

# LEGAL INSIGHTS

A SKRINE NEWSLETTER

## MESSAGE FROM THE EDITOR-IN-CHIEF

As another year draws to a close, it may be appropriate to reflect on some of the interesting legal developments that took place in Malaysia in 2017.

The Companies Act 2016 came into operation on 31 January 2017, introducing a number of new concepts, such as the no par value share regime, solvency statements and companies that have full capacity and powers unless restricted by their respective constitutions.

Two important pieces of social legislation were also passed – the Employment Insurance System Act 2017 (“EIS Act”) and the Self-Employment Social Security Act 2017 (“SESS Act”). The EIS Act requires employers and employees to make mandatory contributions to an employment insurance fund, to enable employees to be provided with the benefits stipulated in the Act in the event of unemployment. The EIS Act is expected to come into operation on 1 January 2018.

The SESS Act establishes a scheme whereby self-employed persons who contribute to the scheme will be entitled to claim benefits as a result of injuries arising from a self-employment activity. The SESS Act came into operation on 13 June 2017 and initially applies only to self-employment persons who provide the service of carriage of persons by public service vehicles, such as taxis and e-hailing vehicles. The SESS Act may be extended to other categories of self-employed persons in the future.

The most significant decision in 2017 was undoubtedly *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat* where the Federal Court re-established the sanctity of the principles of separation of powers and the independence of the judiciary enshrined in the Federal Constitution by determining that such provisions may not be altered even with a two-thirds majority of Parliament.

We take this opportunity to thank our clients for their support in 2017 and to extend our best wishes to our clients and readers for the forthcoming year.

Kok Chee Kheong  
Editor-in-Chief

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## ANNOUNCEMENTS

### LEGAL 500 ASIA PACIFIC 2018

We are pleased to announce that our Firm was ranked in Tier 1 in The Legal 500 Asia Pacific 2018 in the following practice areas:

- Banking and Finance
- Corporate and M&A
- Dispute Resolution
- Intellectual Property
- Labour & Employment
- Real Estate and Construction
- Technology, Media & Telecommunications

We were also listed as one of the leading firms in Projects & Energy and Shipping.

Four of our Partners were ranked as leading lawyers in their respective practice areas:

- Ms. Theresa Chong - Corporate and M&A
- To' Puan Janet Looi - Corporate and M&A
- Dato' Lim Chee Wee - Dispute Resolution
- Ms. Charmayne Ong - Intellectual Property and Technology, Media & Telecommunications)

### SENIOR ASSOCIATES

We extend our heartiest congratulations to David Tan, Sara Lau and Melissa Long who were promoted to Senior Associates in the last quarter of 2017.



David is a member of our Dispute Resolution Division. His practice areas include banking litigation, professional indemnity insurance and commercial disputes.



Sara is a member of our Dispute Resolution Division. Her practice areas include employment law, immigration law, shipping law and medical negligence.



Melissa is a member of our Intellectual Property Division. Her practice areas include intellectual property litigation and advisory work on life sciences.

## DRAW THE LINE ON

### Selvamalar Alagaratnam and Lee Mei Hooi sexual harassment

#### INTRODUCTION

On 5 October 2017, the New York Times published an exposé on allegations of sexual harassment spanning several decades against Hollywood producer, Harvey Weinstein.

The article opened the floodgates on allegations of sexual harassment and assault. Countless others stepped forward to expose their sexual harassers, mostly powerful men in the entertainment industry. The popularisation of the hashtag #metoo on various social media platforms further led to a global phenomenon of women sharing their experiences of sexual harassment. Within a few short weeks, the number of people accusing Harvey Weinstein of sexual harassment has grown to over 80. Many other public entertainment and political figures are also caught up in similar sexual harassment or assault scandals, including UK Defence Secretary Michael Fallon, A-list Hollywood actor Kevin Spacey and renowned Disney animation chief John Lesseter.

A notable trend among the numerous sexual harassment allegations is the existence of a power imbalance between harasser and victim in work-related contexts. In Harvey Weinstein's case, many actresses, existing and aspiring alike, stated that they did not step forward as they feared that doing so would mean the end of their careers. Others left acting entirely following their experiences. While sexual harassment can occur at any time and in any place, the workplace as the playground of power undeniably creates an environment which is especially conducive to sexual harassment.

#### WHAT IS SEXUAL HARASSMENT?

Despite numerous calls for the same, Malaysia, unlike many other countries, does not have any legislation dealing specifically with sexual harassment. Instead, our laws are scattered, with the relevant statutes addressing issues in a limited way and the gaps dealt with in a patchwork fashion by case law and voluntary guidelines.

Due to this, the legal definitions of sexual harassment differ depending on the circumstances the relevant laws are meant to address. For instance, Malaysia does not in fact have clear criminal laws dealing with sexual harassment. Instead, sexual harassment falls under section 509 of the Penal Code, where the insulting of one's modesty by way of words, sounds, gestures, exhibitions of objects or the intrusion of privacy, is a crime punishable by imprisonment of five years or a fine.

Meanwhile, in the recent case of *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor* [2016] 4 MLJ 282 ("*Mohd Ridzwan*"), the Federal Court recognised the tort of sexual harassment as a valid cause of action in Malaysia. Suriyadi FCJ described the ingredients of "*sexual harassment*" as "*the existence of a persistent and deliberate course of unreasonable and oppressive conduct targeted at another person ... calculated to cause alarm, fear and distress to that person*" which is tainted with "*sexual*



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## SEXUAL HARASSMENT

examine the legal framework dealing with in Malaysia

*hallmarks*". *Mohd Ridzwan* is a ground-breaking decision which opens the doors to individual plaintiffs who wish to bring civil suits against the perpetrators of sexual harassment.

From an employment perspective, Part XVA, introduced into the Employment Act 1955 ("Part XVA") on 1 April 2012, deals specifically with sexual harassment in the workplace, and defines it as "unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment". This definition echoes the longer, more comprehensive description of sexual harassment in the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace ("Code"), which is a voluntary code issued by the Malaysian Government in 1999 for the purposes of providing guidance to employers in dealing with sexual harassment in the workplace.

The Code, which was also referred to in *Mohd Ridzwan*, divides sexual harassment into sexual coercion (sexual harassment which may reasonably be perceived as placing a condition of a sexual nature on one's employment) and sexual annoyance (sexual harassment which may reasonably be perceived as an offence, humiliation or a threat, but has no direct link to one's employment). The Code further clarifies that sexual harassment could potentially take place even outside the workplace, such as at work-related social functions or conferences, over the phone, through electronic media; and that such harassment could be verbal, non-verbal, visual, psychological or physical.

### SEXUAL HARASSMENT IN THE WORKPLACE

#### *An obligation to investigate*

Part XVA, which applies to all employees irrespective of their wages, creates a complaints mechanism for sexual harassment for employees in the workplace. Specifically, it requires employers to inquire into any complaints relating to sexual harassment made by an employee against another employee or an employer, and vice versa.

Following the inquiry, if the employer is satisfied that sexual harassment is proven, the employer is required to take disciplinary action against the accused employee which may include dismissal. If the accused person is not an employee, the employer must recommend that the person be brought before an appropriate disciplinary authority.

Part XVA further provides that the Director General of Labour ("Director General") may receive sexual harassment complaints and direct an employer to inquire into such complaints. In this event, the employer is required to inquire into the complaint and submit a report of the inquiry to the Director General within 30 days. However, if the employer is a sole proprietor, the Director General is to inquire into the complaint himself.

Failure to inquire into a complaint or to submit a report of inquiry

to the Director General where required amounts to an offence by the employer.

#### *Constructive dismissal*

In addition to Part XVA, an employee who experiences sexual harassment at work, either at the hands, or due to the inaction, of an employer, may make a claim for constructive dismissal under section 20 of the Industrial Relations Act 1967 (see, for instance, the High Court case of *Sitt Tatt Berhad v Flora a/p Gnanapragasam & Anor* [2006] 1 MLJ 497, where an employee succeeded in her claim for constructive dismissal following an employer's inaction to address her complaints of sexual harassment by her superiors). This recourse stems from the principle that the employer owes a duty to the employees to provide a safe and conducive workplace.

#### *Investigating and dismissing an employee*

While the Employment Act 1955 places upon the employer an obligation to investigate sexual harassment complaints, the process and procedure are left largely to the employer's discretion. The Ministry of Human Resources proposed the Employment (Procedure to Inquire into Complaints of Sexual Harassment) Regulations in 2015 but it has since been put on hold, probably pending feedback and revisions.

Until such time that the regulations are brought into force, the Code remains the only guidance available. The Code, among others, recommends that:

1. A policy statement on sexual harassment be issued by the employer, containing a clear definition of sexual harassment;
2. A complaints/grievance procedure (including guidelines for reporting, investigating and appealing a sexual harassment complaint) be established - due to the sensitive and personal nature of sexual harassment, this procedure should be separate from the employer's normal complaints/grievance procedure;
3. The employer takes measures to protect victims from further embarrassment in the course of reporting and investigation;
4. The disciplinary rules and penalties in the event an employee is found guilty of sexual harassment be made clear; and
5. The employer organise programmes and talks to raise awareness of sexual harassment amongst employees.

*continued on page 21*

## DEFERRED INDEFEASIBILITY

Claudia Cheah and Wong Juen Vei discuss a significant land law case

In the recent decision of *CIMB Bank Berhad v AmBank Berhad & 2 Ors* [2017] 9 CLJ 145, the apex court of Malaysia held that a chargee, whose charge on a land was registered subsequent to a forged discharge of an existing charge, is a "purchaser" entitled to the protection of deferred indefeasibility under the proviso to section 340(3) of the National Land Code ("NLC").

The relevant parts of section 340 of the NLC read as follows:

*"(1) The title or interest of any person or body for the time being registered as proprietor of any land, or in whose name, any lease, charge or easement is for the time being registered, shall, subject to the following provisions of this section, be indefeasible.*

*(2) The title or interest of any such person or body shall not be indefeasible:*

*(a) in any case of fraud or misrepresentation to which the person or body, or any agent of the person or body, was a party or privy;*

*(b) where the registration was obtained by forgery, or by means of an insufficient or void instrument; or*

*(c) where the title or interest was unlawfully acquired by the person or body in the purported exercise of any power or authority conferred by any written law.*

*(3) Where the title or interest of any person or body is defeasible by reason of any of the circumstances specified in subsection 2:*

*(a) it shall be liable to be set aside in the hands of any person or body to whom it may subsequently be transferred; and*

*(b) any interest subsequently granted thereout shall be liable to be set aside in the hands of any person or body in whom it is for the time being vested:*

*Provided that nothing in this subsection shall effect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser."*

### BACKGROUND FACTS

Chin Ting Seng and Chin Chong Lup (the "Chins") were the owners of a piece of land in Klang, Selangor ("Property"). The Chins executed a charge on the Property ("Original Charge") in favour of Southern Bank Berhad which was later vested in CIMB Bank Berhad ("CIMB").

An individual, Wong Chee Keong ("Wong"), applied for a loan from AmBank Berhad ("AmBank") on 4 November 2008 to finance the purchase of the Property. Wong created a charge over the Property in favour of AmBank as security for the loan

("AmBank Charge"). AmBank appointed KK Lim & Associates ("KKL") as their solicitors whilst Ku Abdul Rahman & Associates ("KAR") acted for Wong.

KKL received from KAR the issue document title to the Property, the stamped memorandum of transfer ("MOT") and the discharge of charge of the Original Charge ("Discharge of Original Charge") on 10 March 2009, and the duplicate of the Original Charge on 17 March 2009. The Discharge of Original Charge, the MOT and the AmBank Charge were presented for registration at the Land Office by KKL on 19 March 2009.

The Land Office effected the discharge of the Original Charge and registered Wong as the registered proprietor of the Property on 25 November 2009. Thereupon, AmBank was registered as the chargee of the Property under the AmBank Charge.

Subsequently, it was discovered that there were two titles over the Property and the Discharge of Original Charge was forged by Wong. The claims by CIMB and AmBank as chargees over the Property became the core of the dispute.

### DECISION OF THE HIGH COURT

After a full trial, the High Court found that the Discharge of Original Charge was forged. The court held that AmBank was an immediate purchaser and its interest was not protected by the principle of deferred indefeasibility under the proviso to section 340(3) of the NLC. Thus, the AmBank Charge was set aside. Dissatisfied with the decision, AmBank filed an appeal to the Court of Appeal.

### DECISION OF THE COURT OF APPEAL

The Court of Appeal allowed AmBank's appeal and held that AmBank was a subsequent purchaser whose interest was protected by the proviso to section 340(3) of the NLC in accordance with the deferred indefeasibility principle.

CIMB obtained leave to appeal to the Federal Court on the following question of law:

*"Whether a chargee comes within the meaning of 'purchaser' under the proviso to section 340(3) of the National Land Code?"*

### DECISION OF THE FEDERAL COURT

CIMB's appeal was dismissed by a majority of 4 to 1. Md Raus Sharif CJ in delivering the majority decision, agreed with the Court of Appeal that AmBank was a subsequent purchaser whose interest was protected by the deferred indefeasibility principle in the proviso to section 340(3) of the NLC.

The dissenting judge, Jeffrey Tan FCJ, disagreed with the Court of Appeal and held that AmBank, being the chargee, was an immediate purchaser rather than a subsequent purchaser and fell outside the proviso to section 340(3).



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*Is a chargee a “purchaser”?*

Both the majority and minority judges agreed that a chargee having acquired an interest in the land, is a “purchaser” within the meaning of the proviso to section 340(3) of the NLC. The judges relied on several cases, including *T Damordaran v Choe Kuan Him* [1972] MLJ 267 (Privy Council) and *Tan Ying Hong v Tan Sian San & Ors* [2010] 2 MLJ 1 (Federal Court), to support this conclusion. The majority judges also relied on the definition of a “purchaser” in section 5 of the NLC.

*The concept of indefeasibility*

The majority held that the concept of indefeasibility was settled when the Federal Court in *Tan Ying Hong* overruled its earlier decision in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* [2001] 2 CLJ 133. The court in *Adorna Properties* had misconstrued section 340 of the NLC and arrived at an erroneous conclusion that the proviso in subsection (3) of section 340 applied equally to subsection (2). Arifin Zakaria CJ in *Tan Ying Hong* held that even though subsections (3)(a) and (3)(b) referred to the circumstances specified in subsection (2), they are restricted to subsequent transfer or interest subsequently granted thereout and could not apply to the immediate transferee of any title or interest. Arifin Zakaria CJ further explained that by applying subsection (3) to subsection (2) of section 340 of the NLC, *Adorna Properties* gave recognition to the concept of immediate indefeasibility which is contrary to section 340 of the NLC.

The majority judges also referred to a subsequent Federal Court decision in *Kamarulzaman Omar & Ors v Yakub Husin & Ors* [2014] 1 CLJ 987 which further explained the principle of indefeasibility in the following terms:

*“If the title or interest is registered in the name of an immediate purchaser, the bona fide of the immediate purchaser will not offer a shield of indefeasibility. The title or interest of an immediate purchaser is still liable to be set aside if any of the vitiating elements as set out in s 340(2) had been made out. If the title or interest is registered in the name of a subsequent purchaser, then the vitiating elements in s 340(2) would not affect the title or interest of a bona fide subsequent purchaser. The title or interest of a subsequent purchaser is only liable to be set aside if the subsequent purchaser is not a bona fide subsequent purchaser. The title or interest acquired by a subsequent purchaser in good faith for a valuable consideration, or by any person or body claiming through or under such a subsequent purchaser, is indefeasible.”*

*Was AmBank a subsequent purchaser?*

The Majority Judgment

The majority judges agreed with the Court of Appeal that AmBank was a subsequent purchaser in good faith and for valuable consideration. The majority judges agreed that there were two stages before the AmBank Charge could be created.

First, the Original Charge has to be discharged and second, the Property transferred from the Chins to Wong.

CIMB’s interest in the Property had been extinguished by the forged discharge resulting in Wong becoming the immediate purchaser. Thus, AmBank derived its interest in the Property from the charge executed by Wong and not from CIMB. AmBank was thus a subsequent purchaser entitled to the protection of deferred indefeasibility.

The Minority Judgment

Jeffrey Tan FCJ took the view that a party would only be considered as a subsequent purchaser if his title or interest is derived from an immediate purchaser in good faith and for valuable consideration. In short, for the title or interest of a subsequent purchaser to be indefeasible, both the immediate and subsequent purchasers must be purchasers in good faith and for valuable consideration.

On the facts, Wong did not acquire any good title in order to create the AmBank Charge. As the AmBank Charge could not subsist without a valid title, it did not enjoy the protection of deferred indefeasibility.

The learned judge also opined that AmBank was not a *bona fide* purchaser as the registration of the AmBank Charge was obtained through forged documents and AmBank had failed to properly investigate all matters that pertained to the sale and creation of the charge. His Lordship referred to the Federal Court decision in *Pekan Nenas Industries Sdn Bhd v Chang Ching Chuen* [1998] 1 MLJ 465, wherein the basic element of good faith was described as *“the absence of fraud, deceit or dishonesty and the knowledge or means of knowledge of such at the time of entry into a transaction.”*

Jeffrey Tan FCJ further held that even if the MOT was not forged, the transfer to Wong and the AmBank Charge could not and would not have been registered but for the Discharge of Original Charge which was a forged instrument. Wong, who authored the forgery, could not have acted in good faith and it would *“rub salt to the wound”* if the court held that Wong was a purchaser in good faith. The judge went on to say that it would be *“the cruellest cut of all wound”* if Wong, a forger, would have the right to redeem the Property if the AmBank Charge was indefeasible.

Based on the foregoing, Jeffrey Tan FCJ held that Wong was

## GUARDIANS OF THE (BIO-RESOURCES) GALAXY

Charmayne Ong and Gooi Yang Shuh provide a primer on the Access to Biological Resources and Benefit Sharing Act 2017

Over two decades ago, a group of nations banded together to protect the Earth's bio-resources by signing the Convention on Biological Diversity ("Convention"), followed by the Nagoya Protocol on Access to Genetic Resources and the Fair and Equitable Sharing of Benefits arising from their Utilization.

Malaysia became a signatory to the Convention in 1992 and recently enacted the Access to Biological Resources and Benefit Sharing Act 2017 ("Act"), which was gazetted on 17 October 2017. According to the Ministry of Natural Resources and Environment ("Ministry"), the Act will only come into force after subsidiary legislation to the Act is drafted and gazetted in the first quarter of 2018.

In a nutshell, the Act seeks to act as a guardian to Malaysia's rich biodiversity by regulating access to bio-resources and associated traditional knowledge as well as the sharing of benefits arising from the use of these resources. Historically, corporations and researchers would learn of the medicinal or health benefits of various local bio-resources from the indigenous or native communities, then appropriate and exploit the bio-resources, without financial compensation to the State or indigenous communities. However, careful scrutiny of the wording of its provisions reveals that the powers conferred under the Act may be far more wide-reaching than intended.

“ the Act seeks to act as a guardian to Malaysia's rich biodiversity ”

### KEY PROVISIONS OF THE ACT

The Act requires any person who intends to access a biological resource or traditional knowledge associated with a biological resource to apply for a permit.

"Biological resource" is defined to include genetic resources, organisms, microorganisms, derivatives and any parts thereof; the populations and any other biotic component of an ecosystem with actual or potential use or value for humanity; and any information relating to the foregoing (Section 4).

As for what constitutes "access", the Act provides that a person is said to have access to a biological resource if the taking of a biological resource from its natural habitat or place where it is kept, grown or found, is for the purpose of research and development or if there is a reasonable prospect that a biological resource will be subject to research and development (Section 5).

Right off the bat, it must be emphasised that the potential ramifications of such wide definitions cannot be overstated. Take, for example, lemongrass – a commonplace plant found

throughout Malaysia. If the Act is interpreted strictly, even food and beverage manufacturers that research into, develop and commercialise lemongrass plants harvested in Malaysia into simple food products may be required to apply for a permit.

### Permit for Commercial Purposes / Non-commercial Purposes

There are two types of permits under the Act: one for commercial or potential commercial purposes (Section 12); and one for non-commercial purposes only (Section 13).

Both permits are to be applied from, and issued by, the relevant Competent Authority which are the statutory bodies specified in the First Schedule of the Act, with one Competent Authority designated for each State and a National Competent Authority overseeing the general implementation of the Act. Many practical questions come to mind when reviewing the Act and the provisions on applying for permits.

The Act does not deal with the situation where a bio-resource is located in and the access spans several States. Would a single permit from one Competent Authority suffice or are separate permits from each Competent Authority needed, depending on where access takes place?

“ any person who intends to access a biological resource ... (must)... apply for a permit ”

The Act also provides that the Competent Authority may approve the application and issue a permit, with or without condition, if the criteria set out in Section 12(2) (for permits for commercial purposes) or Section 15(3) (for permits for non-commercial purposes) are satisfied.

Save that applications for permits for commercial purposes require a benefit sharing agreement ("BSA") to be established, both sets of criteria under Section 12(2) and Section 15(3) are largely identical and rather lengthy, including, *inter alia*, that an applicant must obtain prior informed consent.

The extent to which the fulfilment of these criteria must be proven remains to be seen. For instance, one criteria is that the access "may not result in adverse environmental impact". Does this necessitate an environmental impact assessment to be conducted? If so, an application would be very laborious and cost-intensive.

### Prior Informed Consent and Benefit Sharing Agreement

Prior informed consent of the relevant indigenous community must be obtained for access to a bio-resource on land to which



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they have a right and to associated traditional knowledge held by them (Section 23(1)).

BSAs are to be entered into with the “resource provider” (Section 22(1)), which is defined to include, *inter alia*, the Federal Government or State Authority possessing bio-resources in *in-situ* conditions; and the indigenous and local communities where the resource is on land to which they have a right or where they are the holders of the traditional knowledge.

A BSA is to be based on “mutually agreed terms and provide for fair and equitable benefit sharing” (Section 22(2)). However, there is no guidance on what would amount to “fair and equitable”. One can already foresee the skirmishes that could be had in court as to how this is to be measured.

The effectiveness of “mutually agreed terms” is questionable as well. Inequality of bargaining power aside, it is not difficult to envisage a scenario whereby an indigenous community fails to appreciate the commercial value of a particular bio-resource and signs an unfavourable deal.

**“ the Act is well-intended and should be implemented to protect the indigenous and local communities ”**

### *Identifying the local or indigenous communities*

Section 23(4) provides that any prior informed consent shall be obtained from, and a BSA entered into with, the representative, organisation or body identified in accordance with the customary laws and practices, protocols and procedures of the indigenous and local community.

Where no such representative or organisation can be identified, consent is to be obtained from, and a BSA entered into with, the holders of the traditional knowledge within the communities; or the Federal Government or State Authority, if the holders of the traditional knowledge cannot be identified (Section 23(4)(b)).

As for situations where the same traditional knowledge is shared by more than one indigenous or local community, consent must be obtained from, and a BSA entered into with, the duly identified representative or organisation of all the holders of the traditional knowledge; or, where it is not practicable to ascertain all such holders, all such representatives or organisations as the applicant is able to ascertain (Section 23(6)).

The task of identifying the right representative(s) or community(ies) may be a challenging and costly exercise, especially in cases

where a group of researchers independently discovers a bio-resource and its use without assistance from any particular indigenous community.

### *Offences*

Failure to comply with the provisions of the Act should not be taken lightly and would result in rather severe sanctions.

Any person who accesses a bio-resource or traditional knowledge for commercial purposes without a permit will be liable to, in the case of an individual, a maximum fine of RM500,000 or imprisonment for a maximum term of 10 years or both; and in the case of a body corporate, a maximum fine of RM5,000,000 (Section 12(6)).

Where the access without a permit is for non-commercial purposes, an individual will be liable to a maximum fine of RM100,000 or imprisonment for a maximum term of seven years or both; whereas a body corporate will be liable to a maximum fine of RM1,000,000 (Section 15(7)).

### **EFFECT ON PATENTS**

Notwithstanding the impact on researchers and corporations generally, the Act has a number of provisions which would affect patent holders specifically.

The National Competent Authority is tasked under the Act to establish measures for the purpose of monitoring and tracking bio-resources or traditional knowledge, including the designation of checkpoints where permits must be produced. Crucially, such checkpoints include offices or authorities dealing with applications for patents, i.e. MyIPO.

Based on general enquiries with the Ministry, MyIPO would inform the Ministry of any patent application which involves a bio-resource or traditional knowledge, and the Ministry would then investigate its source of origin. However, it remains to be seen how effective such a checkpoint system would be.

Further, any person applying for a patent in relation to a bio-resource or traditional knowledge accessed is required to notify the National Competent Authority in writing within 30 days from the date of the application (Section 31(1)). Failure to do so amounts to an offence.

## THE DOCTRINE OF PRIME NECESSITY

Geraldine Goon analyses the Court of Appeal decision adopting the doctrine of prime necessity into Malaysian law

In the recent case of *Labuan Ferry Corporation Sdn Bhd v Chin Mui Kien & Ors & Another Appeal* [2017] 1 LNS 497, the Court of Appeal unanimously applied the common law doctrine of prime necessity, subject to the qualification that the doctrine applies only where no statutes exist to exclude the applicability of the doctrine.

In short, the doctrine of prime necessity means that in the absence of good cause to the contrary, where a business is a monopoly providing an essential service, that business must make the service available to all and at a reasonable price.

### BRIEF FACTS

The Plaintiffs were owners or operators of lorries or trailers whose business was to transport goods. The Defendant was the sole operator of ferry services between Menumbok and Labuan under a contract with the State Government of Sabah which prevented the Defendant from unilaterally increasing fares without the prior written consent of the State Government. Although the Defendant's contract with the State Government expired on 20 June 2010, it remained the sole operator of ferry services between the two points until the middle of 2012. The Plaintiffs in both suits complained of the following:

“ the Court of Appeal unanimously applied the common law doctrine of prime necessity ”

- (a) That in January 2011, the Defendant unilaterally and unlawfully increased the charges for its ferry services for a 9-ton laden lorry from RM270.00 to RM1,080.00 for the Menumbok-Labuan route and RM1,120.00 for the Labuan-Menumbok route; and
- (b) Due to the Plaintiffs' complaints regarding the increased charges, some Plaintiffs were denied use of the ferry's services leading to the loss of use of vehicles stranded in Labuan.

The Plaintiffs' main argument was that the Defendant, being the sole provider of an essential service, had a duty to ensure the availability of the service to all and charge a reasonable price for that service pursuant to the doctrine of prime necessity. The Plaintiffs' basis for the application of the doctrine as part of Malaysia's common law was its application in the common law jurisdiction of England supported by persuasive decisions from New Zealand and Canada. The doctrine was to be imported by way of section 3(1) of the Civil Law Act 1956 ("Civil Law Act") which states as follows:

**"Section 3. Application of U.K. common law, rules of equity and certain statutes.**

(1) Save so far as other provision has been made or may hereafter be made by any written law in force in Malaysia, the Court shall—

- (a) in Peninsular Malaysia or any part thereof, apply the common law of England and the rules of equity as administered in England on the 7 April 1956;
- (b) in Sabah, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 1 December 1951;
- (c) in Sarawak, apply the common law of England and the rules of equity, together with statutes of general application, as administered or in force in England on 12 December 1949, subject however to subparagraph (3)(ii):

*Provided always that the said common law, rules of equity and statutes of general application shall be applied so far only as the circumstances of the States of Malaysia and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary."*

“ if there is no statute which deals with ... the doctrine, ... the doctrine "shall" be applied in Malaysia ”

The Defendant's position was that the doctrine had no place in Malaysian law as there are in existence written laws that govern the Plaintiffs' claims, namely the Contracts Act 1950 ("Contracts Act"), the Competition Act 2010 ("Competition Act") and the Merchant Shipping Ordinance 1952 ("Merchant Shipping Ordinance").

### THE DECISION OF THE HIGH COURT

The High Court held that there was no reason for the non-application of the doctrine in Malaysia and such application was not precluded by any existing legislation. The Defendant appealed.

### THE DECISION OF THE COURT OF APPEAL

The Court of Appeal charted the following framework to reach their conclusion. Firstly, the service being considered must be an essential service. Secondly, if there is no statute which deals with or encapsulates the doctrine, it must follow that the doctrine "shall" be applied in Malaysia pursuant to section 3(1) of the Civil Law Act, subject to any "qualifications as local circumstances render necessary".

In satisfaction of the first limb, the Court of Appeal accepted that





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the ferry service was indeed an essential service. Unfortunately, the Court of Appeal did not elaborate on the basis upon which the ferry service was found to be essential. Guidance may be sought from the High Court decision (reported in [2016] 1 CLJ 866) where Stephen Chung J was convinced by the following factors:

- (1) the Defendant was, at all material times the sole operator and had a monopoly over the ferry services between Menumbok and Labuan;
- (2) there is no bridge or land connection or link between the two points; and
- (3) such ferry services are essential to trade, commerce and transportation between Labuan and Sabah.

The Court of Appeal then moved on to consider the origin of the doctrine from the 18<sup>th</sup> century English case, *Allnut v Inglis* (1810) 12 East 527. The doctrine had been laid down as follows:

*“Every man may fix what price he pleases upon his own property or the use of it but if for a particular purpose, the public have a right to resort to his premises and make use of them, and he has a monopoly in them for that purpose, if he will take the benefit of that monopoly, he must as an equivalent perform the duty attached to it on reasonable terms ...”*

The Court of Appeal then went on to consider section 3(1) of the Civil Law Act and said:

*“It is thus mandatory to apply the common law of England as administered or in force in England on the dates specified in section 3(1)(a)(b)(c) of the Civil Law Act where no provision “has been made ... by any written law in force in Malaysia.””*

The Court of Appeal clarified that the “common law” referred to in section 3(1) of the Civil Law Act is the common law of England. Any development in Malaysian common law after the dates specified in the Civil Law Act is entirely in the hands of the Malaysian courts (*Chung Khiaw Bank Ltd v Hotel Rasa Sayang Sdn Bhd* [1990] 1 MLJ 356).

In the opinion of their Lordships, *“the mere existence of the Competition Act, Contracts Act and the Merchant Shipping Ordinance is not key to determining whether the common law doctrine of prime necessity applies to Malaysia. The key to determining the issue is whether the three statutes encapsulate the common law doctrine of prime necessity.”*

As none of the three statutes cited by the Defendant contained provisions that regulate the monopoly of essential services, these statutes are not *“other provision ... made under any written law in Malaysia”* within the meaning of section 3(1) of the Civil Law Act which have the effect of excluding the application of the common law doctrine of prime necessity.

The Court of Appeal took the view that the object of the Competition Act is to protect the interests of consumers by prohibiting anti-competitive conduct among competitors and not to regulate monopolies of essential products and services. Thus, the Competition Act has nothing to do with the doctrine of prime necessity, which is concerned with the obligation imposed on monopoly suppliers of essential products and services to supply their products and services in consideration for fair and reasonable payments.

Based on the facts and circumstances of the case, the Court of Appeal agreed with the High Court that the doctrine of prime necessity could and did apply. The Court of Appeal also found that the increased fares imposed by the Defendant were excessive and unreasonable in the circumstances.

## CONCLUSION

Although this was not the first time the doctrine has been argued and considered in Malaysia, it marks the very first positive application and acceptance of the doctrine as part of Malaysian common law. The only other reported decision that has considered the doctrine is *Tsen Heng That v Sabah Fish Marketing Sdn Bhd & Ors* [2015] 1 LNS 585, which incidentally was also presided over by Stephen Chung J.

In *Tsen Heng That*, one of the issues raised during an application for an interim injunction was whether the fisheries complex owned by the 1<sup>st</sup> Defendant was a business invested with the “monopoly of a public privilege”. The High Court declined to consider the issue as there was insufficient evidence at that interlocutory stage of proceedings to determine the issue and took the view that it was a matter to be decided at trial. Unfortunately, there is no further reported decision on the outcome of the trial and whether a case for the doctrine was made out or not.

It must be noted that in coming to its decision, the Court of Appeal in *Labuan Ferry* was careful to clarify that there is no statute that they were aware of that deals with the cause of action of the nature brought by the Plaintiffs. Hence, a party who seeks to invoke the doctrine of prime necessity must canvass all available legislation before pursuing an action on this ground lest the cause of action be stymied by an applicable statutory provision.

## THE MERCHANT SHIPPING (AMENDMENT) ACT 2017: A SEA CHANGE?

Siva Kumar Kanagasabai and Corrinne Chin highlight the key amendments to the Merchant Shipping Ordinance 1952

### INTRODUCTION

The Merchant Shipping (Amendment) Act 2017 ("MSAA 2017") was passed by Dewan Rakyat and Dewan Negara on 9 and 16 August 2017 respectively to amend the Merchant Shipping Ordinance 1952 ("MSO 1952"). Although the MSAA 2017 was gazetted and became law on 1 December 2017, it will only come into force on a date appointed by the Minister.

This article will provide an overview of the key amendments made in MSAA 2017, specifically the registration of ships under the Malaysia Ship (International) Register, bareboat chartered-out ships, the Registrar's new powers, the rights of mortgagees, licensing of ships, increment of penalties, and the Malaysia Shipping Development Fund.

In this article, a "Malaysian ship" refers to a ship that is registered or licensed under Part II of MSO 1952, as amended by MSAA 2017.

### REGISTRATION OF SHIPS

Under MSAA 2017, no ship shall be within Malaysian waters or the exclusive economic zone unless it is registered in Malaysia as a Malaysian ship or registered in any other country, subject to MSO 1952 and any other written law. A ship may be registered as a Malaysian ship under the Malaysia Ship Register ("MSR") or Malaysia International Ship Register ("MISR") (collectively "Ship Registers").

MSAA 2017 increases the number of categories of registration of ships as Malaysian ships under the Ship Registers and amends the requirements imposed on some of the categories when registering a ship. In addition, it also removes the requirement that property in a ship be divided into 64 shares and provides that a ship may be divided into any number of shares.

#### *Registration under MSR*

Under MSAA 2017, a Malaysian citizen or a body corporate incorporated in Malaysia may register their ships as a Malaysian ship under MSR.

The present law specifically requires a Malaysian corporation registering its ship under MSR to have, amongst others, a majority of Malaysian shareholders and directors. However, under MSAA 2017, the extent to which it may register its ship under MSR will be determined by the Minister (normally by regulations which will be issued in due course). As the regulations have not been issued at this juncture, it is unclear whether MSAA 2017 would result in less stringent requirements being introduced.

#### *Registration under MISR*

Presently, only a corporation incorporated in Malaysia may

register its ship as a Malaysian ship under MISR. With the inception of MSAA 2017, any person or entity, regardless of citizenship or place of incorporation, may register a ship as a Malaysian ship with MISR.

Unlike the more stringent MSO 1952, MSAA 2017 does not subject a Malaysian company to foreign shareholding and paid-up capital requirements, nor the requirement to appoint a ship manager.

However, a non-Malaysian citizen or a body corporate incorporated outside Malaysia applying to register a ship as a Malaysian ship under MISR, is required to appoint a representative person so long as the said ship remains registered. The representative person must be a Malaysian citizen who has his permanent residence in Malaysia or a body corporate incorporated in Malaysia which has its principal place of business in Malaysia.

Unlike a ship manager whose responsibilities include maintaining and operating a ship, the role of a representative person, as stated in MSAA 2017, is to file documents or furnish information required under the MSO 1952 and accept service of any document to be served on the owner relating to offences.

The current law does not allow a ship to be registered under MISR unless it is fitted with mechanical means of propulsion, is not more than 15 years or 20 years in age (depending on the type of ship) and is of not less than 1,600 gross tonnage, unless exempted by the Minister. Under MSAA 2017, the age and tonnage criteria for registration under MISR may be prescribed in regulations to be issued by the Minister. Hence it remains to be seen whether the criteria for registration under MISR will be stricter or more lenient in this regard.

#### *Ships under Bareboat Charter Terms*

MSO 1952 currently does not provide for the registration of ships under bareboat charters. In a revolutionary move, MSAA 2017 will allow charterers of a ship under bareboat charter terms to register a ship as a Malaysian ship with the Ship Registers. The establishment of a bareboat charter registry operating under the Ship Registers is in line with regimes in other countries such as the United Kingdom and Singapore.

MSAA 2017 defines "bareboat charter terms" as the hiring of a ship for a stipulated period on the terms which give the charterer possession and control of the ship, including the right to appoint the master and crew of the ship.

The registration of a ship under bareboat charter terms with the Ship Registers is subject to (i) the Minister's approval; and (ii) evidence that the ship's registration at its primary registry has been suspended or that the authority of primary registry has consented to the suspension of the ship's registration at its primary registry.



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### BAREBOAT CHARTERED-OUT SHIPS

The current law also does not stipulate the rights of Malaysian shipowners to register their ships as a bareboat charter in another country. Following the amendments made in MSA 2017, Malaysian shipowners may do so subject to conditions imposed by the Director of Marine and the consent of the Registrar. However, the Minister may disallow any Malaysian ship to be bareboat chartered-out for any reason and duration as he thinks fit. While a Malaysian ship is bareboat chartered-out and re-registered in another country, the registration of that ship in Malaysia will be suspended.

### REGISTRAR'S NEW POWERS

The Registrar is responsible to maintain the Ship Registers. MSA 2017 accords the Registrar with the power to, amongst others, suspend and terminate registrations of Malaysian ships (including ships on bareboat charter terms) under the Ship Registers, which the law does not presently expressly provide for. For example, the Registrar may terminate the registration of a Malaysian ship if the ship is broken up, or is an actual or constructive total loss such that it is no longer capable of being used in navigation.

The Registrar may also terminate the registration of a ship under bareboat charter terms if (i) the ship ceases to be operated under a bareboat charter; or (ii) the rights and obligations of the bareboat charterer under the bareboat charter terms are assigned; or (iii) the ship's primary registry is closed or annulled; or (iv) the primary registry authority has revoked or withdrawn the suspension of the ship's registration at its primary registry.

### RIGHTS OF MORTGAGEES

Registered mortgagees are empowered to sell the ship when the mortgage money is due and to give effectual receipts for the purchase money. Nevertheless, in practical terms, unless there is a debenture providing for the appointment of a receiver with the right to sell the ship, any sale of a ship pursuant to a mortgage would require a Court order.

MSA 2017 also expressly recognises contractual or equitable interests, and allows for such interests to be enforced by or against the owners and mortgagees of ships.

However, it should be noted that under MSA 2017, a bareboat chartered-in ship may not be mortgaged. In fact, the laws of primary registry of these ships will apply to issues such as the priority of registered mortgages.

### LICENSING OF SHIPS BELOW 15 NET TONNAGE

Unless specifically exempted, MSA 2017 will require ships below 15 net tonnage in any part of Malaysian waters for purposes of trade or business; transportation of any person other than for

trade or business; or sports, leisure or recreational activity, to be licensed. The present law requires the licensing of vessels below 500 gross tonnage for any of the aforesaid purposes.

### PENALTIES

MSA 2017 increases the penalties across the board in the event MSO 1952 is contravened. For example, the penalty for a person who uses a ship or causes or permits a ship to be used without a licence or for a purpose other than the purpose for which it is licensed or contrary to the conditions of its licence will attract a fine not exceeding RM100,000 and/or imprisonment for a term not exceeding two years, as opposed to a mere fine not exceeding RM10,000 under the present law.

### MALAYSIA SHIPPING DEVELOPMENT FUND

MSA 2017 also introduces the Malaysia Shipping Development Fund ("Fund") from monies collected through the payments of annual tonnage fee. The Malaysia Shipping Development Fund Committee ("Committee") controls and administers the Fund which is aimed at improving the shipping industry. Specifically, the Fund is to be expended to improve the shipping industry; provide awards, fellowships, scholarships and research grants; sponsor research projects; organize seminars, expositions and other similar activities; and pay any other expenses incurred by the Committee in the execution of its functions.

### COMMENTS

MSA 2017 is intended to arrest the steady decline of Malaysian shipping tonnage by encouraging shipowners and bareboat charterers to flag their ships in Malaysia by introducing more categories of registration and imposing less stringent registration requirements under the Ship Registers. It also increases the powers of the Registrar and introduces stricter penalties. MSA 2017 also seeks to address the need to improve maritime human resources by introducing the Fund to train and educate our maritime manpower.

The amendments under MSA 2017 will no doubt complement the Ministry of Transport's 5-year Malaysia Shipping Master Plan to revitalize shipping. Time will tell whether the amendments will bring about a sea change to the Malaysian shipping industry.

## STATUTORY ADJUDICATION – A MORE LEVEL PLAYING FIELD

Shannon Rajan highlights a recent Federal Court decision on the Construction Industry Payment and Adjudication Act 2012

In the recent case of *View Esteem Sdn Bhd v Bina Puri Sdn Bhd* [2017] 1 LNS 1378, the Federal Court dealt with three broad issues pertaining to the Construction Industry Payment and Adjudication Act 2012 ("CIPAA"), namely: (a) jurisdictional challenge under section 41; (b) the adjudicator's right to exclude defences; and (c) setting aside and stay of an adjudication decision under sections 15 and 16.

Unless otherwise stated, all references to sections in this article are to sections in CIPAA.

### BACKGROUND

The appeal before the Federal Court involved three applications arising from the same adjudication claim, which were consolidated and heard together in the High Court. The Appellant filed an application to challenge the adjudicator's jurisdiction under section 41 and another application to set aside and/or stay the adjudication decision under sections 15 and 16, whilst the Respondent filed an application to register and enforce the adjudication decision as a judgment of the court pursuant to section 28. The High Court dismissed both the Appellant's applications and allowed the Respondent's application. The Court of Appeal affirmed all three decisions of the High Court.

“ there was no requirement for the earlier claim to be “pending” ”

### THE FEDERAL COURT'S DECISION

#### *Jurisdictional challenge under section 41*

Regarding the first issue, the Federal Court observed that the High Court fully considered section 41 on its merits but the Court of Appeal's decision was a procedural one whereby it decided that the section 41 application ought to be dismissed outright because it was brought as a separate application and not as an application under section 15. The Federal Court was of the view that the Court of Appeal erred in failing to distinguish between the present case where CIPAA did not apply at all because of section 41 with a case where CIPAA applied but the adjudicator had exceeded his jurisdiction under section 15. The Federal Court found that the Appellant had correctly not invoked section 15 because it could not on one hand, complain that CIPAA did not apply to the case and yet on the other hand, invoke a provision of CIPAA to seek relief.

The Federal Court then dealt with the question as to whether CIPAA applies to the present case by considering the words in section 41, i.e. a “*payment dispute ... commenced in any court*

*or arbitration before the coming into operation of the Act*”. The Federal Court observed that the High Court in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor* [2015] 11 MLJ 499, had decided that CIPAA applies retrospectively to construction contracts made and payment disputes arising before CIPAA came into force. Thus in transitional cases, such as the present case, a determination must be made as to whether the section 41 exclusion applies.

The Federal Court held that it would be sufficient to establish a right of exclusion under section 41 if the paying party demonstrated that a claim covering the present claim had been **previously commenced** in court or arbitration and that there was no requirement for the earlier claim to be “pending”. The Federal Court accepted the Appellant's case that the progress claim no. 28 (i.e. cumulative of earlier progress claims contained in interim certificates no. 23 to 26R), which is the subject matter of the present payment dispute fell within the exclusion under section 41 as a claim based on interim certificates no. 23 to 26R had been commenced in court in May 2013. Therefore, the Respondent's claim was excluded from CIPAA.

“ there is no impediment for the adjudicator to consider ... all the grounds of defence ”

#### *Exclusion of defences by adjudicator*

The next issue was whether the adjudicator had the right to exclude the Appellant's defences. The adjudicator relied on section 27 to exclude the Appellant's defences because they were not stated in the payment response under section 6 albeit pleaded in the adjudication response under section 10. The High Court agreed with the adjudicator and held that sections 5 (*payment claim*) and 6 (*payment response*) were determinative of jurisdiction and that the adjudicator's jurisdiction did not extend to matters in the adjudication claim, adjudication response and adjudication reply found in sections 9 to 11. The High Court's conclusion was based on the finding that sections 9 to 11 were mere “*formal manifestations*” of the dispute.

The Federal Court disagreed with the High Court's reasoning. It found that the payment response under section 6(2) requires the non-paying party to merely state “*amount disputed and the reason for dispute*” whilst the adjudication response under section 10 requires the respondent to “*answer the adjudication claim*”. It was the Federal Court's view that the latter is a legal response with the obligation to “*answer*” imposed by statute. A similar view was taken with regard to the payment claim under section 5 and adjudication claim under section 9.

The Federal Court also placed significance on the fact that an



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unpaid party and a non-paying party were referred to as the claimant and respondent respectively after the “*initiation of adjudication*” under section 8, which signifies the commencement of the adjudication process. The two-stage process under CIPAA did not warrant giving a reduced importance to the adjudication pleadings under sections 9 to 11 and greater significance to the initial documents under sections 5 and 6.

The Federal Court then determined the scope of the jurisdictional limitation under section 27(1). First, it stated that section 27(1) refers to the subject matter of the claim under section 5, which is the “*cause of action*” identified by the claimant by reference to the applicable clause of the construction contract. Thus, if the payment claim relates to progress claim no. 28, the jurisdiction of the adjudicator is limited to this progress claim and nothing else. The payment response is likewise limited to an answer to progress claim no. 28. Section 27(1) had nothing to do with the grounds of the claim or the reasons for opposing the claim. The Federal Court held that in the absence of prohibitory clauses, such as those found in section 15(3) of the Building and Construction Industry Security of Payment Act 2006 of Singapore and section 20(2B) of the New South Wales Building and Construction Industry Security of Payment Act 1999, there is no impediment for the adjudicator to consider all the grounds of claim in an adjudication claim under section 9 and all the grounds of defence in an adjudication response under section 10.

“ the courts can stay the award where there are clear errors ”

The Federal Court went on to determine the impact of section 6(4), which provides that if a non-paying party fails to respond to the payment claim, that party is “*deemed to have disputed the entire payment claim.*” The Federal Court found that the High Court had wrongfully reduced the significance of the “*deeming*” effect where the respondent is only entitled to dispute the claim as it stands and not raise any positive defences. Accordingly, the Federal Court held that the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the Appellant.

#### *Setting aside and stay of adjudication decision*

The last issue was the interplay between sections 15 (*setting aside*) and 16 (*stay of adjudication decision*). The High Court held that an application under section 16 can only be allowed in exceptional circumstances, for example, if there was “*overwhelming evidence*” that a contractor would be unable to meet its contractual and financial obligations to the employer. The Federal Court held that such a stringent test is not justified under CIPAA as section 16 itself contains no such limiting requirement or intent. The Federal Court adopted a more liberal

reading of section 16, where the courts can stay the award where there are clear errors or to meet the justice of the individual case.

The Federal Court also dealt with the procedural aspect of section 16. It concluded that the Court of Appeal had erred in holding that a stay application under section 16 could only be made after the filing of an application under section 15. The Federal Court observed that section 16(1)(a) provides that the parties may apply for a stay once an application to set aside an award under section 15 has been made but it does not go on to say that the said application must be made separately. It is wholly appropriate for a stay under section 16 be filed together with an application to set aside an award under section 15 as a matter of practical utility for the High Court to make the appropriate order in a joint consideration of both.

#### CONCLUSION

The Federal Court’s decision on the last two issues have wide repercussions on statutory adjudications in Malaysia. The Federal Court’s decision to allow a respondent to raise additional defences in the adjudication response that were not pleaded in the payment response is a complete reversal of the previous position. This decision mitigates the harshness of the previous position where the respondent had to set out in the payment response, all possible defences available to it within ten working days from the receipt of the payment claim. Now, the respondent has until the adjudication response to put forward all its defences and the pressure is shifted to the claimant who would have only five working days to deal with these defences, some of which may be raised for the very first time in the adjudication process.

The Federal Court has also made it easier for a losing party to obtain a stay of the adjudication decision, which specifically includes “*clear errors or to meet the justice of the individual case*”. This decision means that there is a greater onus on the adjudicators to arrive at a correct decision within the tight timelines as material errors could lead to a stay of the adjudication decision, which would in effect nullify the whole adjudication process.

## THE GOOGLE ORDER

Nathalie Ker explains an interesting decision by the apex court of Canada

With the rise of online shopping and website-based businesses, the issue of protecting rights on the internet has increasingly vexed courts in many jurisdictions. Can a non-party, e.g. internet service providers or operators of search engines, be regarded as ‘facilitators’ of prohibited acts by a defendant on the internet? Can the court impose orders on such non-parties?

Earlier this year, these questions were before the Supreme Court of Canada in the case of *Google Inc. v Equustek Solutions Inc.* (2017) SCC 34. The Court handed down its judgment on 28 June 2017, granting a worldwide injunction against Google, a non-party to the main litigation, mandating it to remove websites belonging to the defendant in the main action from search results online.

### BACKGROUND FACTS

Equustek Solutions Inc. (“Equustek”), a small technology company in British Columbia, brought an action in April 2011 against one of its distributors, a company by the name of Datalink. Equustek claimed that Datalink, while acting as a distributor of Equustek’s products, began to re-label one of the products and passed it off as its own. Datalink also acquired Equustek’s confidential information and trade secrets, using these to manufacture a competing product.

“ an interlocutory injunction could be granted against a non-party ”

Equustek obtained court orders requiring Datalink to return to Equustek any information and trade secrets that belonged to Equustek. In addition, Datalink was ordered to post a statement on its websites informing customers that Datalink was no longer a distributor of Equustek’s products and directing customers interested in Equustek’s products to Equustek’s website. However, Datalink then abandoned the proceedings and left the jurisdiction without complying with any of the orders.

In July 2012, Equustek obtained a *Mareva* injunction freezing Datalink’s worldwide assets, including its entire product inventory. Equustek further sought to have Datalink and its principal found in contempt, but no one appeared on Datalink’s behalf and a warrant of arrest was issued against Datalink’s principal. Despite the numerous court orders, Datalink continued its online business from an unknown location, selling the products in question on its websites to customers all over the world.

Having only obtained paper judgments against Datalink with no relief in sight, Equustek approached Google in September 2012 and requested that it de-index the websites belonging to Datalink. Google refused to do so and Equustek brought proceedings in the Supreme Court of British Columbia seeking an

order requiring Google to de-index Datalink’s websites. Google then told Equustek to obtain a court order prohibiting Datalink from carrying on business online, and that it would comply with such an order by removing specific webpages. Due to its internal policy, Google was not willing to remove entire websites. Equustek agreed to try this approach and an injunction was granted in December 2012 ordering Datalink to “cease operating or carrying on business through any website” (“December 2012 Order”).

As Google had not taken down Datalink’s websites, Datalink was able to sidestep the effect of the December 2012 Order by moving its content to new webpages within its websites. Equustek was again left without an effective remedy.

Equustek finally sought an injunction to prohibit Google from displaying any part of Datalink’s websites on any of its search results worldwide. The injunction order (“Google Order”) was granted by the Supreme Court of British Columbia and upheld by the Court of Appeal of British Columbia on Google’s appeal. Google then brought the case to the apex court, the Supreme Court of Canada.

### THE JUDGMENT OF THE SUPREME COURT

*The Test: Just and Equitable*

The Google Order was upheld by the Supreme Court of Canada by a 7:2 majority. The majority judges were satisfied that the case fulfilled the requirements to grant such an injunction. Justice Abella, who gave the decision of the majority, began by highlighting that the decision to grant an interlocutory injunction is a discretionary one and entitled to a high degree of deference. The judge referred to *RJR—MacDonald Inc. v Canada (Attorney General)* [1994] 1 S.C.R. 311, which sets out a three-part test for determining whether a court should exercise its discretion to grant an interlocutory injunction: is there a serious issue to be tried; would the person applying for the injunction suffer irreparable harm if the injunction were not granted; and is the balance of convenience in favour of granting the interlocutory injunction or denying it. Ultimately, the question is whether granting the injunction is just and equitable in the circumstances of the case.

*Injunction Against Non-Parties?*

Justice Abella then addressed Google’s argument that it should be immune from the grant of the interlocutory injunction as it was not a party to the litigation. Justice Abella dismissed this argument, holding that an interlocutory injunction could be granted against a non-party and that the test would be unchanged in these circumstances. Citing the case of *MacMillan Bloedel Ltd v Simpson* [1996] 2 S.C.R. 1048, Justice Abella stated that where a non-party violates a court order, there is a principled basis for treating the non-party as if it had been bound by the order. The non-party’s obligation arises not because it is bound by the injunction by being a party to the cause, but because it is conducting itself so as to obstruct the course of justice.



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In support of its decision, the Supreme Court of Canada drew an analogy with *Norwich* orders (*Norwich Pharmacal Co. v Customs and Excise Commissioners* [1974] A.C. 133). A *Norwich* order is an order granted by the court to compel non-parties to disclose information or documents in their possession required by a complainant. Justice Abella further emphasised that a *Norwich* disclosure may be ordered against non-parties who are not themselves guilty of wrongdoing, but who are so involved in the wrongful acts of others that they facilitate the harm.

Justice Abella made the point that Datalink was only able to survive on Google’s search engine which directs potential customers to its websites. He then stated that although this did not make Google liable for the harm caused to Equustek, Google was the “*determinative player*” in allowing the harm to occur.

*Worldwide Relief*

The Supreme Court of Canada agreed with the court below that the injunction had to have worldwide effect. If the injunction were restricted to Canada only, purchasers from outside the country could still purchase from Datalink’s websites, and Canadian purchasers could still find Datalink’s websites by other means. Justice Abella stated as follows:

“*The Internet has no borders — its natural habitat is global. The only way to ensure that the interlocutory injunction attained its objective was to have it apply where Google operates — globally.*”

**DISSENTING JUDGMENT**

*Permanent Injunction and Final Order*

It is also useful to note the dissenting judgment delivered by Justices Côté and Rowe. The dissenting judges were of the opinion that the Google Order was effectively a permanent injunction against Google and provided Equustek with more relief than it sought against Datalink. Justices Côté and Rowe argued that the test for interlocutory injunctions did not apply to an order which is effectively final, and the test for a permanent injunction had not been satisfied. Justice Abella tried to address the issue by saying that Google could have applied to have the injunction varied or vacated, but had not done so.

*Scope of “Aids and Abets” Too Wide*

The dissenting judges acknowledged that a non-party may be liable for contempt if he aided or abetted the doing of a prohibited act. However, the dissenting judges held that Google did not aid or abet the breach of the order by Datalink. Equustek had argued that Google’s search engine was facilitating Datalink’s ongoing breach by leading customers to Datalink websites. This argument was dismissed by the dissenting judges as this would render the scope of “*aids and abets*” too wide. The dissenting judges gave the example that such an overbroad definition might include the companies supplying Datalink with the material to produce the

products, the companies delivering the products, or (as argued by Google), it might also include the local power company that delivers power to Datalink’s physical address.

*Google Order Lacks Effectiveness*

Further, the dissenting judges agreed with Google that Datalink’s websites could be found using other search engines, links from other sites, bookmarks, email, social media, printed material, word-of-mouth, or other indirect means. The dissenting judges held that this showed the lack of effectiveness of the Google Order.

*Alternative Remedies Available*

Lastly, the dissenting judges stated that Equustek had other remedies at its disposal. Equustek could have pursued a remedy in the French courts as Datalink had assets in France. Equustek could also pursue injunctive relief against the relevant Internet Service Providers to enforce the December 2012 Order. Equustek also had the option of initiating contempt proceedings in France or in any other jurisdiction with a link to the illegal websites.

**COMMENTS**

The decision in *Google v Equustek* is a practical one and provides complainants in Canada with more tools to protect their rights. A *Norwich* order may only compel a non-party to disclose information and documents, whereas a Google Order goes further and may compel a non-party to carry out, or refrain from carrying out, specified acts to aid in the enforcement of the orders in the main action.

Where a similar situation involving intellectual property or other rights comes before the Malaysian courts, it would be interesting to see whether the Malaysian courts would apply the decision of the Supreme Court of Canada. A litigant seeking a Google Order should be prepared to show that he has exhausted other legal remedies, and that the person against whom the order is sought is the determinative player in facilitating the breach. In light of the points made by the dissenting judges, a complainant should also be prepared to show that the order would be effective in preventing the harm caused to him.

## THE DOCTRINE OF NON-DELEGABLE DUTY OF CARE

A commentary on *Dr. Kok Choong Seng and Sunway Medical Centre Berhad v Soo Cheng Lin* [2017] 1 LNS 1452 by Sara Lau

### SALIENT BACKGROUND FACTS

The patient, Soo Cheng Lin ("Patient"), had a lump on his forearm which Dr. Kok Choong Seng ("Doctor"), a consultant orthopaedic surgeon advised be removed. The Patient agreed and the Doctor arranged to carry out the surgery at Sunway Medical Centre ("Hospital"). After the surgery, the Patient complained of pain and numbness at the area of his forearm which had been operated on. Upon consultation with a second doctor, the Patient was diagnosed as having lost 90% of his left median nerve.

The Patient brought an action in negligence against the Doctor and the Hospital. Of interest, the Patient alleged that the Hospital owed him a non-delegable duty to ensure that he was treated with care and skill by the Doctor at the Hospital.

### THE INHERENT PROBLEM

Under the private healthcare system in Malaysia, doctors typically enter into independent contractor agreements with hospitals whereby the doctors render medical services on their own accord in collaboration with hospitals which provide the premises, tools and assisting staff such as nurses. It is the general stance of private hospitals that barring any unusual circumstances, responsibility for any medical treatment gone awry rests solely with the doctors who provide the treatment.

This is consistent with the intrinsic hallmark of the law of negligence - that tortious liability associated with negligence is fault-based and is linked to a breach of one's own duty of care. The well-known exception to this general rule, i.e. vicarious liability, is niftily mitigated by the existence of a contract for services (independent contractor agreement) rather than a contract of service (employment agreement). Hospitals could therefore eschew any liability arising from the doctor's negligence.

This decision, however, raised another exception to the general rule of fault-based liability - the doctrine of non-delegable duty of care. Here, the Federal Court was asked to consider if the doctrine of non-delegable duty of care as expounded in the recent English case of *Woodland v Swimming Teachers Association and others* [2014] AC 537 ("*Woodland*") could apply to private hospitals in Malaysia.

### HIGH COURT & COURT OF APPEAL FINDINGS

Both the High Court and Court of Appeal agreed that there existed a non-delegable duty of care on the part of the Hospital.

The High Court found, amongst others, that the Hospital owed a non-delegable duty of care to the Patient to ensure that care is taken by the Doctor in the treatment of the Patient. The High Court stated that the Hospital's duty could not be discharged by delegating it to the Doctor under a contract for services and that the Hospital was liable for the acts and omissions of the Doctor, regardless whether the Doctor is an employee or an independent contractor.

Aggrieved, the Hospital appealed against the High Court's finding of liability on its part.

The Court of Appeal dismissed the Hospital's appeal and adopted the doctrine of non-delegable duty as expounded in *Woodland*. The Court of Appeal found that the Patient became a patient of the Hospital upon admission and was vulnerable or dependent on the Hospital's protection against the risk of injury. Therefore, by reason of the Hospital's role as a healthcare service provider, the Court of Appeal imputed a positive duty on the Hospital to protect the Patient from harm, including in relation to the treatment provided by the Doctor.

### THE NON-DELEGABLE DUTY OF CARE

In *Woodland*, the claimant was a pupil at a school, for which the defendant educational authority was responsible. It was part of the national curriculum that all pupils received swimming lessons. The swimming lessons were taught by a swimming teacher, with a lifeguard in attendance, at a pool run by a local authority. Neither the swimming teacher nor the lifeguard were employees of the defendant.

During a swimming lesson, the claimant suffered a serious brain injury. The claimant brought a claim against the swimming teacher and lifeguard for negligence and against the defendant for breaching its non-delegable duty of care towards him.

In expounding on the doctrine of non-delegable duty of care, the Supreme Court observed that there appeared to be two broad categories of cases wherein such a duty may be found. The first is as where an entity ("X") engages an independent contractor ("Y") to perform an inherently hazardous function.

The second, which was more relevant in the instant case, is where the following three characteristics were apparent:

- (1) the duty arises not from the negligent character of the act itself, but by reason of an antecedent relationship between X and a victim of negligence ("Z");
- (2) the duty is a positive or affirmative duty to protect a particular class of persons against a particular class of risks, and not simply a duty to refrain from acting in a way that foreseeably causes injury; and
- (3) the duty, while delegable, remains X's and delegation of the same makes no difference to his legal responsibility for the proper performance of the same.

*Woodland* was a case which involved the second category. The Supreme Court laid down the following test ("*Woodland Test*"), which must be satisfied before a non-delegable duty may be found:

- (1) Z is a patient or child, or is otherwise especially vulnerable or dependent on X against risk of injury;





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- (2) There is an antecedent relationship between Z and X which involves some element of control over Z;
- (3) Z has no control over how X chooses to perform those obligations;
- (4) X has delegated to Y a function, integral to the positive duty which X assumed over Z and Y performs such functions; and
- (5) Y is negligent in the very function which was delegated by Z, which Y had assumed.

The Supreme Court in *Woodland* ultimately held that the defendant was not vicariously liable for the swimming teacher's and the lifeguard's negligence as they were independent contractors. However, the Court found that the defendant had assumed a non-delegable duty to ensure that the claimant's swimming lessons were carefully conducted and supervised by whomever it had entrusted to perform those functions. Hence, as the negligence occurred in the course of the functions which the school had assumed an obligation to perform, the defendant was in breach of its duty for the independent contractors' negligence in performing those functions.

**THE FEDERAL COURT DECISION**

The Federal Court, in a landmark decision, found that the doctrine of a non-delegable duty of care as expounded in *Woodland* is applicable in Malaysia, and **could** extend to private healthcare institutions such as the Hospital in relation to doctors, who as independent contractors, perform medical treatment within its facilities. The Federal Court categorically rejected the arguments by counsel "that all private hospitals are always or never under a non-delegable duty of patients."

The Court found that given that the role of the hospital may vary from patient to patient, the extent and scope of the hospital's duty towards a patient must be ascertained from the facts and circumstances of the case.

Applying the *Woodland Test* to the present case, the Federal Court found that the first feature was satisfied - the Patient was admitted and underwent surgery in the Hospital's premises and was in an especially vulnerable position dependent on the Hospital against risk of injury.

In considering whether the second feature of the *Woodland Test* was satisfied, the Court noted that the Patient had consulted the Doctor at his private clinic located outside the Hospital's premises prior to the operation and for follow-up appointments. The Doctor advised and referred to the Patient to the Hospital for its facilities and performed the operation on the Patient himself.

The Court said that from the circumstances surrounding the Patient's engagement of the Doctor and admission to the Hospital, it can be inferred that the Patient reasonably expected the operation to be conducted by the Doctor with due care,

wherever the Doctor referred him to do so; the Hospital would merely provide the relevant facilities required for his admission and operation. In respect of the conduct of the operation by the Doctor, the Court did not find that the Hospital had assumed a positive duty to protect the Patient from injury. Thus, the Federal Court concluded that the second feature of the *Woodland Test* was not satisfied.

The Federal Court contrasted the above with a hypothetical scenario wherein a patient independently enters a hospital and relies on the hospital's recommendation to a suitable doctor on duty. In that situation, the hospital having accepted the patient and undertaken to treat him, may be under a non-delegable duty of care to ensure that the patient is treated with due care.

As the second feature was not satisfied, the questions as to whether the third to fifth features of the *Woodland Test* were satisfied did not arise.

The Federal Court therefore found that the Hospital was not liable for the Doctor's negligence.

**CONCLUSION**

The doctrine of non-delegable duty of care is not without its flaws. The imposition of strict liability upon an entity which is otherwise faultless may be perceived as going too far beyond its basic tenets.

However, it is important to remember that the fundamental jurisprudence behind the law of negligence is an imposition of a positive duty to protect another from harm. This, too, forms the basis behind a non-delegable duty of care; which, in any case, as *Woodland* has shown, is a duty of care which is extremely limited in its application.

Most encouragingly, the Federal Court has recognised that the non-delegable duty of care is a particularly onerous obligation which ought to be imposed only where it is fair, just and reasonable to do so based on the particular circumstances of the case.

A welcome, yet undoubtedly precarious progression in the law of negligence in Malaysia, the overarching subjective approach adopted by the Federal Court in relation to the imposition of a non-delegable duty of care suggests that considerable expansion and development of this area of law may be expected in time to come.

## MORE THAN WORDS?

Joshua Teoh discusses a landmark case on patent infringement for variants

In *Actavis UK Limited and others v Eli Lilly and Company* [2017] UKSC 48, the United Kingdom Supreme Court ("UKSC") upheld patent infringement law.

### WHAT IS PEMETREXED?

The dispute related to pharmaceutical compositions comprising pemetrexed-based compounds. Pemetrexed is a type of 'antifolate' medication. Pemetrexed has been known to have therapeutic effect on cancerous tumours, but with damaging and sometimes fatal side-effects.

Pemetrexed, when combined with two units of the carboxyl group ( $-\text{CO}_2\text{H}$ ), forms pemetrexed diacid. When pemetrexed diacid is dissolved in water, hydrogen (H) from the two  $-\text{CO}_2\text{H}$  units separate from the rest of the molecule to form protons; the remainder, which is the main molecule of interest, results in a pemetrexed anion.

### ELI LILLY'S PATENT

Eli Lilly owned a patent entitled "*Combination containing an antifolate and methylmalonic acid lowering agent*" ("Patent"). The Patent primarily claimed the use of **pemetrexed disodium** in combination with Vitamin B12, and optionally folic acid, in medicament for cancer treatment. Pivotal to the Patent disclosed that the damaging side-effects of pemetrexed can be avoided if administered with Vitamin B12. Such medicament was successfully launched by Eli Lilly as 'ALIMTA' in 2004.

A key point is that when pemetrexed disodium dissolves in water, the two sodium units separate from the rest of the molecule to form protons, and the remainder molecule of interest becomes a pemetrexed anion. If this sounds familiar, it is because the structure of **pemetrexed disodium** is just like pemetrexed diacid, except that the former contains two  $-\text{CO}_2\text{Na}$  units instead of two  $-\text{CO}_2\text{H}$  units. Dissolving both in water results in two components: pemetrexed anions and a counter-ion (of sodium or hydrogen).

### THE ACTAVIS PRODUCTS

Actavis's products involved other pemetrexed compounds used with Vitamin B12 for cancer treatment. Instead of **pemetrexed**

**disodium**, Actavis used pemetrexed diacid or variants of pemetrexed containing tromethamine or potassium units ("the Actavis Products"). Actavis contended that as the Patent's monopoly extended only to pemetrexed disodium, the Actavis Products did not infringe the Patent.

Eli Lilly claimed that there was direct and indirect infringement; direct infringement as the Patent covered all salt variants and the person ordinarily skilled in the art would conduct routine tests to establish which salt performed the same function, and indirect infringement because once sodium ions are added to the Actavis Products by medical practitioners, pemetrexed disodium would be involved in the preparation of those products.

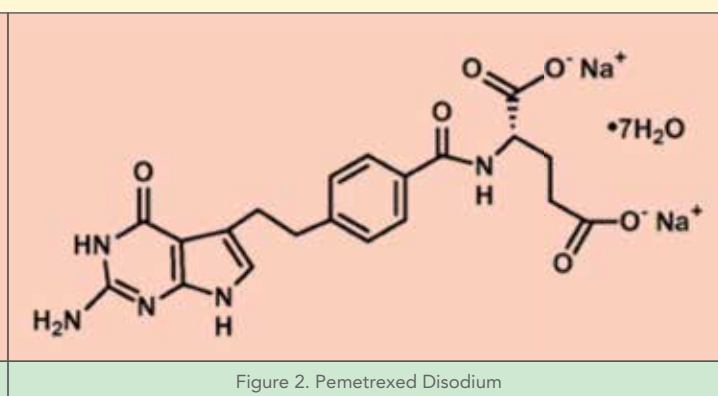
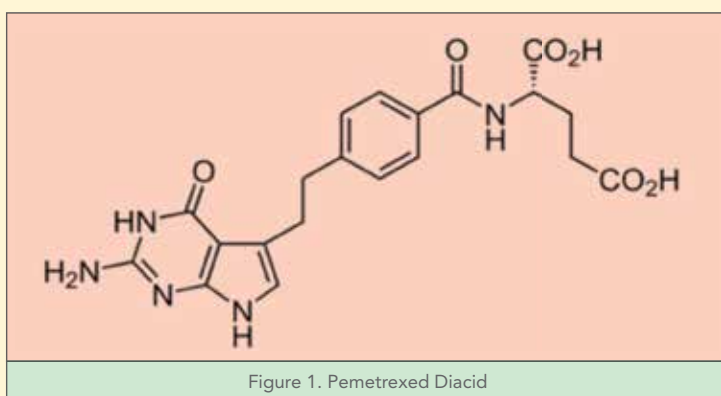
The High Court found that none of the Actavis Products directly or indirectly infringed the Patent. On appeal, the UK Court of Appeal held that there was indirect infringement, but no direct infringement.

The issues before the UKSC were: (i) What is the correct approach to interpret patent claims and assess infringement in light of the Protocol on Interpretation of Article 69 of the European Patent Convention ("Protocol") in relation to 'equivalents'; and (ii) To what extent can a patent's prosecution history (e.g. papers submitted from filing to grant) be used to determine the scope of the patent's claims.

### DEALING WITH A VARIANT

A 'variant' is a feature which differs from the primary, literal, or clear contextual meaning of a claim. Previously, the UK House of Lords formulated the landmark three-step "*Improver Questions*" in *Improver Corp v Remington Consumer Products Ltd* [1990] FSR 181 as to whether a variant infringes:

- Q.1 Does the variant have a material effect upon the way the invention works? If yes, the variant is outside the claim. If no, then Q.2.
- Q.2 Would this (variant having no material effect) have been obvious at the date of publication of the patent to a reader skilled in the art? If no, the variant is outside the claim. If yes, then Q.3.





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Q.3 Would the reader skilled in the art nevertheless have understood from the language of the claim that the patentee intended that strict compliance with the primary meaning was an essential requirement of the invention? If yes, the variant is outside the claim. If no, the variant infringes.

Under the Improver Questions, if one were able to arrive at a negative answer to the last question, Q.3, this was taken to mean that the patent (or a particular claim under the patent) covers a class of things which included the variant as well as its literal meaning – with the latter being perhaps the most perfect, best-known, or striking example of the class. Arriving at a negative answer to Q.3 therefore would mean the variant infringes.

Fast forward 27 years, the UKSC has now criticised the Improver Questions. Q.1 required focus on “the problem underlying the invention”, “the inventive core”, or “the inventive concept”. Q.2 imposed too high a burden on the patentee. In respect of Q.3: (i) although the “language of the claim” is important, Q.3 does not exclude the patent specification and all the knowledge and expertise which the notional addressee is assumed to have; (ii) the fact that the language of the claim does not on any sensible reading cover the variant is not enough to justify holding that the patentee does not satisfy Q.3; (iii) it is appropriate to ask whether the component at issue is an ‘essential’ part of the invention, but that is not the same thing as asking if it is an ‘essential’ part of the overall product or process of which the inventive concept is part; and (iv) when one is considering a variant which would have been obvious at the date of infringement rather than at the priority date, it is necessary to imbue the notional addressee with rather more information than he may have had at the priority date.

The UKSC observed that an assessment on infringement must consider two distinct issues, best approached through the eyes of the notional addressee of the patent, also known as the person skilled in the art. If the answer to either issue is a ‘yes’, the variant infringes.

- I.1 Does the variant infringe any of the claims as a matter of normal, purposive interpretation?
- I.2 Does the variant nonetheless infringe because it varies from the invention in a way which is immaterial, based on facts and evidence?

The UKSC held that both these issues cannot be conflated as a single issue/question on interpretation as this could lead to wrong results in patent infringement cases. A key point here is that I.2 involves identifying the contextual meaning of the claim, and how extensive is the scope allowed for protection. I.2 also suggests the inclusion of the principle of equivalents, limited to inessential variants.

### REFORMULATING THE IMPROVER QUESTIONS

The UKSC considered that it would be better to ask whether, on being told what the variant does, the notional addressee would consider it obvious that it achieved substantially the same result in substantially the same way as the invention. This question

assumes that the notional addressee knows that the variant works and that it could apply to variants which rely on or are based on developments that have occurred after the priority date.

Accordingly, the UKSC reformulated the Improver Questions (“Reformulated Questions”) as:

- RQ.1 Notwithstanding that it is not within the literal meaning of the relevant claim(s) of the patent, does the variant achieve substantially the same result in substantially the same way as the invention, i.e. the inventive concept revealed by the patent? If no, the variant does not infringe.
- RQ.2 Would it be obvious to the person skilled in the art, reading the patent at the priority date, but knowing that the variant achieves substantially the same result as the invention, that it does so in substantially the same way as the invention? If no, the variant does not infringe.
- RQ.3 Would such a reader of the patent have concluded that the patentee nonetheless intended that strict compliance with the literal meaning of the relevant claim(s) of the patent was an essential requirement of the invention? If yes, the variant does not infringe.

### DID THE ACTAVIS PRODUCTS INFRINGE?

Using a normal, purposive interpretation, the Actavis Products did not infringe the Patent as no sensible interpretation of ‘pemetrexed disodium’ would include pemetrexed diacid, pemetrexed ditromethamine, or pemetrexed dipotassium. However, if one filtered it through the Reformulated Questions, the Actavis Products worked in the same way as the invention specified in the Patent, as they were medicament containing pemetrexed anion and vitamin B12.

RQ.1 was answered ‘yes’ as the Actavis Products achieve substantially the same result in substantially the same way as the invention. As for RQ.2, the UKSC found that the notional addressee of the Patent would appreciate that each of the Actavis Products would work the same way as pemetrexed disodium when included in a medicament with Vitamin B12. Factually, as at the priority date, the notional addressee would know that the use of a free acid worked as well as ditromethamine and dipotassium salts and would investigate whether pemetrexed free acid, pemetrexed ditromethamine, or pemetrexed dipotassium function in the same manner as a purely routine exercise. As for RQ.3, the UKSC found that even though the claims in the Patent call for pemetrexed disodium, there was no plausible reason why any rational patentee would limit the scope of protection

*continued on page 22*

## DEFERRED INDEFEASIBILITY

*continued from page 5*

not the immediate purchaser in good faith and for valuable consideration. As there was no immediate purchaser, AmBank could not be the subsequent purchaser. AmBank was an immediate purchaser and its interest was therefore defeasible.

### COMMENTS

The Federal Court's decision settles the issue as to whether a chargee is a "purchaser" within the meaning of the proviso to section 340(3) of the NLC.

The law remains that a forger or fraudster cannot obtain an immediate indefeasible title or interest in the land. The majority judgment is to be lauded as it affirms the principle of deferred indefeasibility whereby a forger or fraudster may pass good title to a subsequent purchaser who acts in good faith and for valuable consideration. Similarly, a forger or fraudster may create a valid charge over the land in favour of a chargee who acts in good faith for valuable consideration. Indeed, as the law accords the protection of deferred indefeasibility to a subsequent purchaser, there is no reason to deprive a chargee of the same protection if the chargee has acted in good faith and provided valuable consideration for the creation of an interest in the land.

On the other hand, Jeffrey Tan FCJ has set a high bar for the application of the principle of deferred indefeasibility by requiring both the immediate and subsequent purchasers to be purchasers in good faith and for valuable consideration in order to fall within the meaning of "purchaser" in the proviso to Section 340(3) of the NLC. It should be noted that the opening part of section 340(3) refers to "any person or body" whose title is defeasible and not to a "purchaser". As such, there does not seem to be a requirement under section 340(3) for a subsequent purchaser to derive his title or interest from a "purchaser" (an expression which brings into play the elements of good faith and valuable consideration) to obtain the benefit of deferred indefeasibility under the proviso.

It is also noteworthy that both the majority and minority judges in the Federal Court recognised the importance of deferred indefeasibility in the Torrens system. To quote the concluding paragraph of Jeffrey Tan FCJ's judgment:

*"Immediate indefeasibility gives certainty. But unless a security system is statutorily in place to prevent fraud and forgery, such as, but not limited to, the attendance of parties before the registering authority, as well as an indemnity scheme to compensate proprietors for the errors of the registering authority, deferred indefeasibility should remain, to protect innocent proprietors against fraud and forgery."*

## GUARDIANS OF THE (BIO-RESOURCES) GALAXY

*continued from page 7*

Although the Act does not have retroactive effect *per se* on current owners of patents which are derived from access to bio-resources or traditional knowledge, there are transitional provisions which could, nonetheless, potentially apply.

Any person who, on the date on which the Act comes into operation ("Effective Date"), is accessing a biological resource or traditional knowledge with the consent of the resource provider is required to apply for a permit within 12 months of the Effective Date (Section 63(1)). Further, after the Effective Date, any person in possession of a bio-resource or traditional knowledge without a BSA must enter into such an agreement if there is new use of the bio-resource or traditional knowledge; or there is development of a new product arising therefrom (Sections 63(3) and 63(4)).

Based on the language in the Act, it appears that only existing patent owners who are continuing to or may access a bio-resource after the Effective Date would require a permit. This implies that a permit may not be required if a patent owner has ceased to access the bio-resource and no longer intends to do so after the Effective Date. It is hoped that the Ministry will clarify this issue to provide guidance to affected patent owners.

Therefore, existing owners as well as current and potential applicants of patents which are based on bio-resources or traditional knowledge and users thereof should take cognisance of the obligations that will be imposed upon them when the Act comes into operation.

### CONCLUSION

The Act is ambitious and should be lauded as a step in the right direction in preserving the country's biodiversity. However, the wide breadth of its provisions may give rise to a number of practical, financial and administrative issues for individuals or companies, especially start-ups with limited funds for research and development and commercialisation activities. This in turn may be a barrier to creativity and development of new ideas and inventions.

Nevertheless, at the end of the day, much like the Guardians of the Galaxy, the Act is well-intended and should be implemented to protect the indigenous and local communities it has been entrusted with protecting, but in a way that is fair and does not over-burden parties who intend to create and develop new ideas and inventions. It is to be hoped that the subsidiary legislation will achieve that by introducing a set of obligations that work for both sides.

# DRAW THE LINE ON SEXUAL HARASSMENT

continued from page 3

As a general rule, there is no question that sexual harassment amounts to serious misconduct justifying dismissal should it be proven. The Industrial Court in *Shaun Khee Tuck Keat v Carigali Hess Operating Company Sdn Bhd* [2016] 4 ILR 112, in finding that an employee dismissed for sexual harassment was dismissed with just cause or excuse, held that “harassment is a very serious misconduct and in whatever form it takes, it cannot be tolerated by any employer”.

However, like any other dismissal, employers should ensure that all their records and documentation are in order so that they are able to prove that an employee was dismissed for just cause or excuse, failing which the employee may succeed in an unjust dismissal action. In particular, for cases involving sexual harassment, the Industrial Courts have often held that there is a specific requirement for the complainant’s evidence to be corroborated.

An oft-cited case in this respect is *Jennico Associates Sdn Bhd v Lilian Therera De Costa & Anor* [1998] 3 CLJ 583 (“*Jennico Associates*”). In *Jennico Associates*, an employee, Lilian Therera, alleged constructive dismissal against her employer after complaining of sexual harassment on two different occasions by the managing director, Zulkifli, to whom she reported. She had complained of him kissing her and telling her that he wished he could make her his second wife as well as molesting her from behind. The alleged incidents occurred only in the presence of Lilian and Zulkifli, with no witnesses present. However, Lilian did not lodge a police report, but informed her husband and friends weeks after the incidents.

The High Court ultimately found that Lilian’s evidence was insufficient to support her claim of constructive dismissal. In considering the evidence, the judge opined that the evidence of a complainant in a sexual case is similar to an accomplice’s evidence and stated:

“... an allegation of sexual harassment must be adequately corroborated. To rely on the uncorroborated evidence of the complainant alone would be very dangerous ...”

As Lilian’s evidence lacked any independent corroboration and had “numerous material contradictions”, and the Industrial Court had not warned itself of the danger of making a finding on a claimant’s uncorroborated evidence, the High Court found that the Industrial Court had wrongly allowed Lilian’s claim and therefore quashed the Industrial Court award.

*Jennico Associates* is a notable case which is often relied upon or referred to by the Industrial Court in respect of the need for corroboration of evidence of sexual harassment. It has been applied not only in cases where constructive dismissal is alleged, but also where employees have been dismissed for misconduct (as the same burden that applied to Lilian in that case would apply to an employer who dismisses an employee for sexual harassment).

In *Mohd Nasir Atan v Bank Islam Malaysia Berhad* [2015] 2 LNS 0871, the Industrial Court Chairman, while recognising the difficulty of proving sexual harassment due to its personal nature where such behaviour often occurs in the absence of a third party, nonetheless applied *Jennico Associates* in requiring corroborative evidence, providing examples such as CCTV recordings, medical reports, and evidence on the behaviour of the victim during or following the incident. Due to this, the Court found that the employer was not able to prove that the sexual harassment had occurred on the balance of probabilities and accordingly found the claimant’s dismissal to be without just cause or excuse. The Industrial Court’s findings were subsequently upheld by the High Court.

The above cases were all decided on their own facts where the Courts for various reasons had found the evidence of the sexual complainant unreliable on its own. While it would be prudent for an employer to ensure that it has clear and corroborated evidence of a sexual harassment complaint, the lack of independent corroboration by itself should not prevent an employer from dismissing an employee if the employer is convinced of the employee’s guilt after due investigation. This is especially so in light of the recent Federal Court decision in *Mohd Ridzwan*, which specifically addressed the issue of corroboration and stated that “there is no hard and fast rule that in a tort of sexual harassment case there must be corroboration, though like in any civil case the rule of evidence must be stringently upheld”, and that “[t]o demand corroboration, just because there exists some sexual flavor in the complaint will cause the harassed person to be, more often than not helpless, as most of the evidence will consist of the words of the harasser vis a vis the victim”. Although this was stated in respect of the tort of sexual harassment rather than in an employment context, the same principle arguably would apply to Industrial Court matters involving sexual harassment as the same standard of proof (i.e. the balance of probabilities) applies to both.

## CONCLUSION

With current events now shining a light on the prevalence of sexual harassment—a recent survey by BBC showed that more than half of women and one-fifth of men had experienced being sexually harassed at work—change is imminent on the horizon. Now, more than ever, employers should take cognisance of the duty they owe to their employees and the damage to their own reputation if such matters are not dealt with in a timely and proper manner. Pending further development in the law, the adoption of the Code would be a good first step.

## MORE THAN WORDS?

*continued from page 19*

afforded by the Patent to only pemetrexed disodium, as the Patent specification stated that other antifolate drugs have similar effects as pemetrexed disodium.

Accordingly, the Actavis Products with pemetrexed were found to directly and indirectly infringe the Patent in the UK and also in France, Italy, and Spain.

### REFERENCE TO PROSECUTION HISTORY?

The UKSC held that reference to the prosecution history would only be appropriate where the point was truly unclear and the contents of the file would unambiguously resolve the point, or where the patentee had earlier decisively stated that the scope of the patent did not include the sort of variant now claimed as infringing.

### CONCLUSION

Besides reformulating the Improver Questions in considering whether a working variant varies from the invention in a way which is immaterial, the UKSC appears to have also introduced a new two-part test (through I.1 and I.2) for considering whether an alleged variant would infringe a patent claim. This two-part test provides that determining patent claim scope was not solely a construction issue as only the first part was claim construction. There is infringement if the answer is 'yes' to either issue.

For the second part of the test, although the Reformulated Questions are meant to be guidelines, their application would seem to extend the scope of the claim to include all immaterial variants that work as prior to this, it is limited to only immaterial variants that were known as of the priority date. Therefore, one could now argue that any immaterial variant which achieves substantially the same result as the patent invention and in substantially the same way will amount to infringement.

It must be noted however that in this case, the UKSC had only considered the Patent on issues of patent infringement for variants. There was no, or minimal, consideration of the validity of the Patent and the impact of the extended broad scope of claim upon the validity of the Patent. One could therefore argue that this decision is meant for a context where the issue of whether a variant is infringing is concerned.

Whilst the courts in Malaysia have referred and applied the purposive construction and the Improver Questions for patent infringement, it remains to be seen whether the courts would follow this recent UKSC decision in dealing with a variant, particularly given the possible influence of the requirements of the Protocol, a parallel which does not exist here.





## SKRINE REGATTA 2017

On 4 November 2017, Skrine held its 4th Edition of the Skrine Regatta: Paddling for Charity, a biennial dragon boating event, at the Putrajaya Water Sports Complex.

The 2017 Regatta was the largest Skrine Regatta to-date, with eight teams participating, and over 150 dragon boaters and 300 people in attendance. The 2017 Regatta also saw the introduction of new categories, such as the "Small Boat Category" (10 paddlers), "Best Dressed Crew" and "Fastest Time", along with the blue ribbon event, the "Big Boat Category" (18 paddlers).

The day kicked off with team representatives drumming away on Chinese ceremonial drums. The thunderous drum beats and cheers from supporters inspired the KPMG Vikings, PwC Barracudas, Deloitte, Magnum HUAT, Hunza's Paddles of Fury, Teach for Malaysia (TFM), IDEAS Academy (IDEAS), and the Skrine Dragons in their quest for medal positions.

After an adrenaline-fuelled Grand Finals between the KPMG Vikings, PwC Barracudas and the Skrine Dragons, the KPMG Vikings emerged Champions of the "Big Boat Category", reclaiming the Skrine Regatta Challenge Trophy which they won in 2011 and winning the Fastest Time Trophy with a time of 1:05:99. Deloitte charged ahead of IDEAS and Magnum HUAT to win the Minor Finals.

The Skrine Dragons, came in first in the "Small Boat Category" after closely contested races with Hunza, PwC, Deloitte and TFM. Magnum HUAT, with their cheer squad and pom-poms, won the "Best Dressed Crew" award.

The 2017 Skrine Regatta raised a total sum of RM30,000; RM25,000 of which was donated to TFM, a non-governmental organisation that seeks to empower our nation through education, and RM5,000 to IDEAS, a learning centre for underprivileged students, including refugees and undocumented children. The icing on the cake was the delicious traditional food prepared by refugee families of The Picha Project, a social enterprise empowering marginalised communities through a sustainable food catering business.

We would like to thank all teams for their support in making the 2017 Skrine Regatta a resounding success!



# LEGAL INSIGHTS

A SKRINE NEWSLETTER

This newsletter is produced by the LEGAL INSIGHTS' Editorial Committee. We welcome comments and feedback on LEGAL INSIGHTS. You may contact us at [skrine@skrine.com](mailto:skrine@skrine.com) for further information about this newsletter and its contents.

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SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

THE FIRM HAS DEVELOPED OVERSEAS TIES THROUGH ITS MEMBERSHIP OF INTERNATIONAL ORGANISATIONS SUCH AS LEX MUNDI, PACIFIC RIM ADVISORY COUNCIL, THE INTER-PACIFIC BAR ASSOCIATION, THE ASEAN LAW ASSOCIATION, THE INTERNATIONAL TRADEMARKS ASSOCIATION AND THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

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