utilisation of rights issue proceeds. In actual fact RM16, 937, 739.20 of KEAIB's rights issue proceeds was fully utilised by 31 December 1996 in

²⁷ Hereinafter referred to as CMSA.

²⁸ Hereinafter referred to as KEAIB.

²⁹ Hereinafter referred to as SC.

³⁰ Enforcement Milestones in 2004, Source: Securities Commission.

contravention of the SC's conditions. They were both charged on 13 August 2004.

Nonetheless, it should be noted that they were not charged under the Penal Code but the Security Industry Act 1983.³¹ The SIA has now been consolidated as Capital Market and Services Act 2007.

In addition to the criminal liabilities found in the Penal Code, some of the provisions in 'the Companies Act' have been designed in a manner, which are also penal in nature. This is because the legislature felt that criminal liabilities will impose a higher degree of standard upon the auditors to ensure that they play a more effective role as auditors.

Companies Act 1965

Hence, S. 174 (8) of 'the Companies Act' provides that in carrying out auditing duties, if the auditor is satisfied that there has been a breach or non-observance of any of the provisions of 'the Companies Act' and it has not or will not be adequately dealt with by the auditor's report or the directors of the company, he is bound to report the matter in writing to the Registrar. If he fails to do so the penalty is imprisonment for two years or thirty thousand ringgit fine or both. Since the provision drafted is penal in nature, the issue is whether the standard expected of an auditor as to his level of satisfaction to establish breach or non-observance of 'the Companies Act' should be on a balance of probabilities or beyond reasonable doubt. Rightfully, it should be based on beyond reasonable doubt. This is because the provision is designed to be penal in nature. Nonetheless, it could be a situation where the auditors did not report any breach or non-observance of the Act since he was not satisfied that there has been a breach or non-observance. In other words the standard is subjective and not objective. If that is so, then duty to report does not arise.

Additionally, S. 174(8A) of 'the Companies Act'³² provides that an auditor of a public company or a company controlled by a public company, is under a duty to report to the Registrar if the auditor is of the opinion that a serious offence involving fraud or dishonesty is being or has been committed against the company or 'the Companies Act' by officers of the company. The

³¹ Hereinafter referred as SIA.

³² Which was inserted by the Companies (Amendment) Act 2007 in July 2007.

report must be made in writing. If the auditors fail to do so, the penalty is imprisonment for seven years or two hundred and fifty thousand ringgit or both for failure to do so.

However, a point to be noted is that S, 174(8) and (8A) of 'the Companies Act' do not stipulate that the breach, non-observance, fraud or dishonesty is committed by the auditors. The provision is designed to address the breach, non-observance, fraud or dishonesty committed by the officers of the company. Therefore the provisions are not applicable to cases where the breach, non-observance, fraud or dishonesty is committed by the auditors themselves. This shows that there is a lacuna in the law.

Nonetheless, S. 364(2) of 'the Companies Act' provides that every person who in any report required by or for the purposes of this Act makes or authorizes the making of a statement false or misleading in any material particular knowing it to be false or misleading or intentionally omits or authorizes the omission or accession of any matter or thing thereby making the document misleading in a material respect shall be guilty of an offence against this Act. The penalty is imprisonment for 10 years or a fine of RM 250,000 or both. Nonetheless, the difficulty lies in proving intention to do so on the part of the auditors. The provision should have been drafted as a strict liability offence similar to S. 136 of CMSA.

In S. 177 of 'the CMSA', it is provided that a person shall not make false or misleading statements in a material particular which is likely to induce the sale or purchase of securities or is likely to affect the market price of the securities. The provision is breached if the person does not care whether the statement is true or false or he knows or ought reasonably to have known that the statement is false or misleading in a material particular. The provision has used a reasonable person as a benchmark to determine criminal liability. This is welcomed compared to S. 174(8) and (8A) of 'the Companies Act' which is based on subjective standards. The penalty for breach of S. 177 of 'the CMSA' is provided in S. 182 of 'the CMSA' which states that the punishment is a term of not exceeding ten years and to a fine of not less than one million ringgit. The fact that the degree of punishment is heavy is also welcomed in order to deter any fraud.

If auditors make a false statement or misleading statement in the auditors' report and they know it so, they are guilty of this provision. A point to be noted is that the provision uses the term 'misleading'. The term

'misleading' is less serious than the term 'false'. Therefore, as long as the statement made by the auditors fall within the purview of false or misleading, the provision will be invoked. It should also be noted that the term misleading is less serious than fraud or dishonesty

It has been reported that Deloitte KassimChan,³³ has been publicly reprimanded by SC for their failure to discharge due diligence responsibilities for the restructuring of Ocean Capital Berhad.³⁴ There was also a failure to inform the SC of a material change in circumstances that would have affected the SC's consideration.³⁵ Furthermore, the auditors were imposed with a sanction of non-acceptance of all types of submissions under S. 32 of the Securities Commission Act 1993³⁶ where Deloitte acts as the reporting accountant, for a period of six months, with immediate effect.

The actions were taken against Deloitte as they were the reporting accountant and the preparer of the Long-Form Accountants' Report³⁷ Pasaraya Hiong Kong Sdn Bhd³⁸ and against Hwang-DBS in its capacity as the principal adviser for the restructuring scheme of Ocean. The SC's investigations showed that the audited accounts of Pasaraya Hiong Kong and the LFAR submitted to the SC with regards to the proposed restructuring scheme of Ocean contained false and misleading information. It was presented that the accounts of Pasaraya Hiong Kong, as audited by Deloitte, had registered a turnover of RM198.7 million and after-tax profit of RM8.5 million for its financial year ended 31 March 2003. However, the SC's investigations showed that Pasaraya Hiong Kong had overstated its sales by RM7.7 million.

This amount of overstated sales did not have a corresponding cost attached to it, thus the whole amount was booked to profits. If the overstatement was not made, there would have been a significant shortfall in the profits of Pasaraya Hiong Kong. This will affect the restructuring scheme of Ocean. The SC's investigations further showed that Deloitte Tax Services Sdn Bhd, who is the tax agent for Pasaraya Hiong Kong, which is part of the Deloitte network of firms, was fully aware of the overstatement of the sales

³³ Hereinafter referred as Deloitte.

³⁴ Hereinafter referred as Ocean.

³⁵ 30th August 2006, Source: Securities Commission.

³⁶ Hereinafter referred as SCA 1993.

³⁷ Hereinafter referred as LFAR.

³⁸ Hereinafter referred as Pasaraya Hiong Kong.

figures from a tax investigation and settlement that had taken place at the material time. Nevertheless, the information was not made known to the SC by Deloitte. The failure of Deloitte, as the reporting accountant of Pasaraya Hiong Kong, to satisfactorily discharge its due diligence responsibility and to inform the SC of the overstatement of the sales figures of Pasaraya Hiong Kong, together with the resulting impact on the restructuring scheme of Ocean, is a major breach of duty. The SC also found that Hwang-DBS, as the principal adviser, who was aware of the tax investigation, had failed to make reasonable enquiries and to keep track of the investigation that would have led to information on the overstatement.

As regards to debenture holders, S. 175(1) of 'the Companies Act' provides that auditors of a borrowing corporation are obliged to furnish the trustee for debenture holders with specified reports, certificates or documents. Moreover, S. 175(2) of 'the Companies Act' requires an auditor to send by post, a report in writing to the borrowing corporation and to the trustee for debenture holders within seven days of becoming aware of any matter which in his opinion is relevant to the exercise and performance of the powers and duties imposed by 'the Companies Act' or by any trust deed upon any trustee for the debenture holders. If the auditors fail to do so they are subjected to a penalty of RM1000.

As regards to prospectus, S. 47(1) of 'the Companies Act' provides that if an auditor has authorized or caused the issue of prospectus and there is untrue statement or willful non-disclosure, the auditor is criminally liable. A similar provision is also found in S. 246 of 'the CMSA'. The only difference is that the penalty for the latter provision is a lot higher i.e. a fine of not exceeding three million ringgit or a term of imprisonment of not exceeding ten years or both.

It was reported that Ng Chee Loong, who is the principal of Messrs Ng & Associates, was charged for causing Energro Bhd's prospectus, which contained false information, to be issued namely Milan Auto (M) Sdn Bhd's turnover for 2003 is RM82.336 million.³⁹ He was charged on 14 October 2004. He was compounded RM800, 000 for the offence.

³⁹ Enforcement Milestones in 2004, Source: Securities Commission.

However, if an auditor could prove that the statement or willful non-disclosure was immaterial or that he had reasonable ground to believe and did up to the time of the issue of the prospectus, believe the statement was true or the non-disclosure immaterial then he is not guilty of an offence under this Act. Furthermore, it does not mean that an auditor has authorized or caused the issue of prospectus merely because he is included as an expert as required by 'the Companies Act'. There must be evidence of untrue statement or willful non-disclosure. A similar provision is also found in CMSA namely S. 250.

On the issue of appointment of auditors, S. 9(1) of 'the Companies Act' provide that a person shall not knowingly consent to be appointed, and shall not knowingly act, as auditor for any company and shall not prepare, for or on behalf of a company auditors' report (a) if he is not an approved company auditor; (b) if he is indebted to the company or a related corporation of at least RM2500; (c) if he is (i) an officer of the company; (ii) a partner, employer or employee of an officer of the company; (iii) a partner or employee of an employee of an officer of the company; or (iv) a shareholder or his spouse is a shareholder of a corporation whose employee is an officer of the company or (d) if he is responsible for or if he is the partner, employer or employee of a person responsible for the keeping of the register of members or the register of holders of debentures of the company. If he proceeds to do so, the penalty is RM 30, 000.

A point to be noted is what if the auditor claims that he has no knowledge of the above matter. This is arguable since the provision uses the term "...knowingly..." Furthermore, the provision is not a strict liability offence. Thus, auditors can claim that they did not know they are disqualified by 'the Companies Act' to be auditors of a particular company. The provision is ironic. This is because auditors should be in a position to know whether they are disqualified by 'the Companies Act'. The provision is explicit in the criteria for disqualification. Therefore the term knowingly should be removed from the provision so that an objective standard is imposed.

As regards to takeovers and mergers, where there has been a proposal submitted to the SC pursuant to S. 212 of 'the CMSA', if a statement made is false or misleading; submit or cause to be submitted any statement from which there is material omission; or engage in or aid or abet conduct that he knows to be misleading or deceptive or is likely to mislead or deceive the SC, the person

commits an offence under S. 214 of 'the CMSA'. S. 214(1)(c) states it can be any other person than listed in S. 214(1)(a) and (b) namely a company, any of its officers or associates, a financial adviser or an expert. Thus, if the auditors have given a statement which is false or misleading in relation to the takeovers and mergers, they can be made liable.

However, a defence is provided in S. 214(2) of 'the CMSA' that if the person after making enquiries as were reasonable in the circumstances, he had reasonable grounds to believe and did until the time of the making of the statement, was of the belief that he statement was true and not misleading; the omission was not material; there was no material omission; or the conduct in question was not misleading or deceptive he is not in breach of the provision.

CONCLUSION

It is a trite law that the relationship between a company and its auditors is contractual. Nevertheless, the relationship is not purely contractual as auditors hold a public office. There is really little significance in establishing that there is contractual relationship between a company and its auditors since most of the times it is not the company which has suffered a loss and wishing to bring an action against the auditors. It is the stockholders and stakeholders who are at a loss. Observably, there are a number of laws which impose additional duties on the auditors, to ensure that there is no fraud, dishonesty, misleading statement, untrue statement or willful non-disclosure by them. The laws have been designed in a manner which deals with the most serious issues i.e. fraud to the least serious i.e. untrue statements. Nonetheless, the regulators and the relevant authorities should enhance their enforcement in dealing with scandals. This is because the commission of fraud, dishonesty, misleading statement, untrue statement and willful non-disclosure is on the rise. Hence, criminal provisions must be invoked to address the issues. This is because no one or any profession should be above the law. The enactment of the Penal Code, Companies Act 1965 and the Capital Market and Services 2007 alone are not sufficient. In fact, the enactment of the CMSA was seen as an action taken by the legislature in view of the scandals such as Enron, WorldCom and Parmalat in the international front. Nevertheless, the scandals in Malaysia have all occurred after the enactment of the CMSA. Additionally, the laws must be

amended to ensure a more regulated environment such as United Kingdom, Australia, Singapore and Hong Kong.

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