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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

As the year 2019 draws to a close, we would like to highlight three significant legal developments that occurred in Malaysia in the last quarter of the year.

In October 2019, the Federal Court in *Jack-In Pile v Bauer Malaysia* and *Ireka Engineering v PWC Corporation* ruled that the Construction Industry Payment and Adjudication Act 2012 applies prospectively. The ramification of these decisions is far-reaching as it means that the Malaysian statutory adjudication regime does not apply to construction contracts made before in the Act came into operation on 15 April 2014. A commentary on these cases is featured in this issue of our newsletter.

The other two noteworthy events took place on 27 December 2019. One was the issuance by Bank Negara Malaysia of an exposure draft of its policy document for the Licensing Framework for Digital Banks. Bank Negara has announced that it will issue up to five digital banking licences and that the policy document will be finalised in the first half of 2020. Applications can be submitted for such licences thereafter. We will feature an article on this draft policy document in the next issue of Legal Insights.

The other noteworthy event that occurred on 27 December 2019 was the coming into force of the Trademarks Act 2019. This issue of our newsletter includes the third instalment of our series of articles that explain some of the key features of this Act.

Looking ahead, at least two significant legal developments will take place in Malaysia in 2020. First, the corporate liability provisions in the Malaysian Anti-Corruption Commission Act 2009 will come into operation on 1 June 2020. Write-ups on the new provisions have been featured in Issues 1/2018 and 4/2018 of our newsletter.

Second, it has been reported that the Competition Act 2010 will be amended next year to introduce merger controls for mergers and acquisitions by mid-2020. An article on this topic has been included in this issue of Legal Insights to highlight some of the key issues to be considered in implementing merger controls.

I hope that you will find the contents of this issue of Legal Insights interesting.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

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PROSPECTIVITY TRUMPS RETROSPECTIVITY, AND NO, IT'S NOT FAKE NEWS!

Ashok Kumar and Kalaiarasan Rasadurai examine two landmark decisions on statutory adjudication

INTRODUCTION

Prior to the decisions of the Federal Court ("FC") in *Jack-In Pile (M) Sdn Bhd v Bauer (Malaysia) Sdn Bhd (and Another Appeal)* [2019] 7 AMR 348 ("Bauer") and *Ireka Engineering & Construction Sdn Bhd v PWC Corporation Sdn Bhd (and 2 Other Appeals)* [2019] 7 AMR 309 ("Ireka"), there was a cloud of uncertainty arising from conflicting decisions as to whether the Construction Industry Payment and Adjudication Act 2012 ("CIPAA") applies prospectively or retrospectively.

WHERE IT ALL BEGAN

The issue as to the prospective/retrospective application of CIPAA first came to light in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and Another Case* [2015] 5 CLJ 527 ("UDA Holdings") where the High Court decided, *inter alia*, that:

(a) adjudication is nothing more than a dispute resolution mechanism and CIPAA essentially provides a choice of forum and does not affect any existing rights conferred by any written law;

(b) it is a well-established principle that legislation providing for this change of forum in the form of an additional forum, i.e. statutory adjudication, operates retrospectively unless there is provision to the contrary;

(c) the laws adopting the statutory adjudication regime in several other jurisdictions (e.g. the United Kingdom, New Zealand, Singapore, New South Wales, Queensland and Northern Territory of Australia) expressly provide that their statutory adjudication regimes only apply to construction contracts made after their respective legislation have come into force; the Malaysian Parliament chose not to include a similar provision in CIPAA;

(d) in any event, a purposive interpretation of CIPAA warrants a retrospective application; and

(e) reading that CIPAA is available regardless of when the construction contract or payment dispute arose would do no harm or violence to the plain language of CIPAA.

The High Court's decision in *UDA Holdings* was upheld by the Court of Appeal (although no grounds of judgment was delivered).

However, the Court of Appeal in *Bauer (Malaysia) Sdn Bhd v Jack-In Pile (M) Sdn Bhd & Another Appeal* [2018] 10 CLJ 293 ("Bauer CA") departed from *UDA Holdings*, holding that CIPAA applies prospectively.

These conflicting decisions left stakeholders in the construction industry in a predicament as to whether the provisions of CIPAA would apply to construction contracts entered into before CIPAA came into operation on 15 April 2014.

CRUNCH TIME

In view of the conflicting decisions of the Court of Appeal in *UDA Holdings* and *Bauer CA*, leave to appeal was granted by the FC in *Bauer* and *Ireka.*

The two leave questions in *Bauer* may be summarised as follows –

(1) Whether CIPAA applies to construction contracts entered into before the date on which CIPAA come into operation; and

(2) If the answer to question (1) is affirmative, does it follow that section 35 of CIPAA should apply to construction contracts entered into before CIPAA came into operation.

In *Ireka*, the question of law posed to the FC was whether CIPAA gives rise to substantive rights and is consequently not retrospective in nature, making the adjudication decision in this case liable to be set aside.

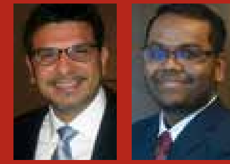
Although framed differently, the leave questions in these appeals essentially required the FC to determine whether CIPAA operated retrospectively or prospectively.

On 16 October 2019, the FC issued separate decisions in *Bauer* and *Ireka* in which it unanimously held that CIPAA applies prospectively. We will now discuss the FC's reasoning in these decisions.

The facts in Bauer

The appellant (Jack-In Pile) was appointed by the respondent (Bauer) as a sub-contractor to supply and install spun piles for a construction project under a letter of award dated 16 March 2011. Clause 11.1 ("clause 11.1") thereof states that all payments to the appellant shall only be made within seven days from the date the respondent received the related progress payments from the employer of the project. The respondent had relied on clause 11.1 since the commencement of the project and asserted that it had no obligation to make payment to the appellant until and unless the respondent has received the related progress payment from the employer.

After CIPAA came into force, the appellant issued a payment claim on 3 August 2016 and subsequently, commenced adjudication proceedings for the unpaid amount of the claim. An adjudication decision was delivered on 23 November 2016 requiring the respondent to pay a sum of RM906,034.00 to the appellant. The appellant sought to enforce the adjudication decision whilst the respondent sought to set aside the same. The issue before the High Court was whether section 35 of CIPAA (which invalidates conditional payment clauses in a construction contract) applied. The respondent's application to set aside the decision was dismissed by the High Court which held that clause 11.1 is a conditional payment provision and had been rendered void by section 35. Relying on *UDA Holdings*, the High Court held that



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CIPAA, including section 35 thereof, applied retrospectively.

The High Court's decision was overturned by the Court of Appeal. David Wong Dak Wah, JCA (as his Lordship then was) found that there was no express provision in CIPAA excluding or including construction contracts made prior to the commencement of CIPAA. His Lordship stated that unless there are clear words in the legislation to the contrary, any legislation affecting substantive rights must be given a prospective effect. Similarly, if the legislation is procedural in nature, that legislation must be given a retrospective effect unless clear words in the same show to the contrary. The learned judge then determined that CIPAA is a legislation relating to a substantive right as it provides a new avenue of access to justice in the construction industry. Although a procedural regime exists within CIPAA, the procedural regime is a consequence of the substantive right created by CIPAA. Accordingly, CIPAA was held to be prospective in nature and the Court of Appeal thereby departed from *UDA Holdings*.

The facts in Ireka

The appellant (Ireka) awarded three subcontracts to the respondent (PWC) before CIPAA came into force. The subcontracts contained an equipollent clause ("clause 13.1") which conferred a right on the appellant to set-off any money due to the respondent with any sum the respondent was liable to pay under any other contract between the parties.

The respondent commenced adjudication proceedings against the appellant in respect of a sum of RM134,869.25 due to the respondent under one of the subcontracts. The appellant did not dispute the amount claimed by the respondent but relied on the cross-contract set-off right in clause 13.1 to set-off the said sum against the amounts which it claimed were owed to it by the respondent under the other two subcontracts.

The adjudicator issued an adjudication decision in favour of the respondent. In coming to his decision, the adjudicator declined to exercise jurisdiction on the disputes arising out of the other two subcontracts which were the subject of separate adjudications before other adjudicators. According to the adjudicator, section 5 of CIPAA only allows an adjudicator to decide on a single construction contract. The High Court and Court of Appeal agreed that the adjudicator was not empowered to decide on multiple construction contracts. The issue of retrospective application of CIPAA was raised in the Court of Appeal but was held to be not a material consideration for the case.

The FC's decisions

The FC relied on substantially the same reasoning to come to its decision in both appeals.

According to the Tan Sri Idrus Harun FCJ (who delivered the judgment of the FC in both appeals), it is a trite legal principle that *"… a statute should not be interpreted retrospectively to impair an existing right or obligation, unless such a result is unavoidable by reason of the language used in the statute."* This rule of interpretation is in consonance with the long line of common law authorities which have been adopted in Malaysian jurisprudence. The FC cited several Malaysian cases that have applied this rule, including the Privy Council's decision of *Yew Bon Tew & Anor v Kenderaan Bas Mara* [1983] 1 MLJ 1 and the FC's decision in *Tenaga Nasional Bhd v Kamarstone Sdn Bhd* [2014] 2 MLJ 749.

The FC also referred to *Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd* [1995] 1 MLJ 292 where the Court of Appeal stated that the correct approach to be adopted in order to decide whether a statute has retrospective effect is to avoid categorising the statute as procedural or substantive but to decide whether the statute if applied retrospectively, would impair existing rights and obligations.

The FC then proceeded to consider sections 19(1), 43(a), 2(1) and 2(3) of the Interpretation Acts 1948 and 1967, which according to their Lordships, are a manifestation of the common law. Read together, these provisions provide that as a general rule, the commencement date of an Act, including CIPAA, cannot be retroactive unless it is clearly intended by Parliament and such intention is evinced by express provisions in the Act itself. The FC noted that there is no express provision in CIPAA from which it can safely infer that Parliament has manifestly intended CIPAA to operate retrospectively.

Despite commending the comprehensive judgment of the High Court in *UDA Holdings*, the FC disagreed with the High Court, stating that the High Court did not appear to appreciate fully the provisions of the Interpretation Acts 1948 and 1967 and the common law position that in the absence of clear and express words to such effect, a statute, such as CIPAA, cannot be applied retrospectively. The FC added that the absence of clear provisions providing a prospective application of CIPAA, as compared to the legislation of other jurisdictions which expressly provide for it, does not automatically lead to a retrospective interpretation, as it is not supported by clear evidence. The FC added that to the contrary, CIPAA is not silent as to its commencement date. Based on well-established rules of interpretation, in the absence of express provision to the contrary, it is plain that Parliament intended that statutory adjudication under CIPAA should apply prospectively. It therefore necessarily follows that any construction contract entered into before the commencement date of CIPAA and any payment disputes arising out of such construction contract are not governed by CIPAA.

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MERGER CONTROL ON THE HORIZON?

To' Puan Janet Looi and Tan Shi Wen discuss issues that may arise from the implementation of merger control

INTRODUCTION

While Malaysia's competition law was perhaps rarely a key consideration for many in the context of a merger and acquisition ("M&A") transaction happening in Malaysia, this may be about to change if the ongoing talks about extending competition law to cover mergers come to fruition.

As background, the primary competition legislation in Malaysia, namely the Competition Act 2010 (the "Competition Act"), came into force on 1 January 2012, and applies to any commercial activity that has an effect on competition in any market inside Malaysia. While the Competition Act contains prohibitions on anti-competitive agreements and abuse of dominance, it has no provisions on merger control.

The competition law enforcement authority in Malaysia, the Malaysia Competition Commission ("MyCC"), is currently the only competition authority in Southeast Asia without the power to regulate M&As. Based on news reports, however, it is understood that the MyCC has begun the process of amending the Competition Act to incorporate power to regulate M&As in Malaysia. It has been said that this may be implemented in the first-half 2020.

WHY IS "MERGER CONTROL" RELEVANT TO M&As?

The purpose of merger control

Merger control refers to a set of procedures for reviewing M&As under competition law. Over 130 countries have merger control laws and the majority of such jurisdictions have mandatory merger control systems i.e. when filing of a transaction is compulsory. This allows regulators to review in advance whether a proposed M&A will have significant anti-competitive effects on competition before a transaction is implemented. Compliance with such procedures is therefore important because before completion can take place, certain M&A transactions may need to be notified to and/or approved by competition authorities in a number of different jurisdictions.

Suspensory effect

In the context of a mandatory merger control regime, if parties fail to notify a transaction before completion, and that failure comes to the attention of the competition authority, the transaction may be declared invalid and fines for non-compliance can be significant. Even if the non-notified transaction does not come to the attention of the relevant competition authority, a failure to notify can also affect the validity of the transaction as a whole. The risk of this is particularly high where multiple competition authorities are involved. This is because competition authorities often liaise with each other in reviewing transactions and the notification procedure in certain jurisdictions may require the disclosure of all competition authorities to whom the transaction will be notified.

As a result, there will typically be a gap between signing and completion of a transaction while merger clearances are obtained. In this interim period, the buyer may incur costs in maintaining financing for the transaction until completion. More crucially, parties can also be exposed to significant risks, including changes in market conditions and a deterioration of the target's business and its relationship with its customers and suppliers. It is therefore advisable for parties to take proactive steps to address merger control issues at an early stage in order to reduce the duration of merger control processes.

Transaction timing

The period for a party to obtain merger control clearance will depend on a number of factors such as the requirements in each jurisdiction and the complexity of the transaction. In general, transactions can be subject to either one or two phases of review, depending on whether there is any competition issue raised. Transactions which do not raise significant competition law concerns (or if such competition concerns are likely to be remedied by commitments) will typically be cleared during a first phase review which takes up to 4 weeks in most jurisdictions. More problematic transactions can be subject to a lengthier second phase review of up to 32 weeks. It is therefore essential for parties to obtain advice at an early stage on the implications of merger control requirements and assess if a lengthy merger control process is envisaged. This will facilitate determination of certain terms of the transaction documentation such as an appropriate long stop date for the transaction.

Structural changes to the transaction

Where a competition authority considers that a M&A transaction will result in significant anti-competitive effects, it can require the parties involved to enter into commitments to remedy those anti-competitive effects. An example of these commitments can be found in acquisition of Spectrum Brands Holdings, Inc by Energizer Holdings, Inc whereby the merged entity would become the largest supplier of batteries and related products in several countries in the European Economic Area. To address competition concerns raised by the European Commission, the applicants proposed commitments, which were accepted by the Commission, to divest certain regional business of the target and to enter into exclusive supply and licence agreement with purchaser of such regional business (**Case M.8988** *Energizer/ Spectrum Brands (Battery and Portable Lighting Business)*. In the event merger clearance is required from several competition authorities, diverse commitments may also be imposed by different competition authorities to address competition concerns in each jurisdiction. Parties will need to ensure that they are in a position to implement such commitments across a global framework and ensure compliance with the different requirements in each jurisdiction.

A competition authority can also prohibit a transaction which will result in significant anti-competitive effects entirely. Based on

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publicly available information, at least 29 M&A transactions with a value of at least EUR46.3 billion were prohibited or abandoned in major jurisdictions in 2018 as a result of competition law intervention. Hence, parties should assess at the outset whether a transaction is likely to have an impact on competition in the relevant jurisdictions and perhaps whether a buyer would rather look at more "competition-law friendly" targets. This will enable them to take steps to mitigate any costs and adverse impacts of merger control processes.

EXISTING MERGER CONTROL REGIMES IN MALAYSIA

Notwithstanding the lack of generic merger control provisions applicable to all industries under the Competition Act, there are sector-specific laws and guidelines that regulate mergers in the context of competition law. These sectors are aviation services and the communications and multimedia sectors, enforced by the Malaysian Aviation Commission ("MAVCOM"), and the Malaysian Communications and Multimedia Commission ("MCMC") respectively.

Aviation services sector

The Malaysia Aviation Commission Act 2015 ("MACA") is presently the only statutory merger control regime in Malaysia. Apart from also dealing with anti-competitive agreements (section 49) and abuse of dominant position (section 53), section 54 of the MACA states that any mergers which 'have resulted, or may be expected to result, in a substantial lessening of competition in any aviation service market' is prohibited.

According to the MACA, a merger occurs if:

(i) two or more enterprises, previously independent of one another, merge;

(ii) one or more persons or enterprises acquire direct or indirect control of the whole or part of one or more enterprises;

(iii) the result of an acquisition by one enterprise of the assets (including goodwill), or a substantial part of the assets, of another enterprise is to place the first-mentioned enterprise in a position to replace or substantially replace the second-mentioned enterprise in the business or, as appropriate, the part concerned of the business in which the second-mentioned enterprise was engaged immediately before the acquisition; or

(iv) a joint venture is created to perform, on a lasting basis, all the functions of an autonomous economic entity.

The MACA merger control is a voluntary regime. Accordingly, for notification and assessment of a merger, parties should self-assess whether a merger can result in a substantial lessening of competition within any market affecting Malaysia, and whether a merger notification should be made to MAVCOM. MAVCOM is more likely to investigate a merger or proposed merger where:

(i) the combined turnover of the merger parties in Malaysia in the financial year preceding the transaction is at least RM50 million; or

(ii) the combined worldwide turnover of the merger parties in the financial year preceding the transaction is at least RM500 million.

Communications and multimedia sector

The communications and multimedia sector in Malaysia is regulated by the MCMC under the Communications and Multimedia Act 1998 ("CMA"). The existing Guideline on Substantial Lessening of Competition issued by the MCMC expressly states that the regulator considers that mergers involving telecommunications and multimedia licensees must be investigated as 'conduct which has the purpose of substantially lessening competition in a communications market' (under section 133 of the CMA). The definition of a merger is similar to that set out in the MACA.

As the CMA does not contain any express provisions for merger control and assessment, there is no process nor is there a legal requirement that parties to a merger or acquisition should notify the MCMC in respect of such transactions. Despite the lack of clear provisions under the CMA, section 140 of the CMA broadly allows a licensee to seek the MCMC's prior approval of any proposed merger. If the merger is implemented without seeking the MCMC's approval under section 140, the MCMC may initiate an investigation on its own accord if it is of the view that the merger would result or has resulted in a substantial lessening of competition in the market. The recent Guidelines issued by the MCMC on Mergers and Acquisitions and Authorisation of Conduct introduced two routes that a licensee may take in relation to clearance of a merger: (a) notification to obtain MCMC's views in respect of the competitive effects of a merger or acquisition (where the applicant receives a no-objection or objection letter, as the case may be); and (b) authorisation of a merger where the merger will promote national interest.

CONCLUSION

Although the MACA and CMA contain merger control provisions from the competition perspective, what remains unclear is the application of the merger regimes to mergers between parties from sectors other than the aviation services and communications and multimedia sectors. However, regardless of the form and

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JUMPING ON THE 5G BANDWAGON

Natalie and Rui Rong explain some challenges in implementing 5G in Malaysia

INTRODUCTION

Self-driving cars, robot doctors controlled remotely conducting surgeries and celebrity holograms will no longer only be scenes from futuristic sci-fi movies. With the implementation of 5G, we will see life imitating art with endless opportunities for this transition into a more connected and automated world. Asimov would be proud.

5G has consistently dominated headlines since the beginning of 2019, promising faster speeds, lower latency and better connectivity for mobile internet. The expectation that 5G will revolutionise the world as we know it is high, especially where the internet is playing an increasingly larger role. According to the 2018 Industry Performance Report by the Malaysian Communications and Multimedia Commission ("MCMC"), the mobile broadband subscription in Malaysia increased from 28.53 million in 2016 to about 36.79 million.

WHAT IS 5G?

So, what is 5G? The term 5G merely denotes the fifth generation of mobile network with the 'G' in 5G being an abbreviation for 'generation'. There is no universal definition for 5G but it is perhaps more precise to explain 5G as a combination of several key technologies with the objective to achieve the result of faster speed, lower latency and ability to connect more devices at the same time. The interest surrounding 5G is due to its potential for use in Internet of Things ("IoT"), smart vehicles, smart cities and enabling control of remote devices.

> **“ For the 700MHz and 3.5GHz bands, MCMC is considering the allocation to a single entity comprising a consortium formed by multiple licensees ”**

The standards for 5G are being developed by the International Telecommunication Union (ITU), known as the IMT-2020 standard. The 3GPP (3rd Generation Partnership Project) industry standard group is also developing a standard for a new air interface known as the 5G NR (New Radio).

Key Technologies of 5G

The foundation of mobile network technology is radio frequencies. However, the spectrum of radio frequency by itself is finite and cannot be expanded despite the increasing usage of the same frequency spectrum. Thus, the solution to this problem as part of 5G implementation is to use millimetre waves, sometimes defined to lie above 24 gigahertz (traditional mobile frequencies are below 6 gigahertz), in addition to lower frequencies.

Millimetre waves have never been used for mobile services due to its short-range frequency and inability to travel through obstacles easily. This is where a new technology known as small cells comes into play. Using these small cells as part of the Radio Access Network will allow the millimetre waves to travel more effectively. A popular idea is to install these small cells on existing lamp posts which will allow the small cells to be effectively distributed in clusters. However, the lower frequencies will still be crucial as they allow a broader coverage due to its longer wavelength, which will be necessary for massive IoT usage. As such, the implementation of 5G will likely require a combined usage of the low, mid and high frequency bandwidths.

The other key feature of 5G implementation is the 'massive' multiple input, multiple output ("MIMO") antennas which will allow more users to simultaneously connect to the network. When massive MIMO is combined with beamforming technology, this will allow the antennas to focus the signal to the particular user or device which will ultimately increase efficiency and reduce wastage of the signal.

5G IMPLEMENTATION EFFORTS IN MALAYSIA

The implementation of 5G is in line with Malaysia's National Fiberisation and Connectivity Plan (NFCP) 2019-2023 which was formulated to, among others, improve broadband quality and Internet access for all Malaysians. In November 2018, MCMC established a national 5G Task Force comprising both public and private sector members with the objective of studying and recommending the strategies for 5G deployment in Malaysia. The Task Force is made up of four main working groups focusing on different areas, namely: (i) business case; (ii) infrastructure; (iii) spectrum management and allocation; and (iv) regulatory. Although an online news website has reported that the Task Force submitted its final report to the Government on 18 December 2019, the Government has to date not issued any official statement on the status of the report.

In October 2019, MCMC announced that 5G demonstration projects will commence across six states (Kedah, Kuala Lumpur, Penang, Perak, Selangor and Terengganu) in Malaysia for a period of six months. In collaboration with private corporations, the use cases that will be tested during the six months include smart traffic lights, smart parking, smart agriculture and augmented reality (AR) for education. According to MCMC's Chairman, the 5G utilisation test cases in Langkawi in Kedah in the agriculture, digital healthcare, education, smart city, smart transportation and tourism sectors have been impressive with around 37 cases of utilisation in just two months of implementation.

Spectrum is the heart and core of any 5G rollout. Hence, one of the first crucial steps in the implementation of 5G is the determination of the frequency spectrum. In July 2019, MCMC initiated a public inquiry on the allocation of spectrum bands for mobile broadband service in Malaysia for the 700MHz, 2300Mhz and 2600MHz bands. Subsequently, a Final Report on Allocation of Spectrum Bands for Mobile Broadband Service in Malaysia ("Final Report") was issued on 31 December 2019.

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In the Final Report, MCMC identified the 700MHz band, 3.4GHz to 3.6 GHz ("3.5 GHz band") and 24.9GHz to 28.1GHz ("26/28 GHz band") for the initial deployment of 5G in Malaysia. The Final Report also describes the award mechanism for the allocation of the spectrum bands, which may be summarised as follows:

- For the 700MHz and 3.5GHz bands, MCMC is considering the allocation to a single entity comprising a consortium formed by multiple licensees instead of an individual licensee to encourage collaboration between operators and for cost-efficiency. Thus, the 700MHz and 3.5GHz bands will be assigned by way of an Apparatus Assignment ("AA") in one package through a tender process. MCMC will start off with 2x30MHz of the 700MHz band and 100MHZ of the 3.5GHz band for the first stage. More information will be available for interested parties when MCMC releases the applicant information package (AIP);

- For the 24.9GHz to 26.5GHZ bands, this will be assigned by way of AA through a tender process to licensees;

- For the first stage of the frequencies within the 700MHz and 3.5GHz bands and for frequencies within the 24.9GHz to 26.5GHZ bands, it is estimated that the tender process will commence in Quarter 1 of 2020;

- For the 26.5GHz to 28.1GHz bands, this will be assigned by way of AA on a first-come first-served basis, and will be open to any party (including non-licensees). Parties that have successfully been assigned frequencies within the 24.9GHz to 26.5GHZ bands will not be eligible to apply for frequencies within these bands. MCMC will issue a notice on the commencement date for the submission of the AA application.

- Frequencies within the 2300Mhz and 2600MHz bands will be maintained per existing allocations, pending maturity of these bands for 5G which is expected to be by year 2021, at the earliest.

In MCMC's press release on the Final Report, it was indicated that once the assignment of the spectrum bands is completed, MCMC expects commercial deployment of 5G in Malaysia to begin in the third quarter of 2020.

THE INEVITABILITY OF REGULATORY DEVELOPMENT

It is axiomatic that the law must keep up with technological development to ensure sufficient and appropriate regulatory oversight. 5G is the key to major changes to various industries so the question of regulation will not be confined only to the telecommunications industry. Discussions surrounding regulation of 5G should be two-fold, the first being the control and regulation surrounding the implementation of 5G itself, and the second, the control and regulation surrounding the application and use of 5G. Some potential areas of concern to Malaysia are discussed below.

5G Infrastructure

As part of the implementation of 5G, it is expected that new infrastructures will be required to be built. These new infrastructures include installation of small cells on existing property such as lamp posts and billboards. This will require coordination and cooperation between the local state and territory governments and mobile service providers. In the United Kingdom, there are already cases of disputes over how much rent councils and landlords are allowed to charged mobile operators who want access to lamp posts for the purposes of implementing 5G network. This is despite the United Kingdom introducing a new Electronic Communications Code in 2017 designed to facilitate the installation and maintenance of electronic communication networks. It has been reported that these legal actions against the local authorities and landlords may result in a two year delay in the implementation of the 5G network. To date, no such guidelines or codes have been announced by the Malaysian Government to assist in the installation of new 5G infrastructure, but it is highly likely that such assistance will be required for the smooth implementation of 5G.

Security of 5G

Cybersecurity concerns are very real in today's climate. This is especially more so for 5G which is intended to be applied and used in things like IoT, self-driving cars, powering smart cities and artificial intelligence. A risk assessment report recently published by the European Member States provides some insight into the potential security risks faced by 5G. Among others, there are concerns that since a 5G network is highly dependent on software, there is an increased exposure and thus more potential entry points for cyberattacks. The fact that 5G will also be dependent on more physical infrastructure like small cells which will be mounted in plain public view must also be considered. In Malaysia, there are plans to establish a National Centre for Security Evaluation in Advance Technology of Cyber Network to evaluate the security of 5G including its systems, infrastructure, hardware and applications.

Data Protection in the 5G Environment

Data protection experts have also pointed out that consumers may lose privacy and control of their data in a 5G environment. One of the key examples is location data. With today's technology,

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HIGH COURT SHEDS LIGHT ON SECTION 31 OF THE EMPLOYMENT ACT 1955

A commentary on Perwaja Steel Sdn Bhd (In Liquidation) v RHB Bank Berhad and 789 Others by Foo Siew Li

INTRODUCTION

The decision of the High Court in *Perwaja Steel Sdn Bhd (In Liquidation) v RHB Bank Berhad and 789 Others* [2019] 5 AMR 342 provides guidance as to how a secured creditor is to deal with wages and statutory payments due to employees under section 31 of the Employment Act 1955 ("EA") when it disposes of a security held over property which is a place of employment.

BACKGROUND FACTS

The Plaintiff was ordered to be wound up on 8 November 2017 by the High Court in Kuala Lumpur, and liquidators were appointed.

The 1st to 4th Defendants are financial institutions that had provided the Plaintiff with credit facilities.

The Plaintiff had also issued Murabahah Medium Term Notes ("Notes"). The 5th Defendant is the trustee for the holders of these Notes and holds all securities provided to secure payment under these Notes.

The credit facilities and the Notes are secured by, *inter alia*, debentures executed by the Plaintiff over its assets in favour of the 1st to the 5th Defendants ("Debenture Holders") respectively and charges over four parcels of industrial land held by the Plaintiff ("Charged Lands"). It was common ground that on the Charged Lands was the Plaintiff's factory and would have been a "place of employment" for the employees of the Plaintiff.

By a Security Sharing Agreement dated 1 June 2012, the Debenture Holders agreed that the debentures and the Charged Lands shall rank *pari passu* and any proceeds from the sale of any of the securities taken shall be payable to the Debenture Holders rateably, and *pari passu*.

On 17 November 2014, prior to the Plaintiff being wound up, the Plaintiff had ceased operations on the Charged Lands and had terminated the employment of its employees.

After the Plaintiff was wound up, a Receiver ("Receiver") was appointed under the terms of the debentures on 24 January 2018. Pursuant to his appointment, the Receiver took steps with the view to disposing, *inter alia,* the Charged Lands. Based on a valuation report, the total proceeds from any sale of the Charged Lands was not expected to satisfy the Plaintiff's total debt owed to the Debenture Holders.

The 6th to the 790th Defendants claim to be former employees of the Plaintiff ("Employee Defendants"). The Employee Defendants allege that they are owed their wages by the Plaintiff and that such wages should be paid out from the proceeds of any sale of the Charged Lands in priority over the Debenture Holders by virtue of section 31 of the EA.

THE TWO QUESTIONS

It was against this backdrop that the Receiver sought directions from the High Court pursuant to section 384 of the Companies Act 2016 ("CA") on two questions, namely:

(1) Whether the Receiver of the property of the Plaintiff which is in liquidation is obliged under section 31 of the EA to cause any part of the sale proceeds of the Charged Lands to be paid to any of the former employees of the Plaintiff if none of them was working on the Charged Land at the time of the sale thereof ("1st Question"); and

(2) Whether the maximum amount payable to any of the former employees of the Plaintiff who are eligible or entitled to be paid from the sale proceeds of the Charged Lands (if any) shall be limited to wages for four consecutive months' work only and such payment shall exclude termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance ("2nd Question").

THE DECISION

The 1st Question

As regards the 1st Question, the arguments posed by the Debenture Holders turned on three issues, namely:

(1) Whether section 31 of the EA applies in respect of a company that has been wound up;

(2) If not, whether section 31 of the EA is applicable only to floating charges; and

(3) Whether employees who are eligible to be paid under section 31 of the EA had to be working on the Charged Lands as their "place of employment" *at the time of sale* of the Charged Lands by the Receiver.

On the first issue, the High Court noted that neither section 31 of the EA itself, nor any related section, indicate whether they apply to companies that have been wound up. The Court however noted that there exists section 527 of the CA that caters for priority of payments, specifically in a winding up.

The High Court considered *Director of Customs, Federal Territory v Ler Cheng Chye (Liquidator of Castwell Sdn Bhd, in Liquidation)* [1995] 3 CLJ 316; [1995] 2 MLJ 600 ("*Ler Cheng Chye*") where the Supreme Court invoked the maxim *generalia specialibus non derogant*, that is, general words do not derogate from the specific, and held, *inter alia*, that section 292(1) of the Companies Act 1965, a special provision dealing with a subject distinctive to companies "*must be read as an exception to the general provision of s.10(1) of the Government Proceedings Act 1956*", which conferred priority to sales tax above all tax.

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Applying *Ler Cheng Chye*, Darryl Goon J held that –

(a) in relation to the CA, section 31(1) of the EA is a specific statutory provision giving priority to employees for payment of their wages and statutory payments out of the proceeds of the sale of their place of employment;

(b) in comparison, section 527 of the CA caters generally for priority of payment in respect of "*all other unsecured debts*" in winding up; and

(c) if having made the general provision in the CA, which existed as section 292(1) of the now repealed Companies Act 1965, the Legislature subsequently passed the special provision in section 31(1) of the EA in 1998, which conflicted with the earlier legislation, the special provision is treated as "*a mere exception to the general provision*".

The Court also held that while the word "priority" is not used in the substantive part of section 31(1), based on the wording of section 31(1) and paragraph (a) under the *second proviso* in section 31(1) of the EA, its effect is clearly to provide priority for wages to employees from proceeds of sale over the claims of the Debenture Holders *qua* secured creditors.

Also, the Court held that having regard to the Explanatory Statement in the Bill that brought about the amendment of section 31(1) of EA ("Explanatory Statement"), both a literal and purposive interpretation of section 31(1) EA would lead harmoniously to achieving the intention of the Legislature to give priority to the rights of employees over secured creditors and that right ought not to be defeated by the general provisions to be found in section 527 of the CA.

On the second issue, the learned judge held that for the same reasons given as to why section 31(1) of the EA is not subject to section 527(1) of the CA, so too is section 31 not subject to section 392 of the CA which sets out preferential debts (including wages and salaries) that have priority over claims under a floating charge. The Court therefore found that it is immaterial whether the Charged Lands are secured under a floating charge or a fixed charge.

In respect of the third issue, the High Court considered the cases of *Weng Neng Medical & Liquor (KL) Sdn. Bhd.* [1994] 3 MLJ 278 and *Ban Hin Lee Bank Bhd v Applied Magnetics (M) Sdn Bhd (In Liquidation)* [2003] 5 CLJ 1 but found that they did not specifically address or consider whether there is a requirement for the employees to be working at the place of employment "*at the time of the sale*" for section 31(1) of the EA to apply. The Court also considered and found that the express words in section 31(1) of EA do not make it a requirement that the employees must be working at the place of employment that is sold at the time it was sold.

By virtue of the above and also having borne in mind the Explanatory Statement and the fact that the EA is a piece of "*beneficent social legislation*", the Court held that what is required is that the employee to whom wages are due under section 31(1) "*was employed or worked at the time when such wages were earned or such money accrued due …*"; in other words, the requirements are "*when and where*" the wages in question were earned rather than whether the employee was still working at the place of employment at the time of its sale.

In relation to the Debenture Holders' contention that there should be a cut-off point at the time the place of employment is sold such that only employees working at that point in time may have priority for their unpaid wages, the Court held that the said contention would call for the insertion of words into section 31(1) of the EA that do not exist and is neither warranted nor necessary. Giving further consideration to the Explanatory Statement and the fact that the EA is a piece of "*beneficient social legislation*", the Court concluded that "*while section 31(1) may have a side effect undesirable to secured creditors, namely the inability to determine the extent of an employer's liability which would affect the value of the security, this is a matter that perhaps needs to be considered by the Legislature*".

Accordingly, the High Court answered the 1st Question in the affirmative.

The 2nd Question

The 2nd Question concerns the amount of "*wages*" the employees are eligible to as provided under section 31(1) of the EA and whether the term "*wages*" for this purpose includes "termination and lay-off benefits, annual leave pay, sick leave pay, public holiday pay and maternity allowance" (collectively "Statutory Payments").

In relation to the Debenture Holders' contention that the payment of "*wages*" under the *second proviso* to section 31(1) of the EA would exclude Statutory Payments because of the wording of section 31(2) and the fact that "priority" is only brought into issue under the *second proviso* to section 31(1), the Court held that:

(a) it is the substantive part of section 31(1) which precludes authorisation of payment of proceeds of sale to the secured creditor or debenture holder until the "*wages*" of employees eligible thereunder are ascertained and paid, that confers priority for such "*wages*" over the claim of the secured creditor; and

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THE DECOMMISSIONING FRAMEWORK IN MALAYSIA

Fariz Aziz and Jeralyn Kan examine the decommissioning framework in Malaysia, the United Kingdom and Australia

INTRODUCTION

According to energy research and consultancy firm Wood Mackenzie, nearly 2,600 platforms and 3,500 wells in more than 380 fields in Asia Pacific are expected to cease production in the next decade. At home, our national oil company, Petroliam Nasional Berhad ("PETRONAS") has also identified decommissioning as a rapidly developing market sector in the oil and gas industry with over 300 platforms in the country of which a considerable number have been operating for more than 40 years.

This article seeks to examine the state of the current legal framework for decommissioning of offshore oil and gas facilities in Malaysia and contrasts it with the decommissioning practices in the United Kingdom ("the UK") and Australia.

WHAT IS DECOMMISSIONING?

Briefly, in the context of the oil and gas industry, decommissioning is an activity to restore a previously operating facility to a safe and environmentally stable condition which includes: well abandonment, which is the preparation of a well to be permanently closed; and upstream facilities decommissioning, which is to permanently make safe platforms and other facilities used.

REGULATORY FRAMEWORK ON DECOMMISSIONING IN MALAYSIA

Currently, the domestic regulatory framework relating to decommissioning of offshore oil and gas facilities is fragmented and found within various statutes such as the Fisheries Act 1985, the Environmental Quality Act 1974, Continental Shelf Act 1966, Exclusive Economic Zone Act 1984 ("the EEZA"), Petroleum (Safety Measures) Act 1984 and Occupational Safety and Health Act 1994 and various other regulations and subsidiary legislation. The Department of Environment has also issued environmental guidelines for the decommissioning of oil and gas facilities in Malaysia.

As a direct result of this fragmentation, a party seeking to undertake a decommissioning project is required to navigate the requirements of various regulators for the purposes of obtaining approvals and complying with regulatory processes required by law giving rise to the issue of potential conflicting stakeholder interests. PETRONAS has fortunately taken the active step of issuing the decommissioning guidelines as part of its PETRONAS Procedures and Guidelines for Upstream Activities ("PPGUA") which are required to be complied with by parties to production sharing contracts ("PSC") with PETRONAS in Malaysia.

Under PPGUA, all aspects of decommissioning undertaken by parties to PSCs with PETRONAS ("PSC Contractors") are subject to review and approval by PETRONAS under the abandonment review framework and the Government of Malaysia. The Government will provide its approval through the *Jawatankuasa Kerja Zon Ekonomi Eksklusif* ("JKZEE") pursuant to Sections 21(1) and 22 of the EEZA for installations operating within the Exclusive Economic Zone . Abandonment Plan approval from PETRONAS is required before making an application to the JKZEE. PPGUA also requires that a decommissioning plan be submitted to PETRONAS during the field development stage.

Further, there is an emphasis on Health, Safety and Environment ("HSE") matters whereby PETRONAS will be updated monthly on the HSE performance of the decommissioning project. Upon completion of all decommissioning works, debris are to be properly disposed of in accordance with the legal instrument between PETRONAS and the contractors. A post decommissioning environmental survey is usually conducted within a few months from the date of completion of the decommissioning works to ensure that there is no adverse impact on the surrounding marine and land environment.

Whilst PPGUA provides a workable framework at present for PSC Contractors, it remains to be seen whether this is sufficient in view of the expected volume and sophistication of decommissioning projects to be undertaken in the future. Furthermore, as a large number of decommissioning projects are likely to be the legal responsibility of PETRONAS (rather than PSC Contractors), introducing a specific decommissioning legislative framework or at least a committee comprising all relevant stakeholders with sufficient oversight authority independent from PETRONAS should be considered.

OPTIONS FOR DECOMMISSIONING IN MALAYSIA

Broadly speaking, the options available for decommissioning depends on the type of installation to be decommissioned. For example, platform decommissioning would require different options from that of pipeline decommissioning. The current practice in Malaysia is that all disused upstream installations are required to be fully removed, except where non-removal or partial removal is proved to be more suitable. Decommissioning projects are to be evaluated on a case by case basis to ensure that the right options are undertaken. To that end, PETRONAS has implemented the rig-to-reef option on some of its offshore platforms in 2017 whereby platform structures are turned into artificial reefs.

Associated with the above is the absence of any form of standard decommissioning contract for decommissioning work in Malaysia, an issue generally faced by the industry globally. At the time of writing, the Oil and Gas UK's decommissioning working group has produced a new LOGIC decommissioning contract with guidance notes which parties operating in the UK are able to use for the dismantling, removal and transport to shore of all types of offshore infrastructure.

In addition to the above, the Baltic and International Maritime Council (BIMCO), a large international shipping industry association, is also currently producing a decommissioning contract for the benefit of its members. These initiatives could prove to be of assistance when crafting a contract to be used in

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Malaysia (depending on the type of decommissioning work to be undertaken) but will need to take into account certain realities of the Malaysian regime, particularly the issue of title to PSC assets, the method of withdrawing from the abandonment cess fund, the upstream services oil and gas licensing regime and Malaysian foreign exchange control restrictions.

ISSUES WITH THE EXISTING DECOMMISSIONING PRACTICE IN MALAYSIA

The following are some of the significant issues that arise from the existing decommissioning practices in Malaysia:

(a) unclear and inaccessible regulations and guidelines;
(b) general lack of experience in the region leading to weak decommissioning plans;
(c) lack of literature and unpredicted effects of decommissioning on marine fauna and flora;
(d) risks to the health and safety of both the personnel performing decommissioning operations and other sea users;
(e) as most of the structures are more than 40 years, records of these structures may not be sufficiently kept; and
(f) shortage of historical precedent to benchmark against to determine the expected costs of decommissioning.

THE DECOMMISSIONING REGIME IN THE UK

The decommissioning landscape in the UK is sophisticated and service providers and operators are generally familiar with the process. The decommissioning of oil and gas assets in the UK is governed primarily by the Petroleum Act 1988. In addition, there is a dedicated website by the Oil and Gas Authority supplemented by extensive guidance notes and literature on decommissioning.

The availability of guidance notes, legislation and regulatory framework dedicated to the decommissioning practice in the UK ensures that operators receive detailed guidance on administrative procedures leading up to the decommissioning works. The framework requires, amongst others, the submission for approval of detailed estimated costs, assessments on environmental impact and other continuing monitoring obligations.

Further, the UK's policies and practices on decommissioning are based on two key principles, the first being the precautionary principle that decommissioning should always aim to achieve a clear sea bed (complete removal of infrastructure remains the base case decommissioning requirement), and the second principle, the polluter pays principle, whereby those who have benefitted from the exploitation or production of hydrocarbons bears the responsibility for decommissioning. The latter involves carry back liability, which means that removal and environmental liability costs can be shared back along the chain of users, owners and licence holders from the time of the original installation until its decommissioning.

The UK's Oil and Gas Authority was established pursuant to the Energy Act 2016 to advise on, amongst others, the costs of carrying out the decommissioning programme and how to keep the costs to a minimum. This establishment is helpful as operators can consult industry experts for cost management advice. In addition, the UK focuses on ensuring that the industry is in possession of transparent data around cost estimates, uncertainty ranges, execution methodologies and best practices to achieve cost certainty. This concept of a transfer of knowledge in a transparent manner will be a useful addition in Malaysia to decrease high decommissioning costs as there is a lack of historical precedent and data in relation to the costs of decommissioning in Malaysia.

Most interestingly, the UK has put in place a mandatory planning tool called the 'comparative assessment' to determine the most suitable decommissioning options to undertake. The comparative assessment narrows down suitable decommissioning options by using yardsticks such as safety risks, environmental impacts, technical feasibility, societal impacts and economic costs against which the options are assessed. According to an industry publication, the planning tool helps deliver best practice while complying with regulatory requirements. The tool is also scalable, which makes it versatile for projects of all sizes (see: '*Comparative assessment helps determine decommissioning options*', offshore-mag.com, 13 June 2017).

THE DECOMMISSIONING REGIME IN AUSTRALIA

Currently the regulatory regime in place in Australia regulating decommissioning practices is set out in the Offshore Petroleum and Greenhouse Gas Storage Act 2006, its regulations and the Commonwealth Offshore Petroleum Decommissioning Guideline.

Australia has recently launched a review of its decommissioning framework in preparation of predicted increase in decommissioning activities in the coming years. A detailed Decommissioning Paper has been issued and following on from that, an Options Paper detailing the preferred proposed options to enhance the decommissioning framework will be released sometime towards the end of 2019.

Preliminarily, the six key principles that underpin the current regime in Australia are as follows:

(a) the petroleum industry is regulated under a broad objective and performance-based scheme that permits the titleholders to discharge their obligations in a manner that suits their individual circumstances;

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"HELLO? IS THIS THING ON?"

Sara Lau discusses the use of surreptitious recordings in employment disputes

A manager at a local telco company was recently said to be *"suspended indefinitely"* following the 'viral' sharing, on various social media platforms, of a video of her scolding her subordinates at work. As a result of the 'viral' video, the business in question suffered reputational harm and had to perform damage control. After all, if a picture tells a thousand words, a video must tell a million.

While netizens focused on the conduct of the said manager, there was little interest as to who recorded the incident, which was clearly carried out covertly. Surreptitious recording of workplace exchanges is on the rise. A decade ago, one would need a stealth recording device to secretly record verbal exchanges – a wiretap hidden in a trouser pocket or a camera disguised as a shirt button. With the advent of technology, recordings can now easily be carried out without detection: just a finger tap or swift swipe on any mobile device. For this reason, coupled with social media-fuelled obsessions for sensation and scandal, it is important to acknowledge that covert recordings may make or break your day or case.

Recording conversations at work can be appealing. In a work-related dispute between colleagues, a covert recording of the dispute would conclusively determine a he-said-she-said deadlock. It can also serve to discredit character. Likewise, an employee claiming to have been bullied, defamed, discriminated against or mistreated by his employer can use a covert recording to prove his claim, simultaneously ravaging the reputation of the employer. Even employers can find covert recording a helpful weapon, especially in cases where an employee confesses to a misconduct that he later denies. Covert recording is powerful evidence indeed.

The million-dollar question is: should we be secretly recording conversations at work?

FIRED FROM WORK

The matter of secret recordings was recently the highlight of a case in Denmark. The matter started with a work-related dispute between a customer consultant ("Employee") and a managing director over commission payments. As the conversation grew heated, the Employee threw a computer mouse in the direction of the managing director, but accounts differ as to whether the Employee threw the computer mouse at the managing director intentionally. The Employee then left work early, but not before some amends were made between him and the managing director. Later that day, the Employee received an email informing him that in consequence of his action of throwing the computer mouse at the managing director and leaving the workplace early, he was deemed to have resigned. Disagreements ensued, followed by a letter two weeks later from the employer's lawyers notifying the Employee that his employment was terminated for cause as he had unlawfully left the workplace.

The Employee instituted unjust dismissal proceedings against his employer. In the first instance in the district court, the Employee produced an audio recording of the dispute he had had with the managing director, which neither the managing director nor the company had knowledge of. The company then issued a further termination letter to the Employee for having audio recorded the dispute, which it considered misconduct. The termination was to take place from the day the recording was made.

On appeal, the Danish High Court considered and decided that the Employee's action of covertly recording the exchange with the managing director amounted to a material breach of the employment relationship to justify termination from employment. In its decision, the Danish High Court attached importance to the fact that the managing director was not informed beforehand that he was being recorded and that this constituted a material breach of the duty of loyalty in the employment relationship.

The Danish High Court's decision was later overturned by the Danish Supreme Court. The Danish Supreme Court found that the audio recording did not breach local penal and data protection laws and accordingly, did not constitute a breach of the employment relationship in the circumstances of the case. Amongst others, the Supreme Court also found that the audio recording served an objective purpose (rather than an unlawful one) and that the interest of the employer did not outweigh this purpose.

APPLICATION IN MALAYSIA

Like in much of the world, there are no statutory prohibitions against covert recordings of a workplace conversation in Malaysia. In fact, covert recordings can be and have been used in a claim for unjust dismissal.

The case of *Sanjungan Sekata Sdn Bhd v Liew Tiam Seng* [2003] 3 ILR 1155 involved the dismissal of an Operations Manager. The Chief Executive Officer alleged that the Operations Manager induced another employee, namely the operations executive ("Operations Executive") to resign from employment and join a different company. To fortify its claim, the company sought to admit tape recordings of the conversation between the Operations Manager and the Operations Executive. The Operations Manager was not aware that the Chief Executive Officer had instructed for tape recorders to be installed in the Operations Manager's office and was thus not aware that his conversation with the Operations Executive was recorded. In deciding whether the surreptitious recording could be admitted as evidence, the Industrial Court held that it could, assuming the following guidelines, which were enumerated in *Mohd Ali Jaafar v PP* [1998] 4 CLJ 208, were complied with:

(a) The tape was run through and found to be clean before the recording was made;
(b) The machine was in proper working order;
(c) The tape was not tampered with or altered in any way - it should be established in whose possession the tape was at all times;
(d) The officers (or other witnesses) played the tape over after

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making the recording and heard voices which they can identify;
(e) A transcript was prepared of the voices; and
(f) The officers (or other witnesses) played over the recording and checked it with the transcript as to the identity of the voices and as to the conversation.

In addition, the Industrial Court advised that the following precautionary steps ought to be followed:

(a) Uttering of the introductory and closing words;
(b) Breaking of the safety tabs after the recording; and
(c) Placing identification marks on the tapes.

None of the criteria above includes a consideration as to whether the recording was obtained without consent or knowledge.

The Industrial Court also ruled in *Yap Fat v Southern Investment Bank Bhd / Southern Bank Berhad & Another* [2010] 3 ILR 350 that the admissibility of illegally obtained evidence, as long as relevant, was consistent with section 30(5) of the Industrial Relations Act 1967 which requires the Industrial Court to act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

Taking into account today's modern gadgets, the guidelines in *Sanjungan Sekata* are obsolete. This was recognised in the case of *Justin Maurice Read v Petroliam Nasional Berhad* [2017] 3 ILR 527, where a conversation was recorded surreptitiously on a handphone device and subsequently saved in a personal computer and later, on a pen drive. In finding that the handphone recordings were not admissible, the Industrial Court gave special attention to the fact that there was a break in the chain of possession and custody in the handling of the recordings and that the persons whose conversation were being recorded could not confirm the accuracy of the recordings. The Industrial Court also found that the claimant, who sought to admit the recordings, could not eliminate any doubt of tampering, altering or editing of the recordings. Further, the Industrial Court chastised the act of surreptitious recording as unethical. Despite this, it is important to note that there is no legal bar to the admissibility of covert recordings.

As such, even if covert recording is seen as distasteful or immoral, this in itself is insufficient to render the recording inadmissible.

Admissibility aside, could the covert recording of a workplace conversation by an employee amount to misconduct? The Industrial Court recently considered this in *Izaidin Joinnie v Amanah Saham Sarawak Berhad* [2018] 2 LNS 1787, where a Compliance Officer was dismissed from employment for his failure to act in the best interests of the company. At trial, it transpired that the Compliance Officer secretly tape recorded a board meeting of the company. While this was not one of the reasons for dismissal, the Industrial Court paid special attention to this act. The Industrial Court found this act so despicable and held, *obiter*, that the act of secret recording was the *"ultimate act of incompatibility"* and *"there could be no excuse and no justification … for such an uncalled for act"*. The Industrial Court further commented that by secretly recording the said board meeting, the Compliance Officer acted in breach of his duty of fidelity or good faith and confidence which he owed to the company and that the company cannot be expected to keep the Compliance Officer on its payroll. Ultimately, the Industrial Court dismissed the Compliance Officer's claim of unjust dismissal.

RISK

Interestingly, none of the above cases conclusively determines whether the act of secret recording amounts to misconduct, and whether such misconduct warrants dismissal. Indeed, without clear case law confirming this, the surreptitious recording of a conversation at work is not, *prima facie*, evidence of misconduct.

This presents a risk to all businesses. The possible leak of a recorded workplace conversation discussing a client's confidential information or revelation of data otherwise protected by law is only the tip of the iceberg. As such, the ability to surreptitiously record conversations at work is inherently hazardous. Left unchecked, this practice can turn the workplace into a hostile and defensive environment promoting self-preservation above teamwork. Colleagues will feel restrained in speaking freely and become suspicious of each other. Further, an employee recording multiple workplace conversations may ultimately collect a dossier of wrongdoings, to be kept as an arsenal for future leverage or as incriminating evidence in an unjust dismissal claim. Needless to say, the reputational damage to a business following such leaks can be most severe.

Employers are thus encouraged to address these risks swiftly and effectively. They can mitigate their exposure to risk by creating comprehensive policies on unacceptable conduct, including the secret recording of any workplace conversation regardless of the subject matter, and enforcing them consistently. If recording is necessary, all participants to a conversation should first be made aware of the same. Even if the law cannot catch up with modern trends quick enough, employers must be wise not to be left behind.

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A DOUBLE-BARRELLED APPROACH?

Janice Ooi explains the guidance by the Court of Appeal in a joinder of a shareholder's personal action and a derivative action

In the recent decision of *Mak Siew Wei v Yeoh Eng Kong & Other Appeals* [2019] 7 CLJ 470 ("*Mak Siew Wei*"), the Malaysian Court of Appeal had the opportunity to consider whether it is appropriate for a shareholder to sue in his personal capacity for losses he had suffered personally, and also on behalf of the company for losses suffered by the company by way of a derivative action, both in the same suit. In other words, can both a shareholder's personal action and a derivative action be brought under the same suit?

The question posed to the Court of Appeal in *Mak Siew Wei* is closely linked to the principle of reflective loss. Reflective loss is one suffered by a shareholder which is merely reflective of the company's loss, such as where the shareholder's loss is a diminution in the value of his shares as a result of a wrong committed against the company.

THE RULE AGAINST REFLECTIVE LOSS

It is a long-standing rule that the proper plaintiff in an action in respect of a wrong allegedly committed against a company is, *prima facie*, the company. This is the common law rule laid down in *Foss v Harbottle* (1843) 67 ER 189 ("*Foss v Harbottle*").

However, the rule in *Foss v Harbottle* is subject to exceptions and allows a shareholder to initiate a common law action on behalf of the company provided two requirements are met. First, the wrong is one that cannot be validly ratified by the majority due to a fraud on the minority; and second, the perpetrators of the fraud are in control of the company. This is the common law derivative action. It is based on a cause of action belonging to the company, not the shareholder.

At the heart of the common law rule in *Foss v Harbottle* is the principle that a company is a separate legal entity and therefore, any loss suffered by a company is separate and distinct from that suffered by its shareholder. In a shareholder's personal action, the allegation is that the wrongdoing in question is an invasion of rights that belong to the said shareholder individually and in his personal capacity as a member. This is to be contrasted with a situation where the wrong is committed against the company. While the shareholder may suffer a loss as a consequence of the wrong committed against the company, for example, in the form of diminution of the value of his shares, such loss is merely reflective of the loss suffered by the company by reason of a wrongdoing committed against the company. A shareholder cannot commence a personal action for such loss. The proper party to commence legal action to make good such loss would be the company. This is the principle against reflective loss.

The rationale of the principle against reflective loss is to prevent double recovery and to ensure that the company's creditors are not prejudiced as a consequence of recovery by the shareholder personally. This rationale was reiterated by the Court of Appeal in *Mak Siew Wei*.

The aggrieved shareholder can, however, commence a common law derivative action on behalf of the company provided that it falls within the exceptions to the rule in *Foss v Harbottle*.

A statutory form of the derivative action is now provided in section 347(1) of the Companies Act 2016 ("CA2016"). Under section 347(1) of CA2016, a complainant which includes, among others, an aggrieved shareholder, may with the leave of the court, initiate, intervene in or defend a proceeding on behalf of the company, if the requirements in that subsection are satisfied.

BRIEF FACTS

In *Mak Siew Wei*, the plaintiff/respondent ("respondent"), was a director and substantial shareholder holding approximately 7.791% of the shareholding of Scan Associates Berhad ("SCAN"). The first to eighth defendants/appellants ("appellants") were directors of SCAN, which was the ninth appellant. The tenth appellant was the auditor of SCAN.

In essence, the respondent's claim against the individual appellants was premised on misrepresentation and deceit. The respondent alleged that the appellants had concealed the actual financial status of SCAN from the respondent as well as the other shareholders of SCAN. Pursuant to the representations made by the appellants, the respondent proceeded to acquire a substantial shareholding in SCAN on or about June 2015. On 28 April 2017, SCAN's shares were delisted and removed from the official list of Bursa Malaysia.

The respondent claimed to have suffered considerable loss in investing or purchasing the shareholding in SCAN as a consequence of the representations by the appellants. The respondent's action against the appellants was brought in his personal capacity as a shareholder of SCAN and on behalf of all the other shareholders of SCAN.

More than a year after the claim was filed, the respondent sought to re-amend the claim against the appellants to:

(i) add a new and separate cause of action, namely a derivative action, for and on behalf of SCAN and all the shareholders save for the third and fourth appellants; and

(ii) include events that had transpired since the filing of the claim, namely, the delisting of SCAN.

It is item (i) above that comprises the crux of the appeal before the Court of Appeal.

The appellants objected to the respondent's re-amendment of the claim based on the following grounds:

(i) the re-amendment, if allowed, would have the effect of permitting the respondent to bring a common law derivative action which has been expressly abrogated by section 347(3) of CA2016; and

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(ii) there was a delay in applying for the re-amendment and the respondent had failed to provide any cogent reasons for such delay.

The High Court found in favour of the respondent and allowed the respondent's application to re-amend the claim to include the derivative action on behalf of SCAN, as well as to plead the events that transpired since the filing of the claim. The High Court's decision was based on, among others, the following reasons:

(i) the common law derivative action in respect of substantive rights acquired before CA2016 came into effect could still be initiated even after the enactment of CA2016. In short, CA2016 did not apply retrospectively. In this regard, the High Court relied on section 620(4) of CA2016 which provides that "*Any right, privilege, obligation or liability acquired, accrued or incurred before the effective date or any legal proceedings, remedy or investigation in respect of such right, privilege, obligation or liability shall not be affected by this Act and shall continue to remain in force as if this Act has not been enacted*";

(ii) the purpose of bringing the derivative action in these proceedings was to avoid multiplicity of proceedings which may arise if the derivative action were to be filed in another court; and

(iii) the derivative action sought to be included in the proceedings vide the re-amendment did not change the character of the suit into another as it was not inconsistent with the complaints earlier pleaded by the respondent.

THE COURT OF APPEAL'S DECISION

The Court of Appeal upheld the High Court's decision in allowing the respondent to re-amend the claim to plead the events that had transpired since the filing of the claim.

In respect of the re-amendment relating to the derivative action, the Court of Appeal agreed with the High Court that section 347(3) of CA2016 did not apply retrospectively by reason of section 620(4) of CA2016. However, after considering the jurisprudence from the United Kingdom and Malaysia, the Court of Appeal disagreed with the High Court's decision in allowing the respondent's re-amendment to include a derivative claim on behalf of SCAN and reversed the said decision.

The Court of Appeal placed heavy emphasis on the principle against reflective loss which had its genesis in the English Court of Appeal case of *Prudential Assurance v Newman Industries No.2* [1982] Ch 204 ("*Prudential Assurance No.2*"). After considering *Prudential Assurance No.2*, Nallini Pathmanathan JCA (as Her Ladyship then was) distilled the principle against reflective loss into the following propositions:

(i) the loss suffered by a company is separate and distinct from that suffered by a shareholder;

(ii) the nature of an action brought by a shareholder for loss suffered personally or *qua* shareholder, is completely different and distinct from that brought by a shareholder on behalf of the company for losses suffered by the latter; and

(iii) any loss suffered by a shareholder in the form of a diminution in the value of the shares or dividends are not to be considered as personal loss; instead, it is a loss reflective of that suffered by the company resulting from a wrongdoing committed against the company. A claim for such loss cannot be brought by way of a shareholder's personal action.

The Court of Appeal further emphasised that the rationale behind the principle against reflective loss is to prevent double recovery and to ensure that the company's creditors are not prejudiced as a consequence of recovery by the shareholder personally.

The Court of Appeal took cognisance of the fact that based on the statement of claim, the respondent relied on the same series of facts and transactions to substantiate his claim in both capacities. The Court of Appeal also took cognisance of the fact that the numerous prayers set out in the statement of claim sought damages for both the company and the respondent in his capacity as a shareholder, interchangeably. In short, one was unable to tell from the statement of claim the difference between the two claims of a fundamentally different nature and character in law. The Court of Appeal considered this to be a contravention of the principle against reflective loss. There was, in the opinion of the Court, a real danger of double recovery and prejudice to the creditors of SCAN.

Apart from the fact that the re-amendment was in contravention of the principle against reflective loss, the Court of Appeal further noted that the re-amendment did not meet the requirements set out in *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213. Firstly, the re-amendment changes unalterably or irrevocably, the character of the suit from a pure shareholder's personal action to one that is both a shareholder's action as well as a derivative action. Secondly, no cogent reasons were given as to why the application to re-amend the statement of claim was made more than a year after the claim was first filed. No reason was given as to why the derivative action was not brought at the outset of the suit.

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VACANT POSSESSION: A DEVELOPER'S HORROR STORY?

Based on a true story, Witter Yee recounts the tale of two conflicting Court of Appeal decisions

Housing developers in Malaysia thought they had found some relief when the Court of Appeal decided that the date of delivery of vacant possession should be calculated from the date of the sale and purchase agreement. Alas, their relief was short-lived when two days later, a different panel of the Court of Appeal decided that it should be calculated from the date when the booking fee was paid.

This is the tale of the Court of Appeal's decisions on 20 August 2019 in the case of *GJH Avenue Sdn Bhd v Tribunal Tuntutan Pembeli Rumah, Kementerian Kesejahteraan Bandar, Perumahan dan Kerajaan Tempatan & Ors* [2019] 6 AMR 112 ("GJH Avenue") and on 22 August 2019 in the case of *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* (Civil Appeal No: W-01(A)-174-03/2018) ("PJD Regency").

GJH AVENUE

Brief Facts

The 2nd and 3rd respondents purchased a bungalow unit from the appellant for the purchase price of RM402,600.00. A booking fee of RM5,000.00 was paid for the said unit on 24 October 2011. Thereafter, the Sale and Purchase Agreement was signed between the parties on 13 February 2012 ("GJH-SPA"). Notice of delivery of vacant possession for the said unit was issued by the appellant on 14 February 2014. Clause 22 of the GJH-SPA requires vacant possession to be delivered within 24 months from the date of the GJH-SPA. As the GJH-SPA was signed on 13 February 2012, and the notice of vacant possession was issued on 14 February 2014, the appellant took a stand that they were only two days late in delivering the vacant possession of the said unit.

The 2nd and 3rd respondents subsequently filed their claim at the 1st respondent, the Homebuyer's Tribunal ("Tribunal"), for liquidated ascertained damages against the appellant for a higher sum. The Tribunal decided that the 24 months for delivery of vacant possession commenced from the date on which the booking fee was paid and awarded the sum of RM12,353.76 to the 2nd and 3rd Respondents as liquidated ascertained damages.

Dissatisfied with the award, the appellant sought to quash the award of damages by the Tribunal and to obtain a declaration that the Tribunal has committed a statutory breach of housing development laws. The High Court dismissed the appellant's judicial review application. The appellant appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal in allowing the appellant's appeal, set aside the liquidated ascertained damages awarded in favour of the 2nd and 3rd respondents. Zaleha Binti Yusof JCA held, *inter alia*, that:

(1) Clause 22 of the GJH-SPA, the latter of which is a prescribed statutory contract set out in Schedule G of the Housing Development (Control and Licensing) Regulations 1989 ("HDR 1989"), is clear and unambiguous. It specifically provides that vacant possession shall be delivered within 24 calendar months "*from the date of this Agreement*"; there is no need for the courts to go through the authorities in finding the plain meaning;

(2) Regulation 11(2) of HDR 1989 which prohibits the collection of any payment except as prescribed by the SPA clearly indicates that "*the date of the Agreement*" as provided for in the GJH-SPA is the actual date the GJH-SPA was entered into, i.e. 13 February 2012; the law as prescribed does not allow the parties to a Schedule G agreement to contract out of the scheduled form; and

(3) The Tribunal has committed a statutory breach by acting beyond the four corners of the housing development laws that created it and gave it power.

The Court of Appeal affirmed its earlier position in *Kompobina Holding Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2017] MLJU 2268 that the date of delivery of vacant possession under a Schedule G agreement is 24 months from the date of the sale and purchase agreement.

At first blush, it appears that the decision in *GJH Avenue* is a clear departure from the Supreme Court's decisions in *Faber Union Sdn Bhd v Chew Nyat Shong & Anor* [1995] 3 CLJ 797 and *Hoo See Sen & Anor v Public Bank Bhd* [1988] 1 CLJ (Rep) 125 which held that the date when time starts to run for the delivery of vacant possession is the date when the purchaser paid the booking fee.

However, it is to be noted that Zaleha JCA in this case did consider *Faber Union* and *Hoo See Sen* but expressly declined to follow the same as they concerned sale and purchase agreements which were pre-schedule G of the HDR 1989 and Housing Development (Tribunal for Homebuyer Claims) Regulations 2002 and are therefore distinguishable and not to be relied upon.

PJD REGENCY

Brief Facts

The 2nd respondent purchased a condominium unit from the appellant for the purchase price of RM522,800.00. The 2nd respondent paid a booking fee of RM10,000.00 to the appellant on 16 January 2013 before the sale and purchase agreement for the said unit was signed by the parties on 21 March 2013 ("PJD-SPA"). Clauses 25(1) and 27(1) of the PJD-SPA require vacant possession of the property and common property to be delivered within 42 months from the date of the SPA. By letter dated 23 January 2017, the appellant sent a notice of vacant possession to the 2nd respondent.

As a result of the delay, the 2nd respondent lodge a claim with the 1st respondent, the Tribunal, seeking damages for the appellant's delay in delivery of vacant possession of the property and common property. The Tribunal calculated the time for delivery of vacant possession from the date of payment of the booking fee and not the date of the PJD-SPA. The appellant filed an application for judicial review at the High Court. The High Court dismissed the appellant's application and affirmed the decision of the Tribunal.

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The appellant appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal dismissed the appellant's appeal. Yew Jen Kie JCA held, *inter alia*, that:

(1) Based on the Supreme Court decisions in *Hoo See Sen* and *Faber Union*, it is settled law that the ascertainment of liquidated ascertained damages for late delivery of vacant possession starts to run from the date of payment of the booking fee or deposit;

(2) The decision in *Faber Union* has been followed by a series of subsequent cases whenever the Courts have been called to determine the date from which liquidated damages for late delivery commences; and

(3) The appellant's contention that the booking fee paid was merely to secure the purchase of the property pending procurement of financing and that the date of payment of booking fee should therefore not be used for the purpose of calculating the time of delivery of vacant possession is misconceived. Clause 1 of the PJD-SPA indicates that payment of booking fee, accepted by the appellant constitute offer and acceptance. Accordingly, the appellant must build and deliver vacant possession to the purchaser within the agreed period.

Hence, housing developers who believed that their deliverance was complete were once again haunted by the ghosts of the past in the form of *Hoo See Sen* and *Faber Union*.

COMMENTS

In view of these two conflicting decisions of *PJD Regency* and *GJH Avenue*, it is now uncertain as to whether the period for delivery of vacant possession starts from the date of payment of the booking fee or the date of the sale and purchase agreement. The appellant in *PJD Regency* has obtained leave to appeal to the Federal Court. We will have to wait for the Federal Court to resolve this question.

Which will survive and what will be left of them?

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THE 5G BANDWAGON

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mobile providers are only able to pinpoint the location of your mobile to the nearest cell phone tower and thus place you in the vicinity of the tower. However, in a 5G environment, due to the use of the clustered small cells, it would be much easier for mobile providers to pinpoint the almost exact location of your mobile. This type of location data is extremely rich data that could be used (or mis-used) in many ways. There will be a need for Malaysian regulators to examine whether present data protection laws, including the Personal Data Protection Act 2010, will be sufficient once 5G is implemented.

Applications using 5G

Regulators will also be keeping an eye out on the potential applications of 5G to enable the relevant regulations or guidelines to be developed on a timely basis. For example, smart vehicles are expected to take off once 5G is implemented since the fast speed and low latency of 5G are crucial to the success of smart vehicles. The presence of smart vehicles on the roads will potentially require amendment to existing traffic laws and other regulations, ensuring that the question of liability in cases of accidents are addressed.

CONCLUSION

Although there is still much to be considered technically and legally in implementing 5G in Malaysia, 5G is right around the corner especially given the Malaysian Government's continuous effort in developing the appropriate framework and expansion of local test beds.

5G's potential will only grow over time. As 5G will revolutionise numerous industries such as agriculture, manufacturing, healthcare, transport and even education, it is understandable, and in fact, imperative, that Malaysia jumps on the bandwagon to avoid being left behind in the new economy.

As 5G develops, laws and regulations will inevitably be amended or enacted to ensure sufficient oversight. Therefore, anyone seeking to be a part of the 5G ecosystem (whether as part of implementation of 5G or through the application of 5G) must remain on their toes and ensure compliance with the laws and regulations which are expected to change over the next few years.

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TRADEMARKS ACT 2019: WHAT IS INVOKED TO REVOKE?

Alyshea Low examines the new laws to expunge registrations from the Register.

INTRODUCTION

The new Trademarks Act 2019 ("2019 Act") came into operation on 27 December 2019. The long-awaited 2019 Act has been anticipated and is welcomed by stakeholders and practitioners alike. The provisions in the 2019 Act emulate certain provisions in other developed jurisdictions and will facilitate Malaysia's accession to the Madrid Protocol as set out under the ASEAN Economic Community Blueprint 2025.

A general overview of the main takeaways from the 2019 Act was covered in Issue 2/2019 and the groundless threats provision introduced in the 2019 Act was explored in Issue 3/2019 of our Newsletter whilst the 2019 Act was in the form of a Parliamentary Bill.

The third part of this series will take a closer look at the provisions relating to the cancellation, revocation, and invalidation of registered trademarks under the 2019 Act.

1976 ACT: REVOKE TO RECTIFY

Under the now-repealed Trade Marks Act 1976 ("1976 Act"), revocation of a registered trademark is done by way of an application by an aggrieved person to the High Court under sections 45 and/or 46 of the 1976 Act.

Section 45 – Rectification

Pursuant to section 45(1)(a) of the 1976 Act, the Court may order the Register to be rectified by expunging an entry of a registered trademark on the basis that the trademark was registered "*without sufficient cause*" or is an entry "*wrongfully remaining*" in the Register. The grounds that may be relied upon by the aggrieved person include, among others, the contention that the trademark does not satisfy the registrability requirements under the 1976 Act; that the trademark proprietor is not the rightful proprietor of the registered trademark; that the trademark registration was obtained by fraud; and that the trademark is similar to another trademark and is likely to deceive or cause confusion to the public.

Section 46 – Non-use

A registered trademark may be removed from the Register pursuant to section 46 of the 1976 Act in respect of any of the goods and services in respect of which it is registered for non-use by the proprietor. This provision may be invoked if it is shown that:

(1) the trademark was registered without an intention in good faith to use it in relation to such goods and services and there has been no such use in good faith up to the date one month before the date of the application for expungement; or

(2) up to one month before the date of the application for expungement, there was no good faith use of the registered trademark for a continuous period of not less than three years.

2019 ACT: CANCELLATION, REVOCATION AND INVALIDATION

Summary of key changes

The 2019 Act provides more extensive provisions relating to the cancellation, revocation, and invalidation of registered trademarks. The key changes under the 2019 Act include additional powers for the Registrar to revoke a trademark registration, albeit limited in nature. Such powers were absent from the 1976 Act.

The grounds for revocation on non-use of a trademark have also been expanded to include revoking a trademark that has become common in the trade as a consequence of acts of inactivity of the registered proprietor, as well as circumstances where as a consequence of use of the registered trademark in relation to goods or services, the use is liable to mislead the public in respect of the nature, quality, or geographical origin of such goods or services.

This article will examine the provisions in the 2019 Act in relation to cancellation, revocation, and invalidation of registered trademarks.

Section 44 – Voluntary cancellation

This is a new introduction by the 2019 Act which provides that the Registrar shall cancel the registration of a trademark upon the request of the registered proprietor. However, such provision is subject to a safeguard which requires the Registrar to notify any person recorded as claiming a right in respect of, or an interest in, the trademark and any assignee of the trademark, before effecting the cancellation.

Section 44 in the 2019 Act is modelled on the provisions in section 45 of the UK Trade Marks Act 1994, and of other jurisdictions such as Singapore, Hong Kong, Australia and New Zealand.

Section 45 – Revocation by Registrar

Similar to section 44, section 45 is also a new introduction by the 2019 Act and confers additional powers on the Registrar, albeit limited, to revoke a registered trademark where:

(1) the Registrar had, in deciding to register the trademark, failed to take into account a notice of opposition filed by any person in accordance with subsection 35(1); or

(2) the Registrar had, in deciding to register the trademark, failed to take into account an application for extension of time for filing a notice of opposition made by any person before the registration.

Other additional powers conferred on the Registrar can be

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found in section 45(4), which provides that within twelve months from the date of registration of a trademark, the Registrar may revoke the registration of the trademark if he is satisfied that it is reasonable to revoke the registration, taking into account any relevant obligations of Malaysia under an international agreement or convention, or that there exist any special circumstances making it appropriate not to register the trademark or to subject a registration to disclaimers, conditions, amendments, modifications, or limitations.

In order to invoke section 45(1), the Registrar must be made aware of his failure within two months from the date of filing of the notice of opposition or date of application for extension of time to file a notice of opposition (section 45(2)). This suggests that in the event the Registrar is only made aware of his failure after the expiry of such two-month period, section 45(1) cannot be invoked. However, section 45(5) provides that in the event the Registrar is only made aware of his failure after the two-month period, the Registrar is still able to revoke the registered trademark under the provisions of section 45(4), if it is still within the twelve months from the date of registration.

Although from the outset it appears that the Registrar's powers for revocation are limited, the use of the term "special circumstances" in section 45(4)(b) may have the effect of giving the Registrar powers to consider revocation requests on wider grounds.

Sections 45(6) and 45(7) provide certain safeguards in favour of the proprietor of the registered trademark and any other persons recorded in the Register as claiming to have a right or interest in the registered trademark in that they require the Registrar to give notice of the proposed revocation to such persons who must also be given opportunity to be heard before the registered trademark is revoked.

Upon revocation by the Registrar, section 45(8) provides that the trademark registration shall be deemed to have never occurred and shall be subject to further examination or proceedings as determined by the Registrar.

It is also interesting to note section 45(9), which provides that the Registrar has no duty to consider any requests for revocation. This suggests that it is entirely up to the Registrar's discretion as to whether any requests for revocation under section 45 would be considered or rejected outright. It remains to be seen whether the refusal by the Registrar to consider a request for revocation can be successfully challenged in Court.

Section 46 – Revocation by Court as to Non-Use

The 2019 Act made changes to the non-use provisions that were available under the 1976 Act. Under the 2019 Act, an aggrieved person may apply to revoke a registered trademark if it can be shown that within a period of three years following the date of issuance of notification of registration, the trademark has not been used in good faith in Malaysia and there are no proper reasons for the non-use (section 46(1)(a)). An aggrieved person can also apply to revoke a registered trademark on the basis that the use of the registered trademark has been suspended for an uninterrupted period of three years and there are no proper reasons for such non-use (section 46(1)(b)).

The 2019 Act has also expanded the grounds for an application for revocation as to non-use of a registered trademark by an aggrieved person to include circumstances whereby the trademark has become a common name in the trade for the product or service for which it is registered in consequence of the registered trademark proprietor's inactivity or where the use of a trademark in relation to goods or services is liable to mislead the public as to the nature, quality or geographical origin of those goods or services.

It is important to note that the registered trademark will not be revoked on the ground of non-use under sub-sections 46(1)(a) and 46(1)(b) if the proprietor is able to show evidence of use after the period of three years, but before the date of the application for revocation. However, any such use will be disregarded unless the proprietor can show that preparations of such use began before the proprietor became aware that the application for expungement might be made.

An interesting feature of the 2019 Act is that section 46(4) permits a registered trademark to be revoked partially only in relation to certain goods or services for which the registered trademark is registered.

The revocation of a mark by the Court is deemed to take effect from the date of application to the Court unless the Court is satisfied that the grounds of revocation exists on an earlier date.

Section 47 – Invalidation by Court

Under the 2019 Act, a registered trademark may be invalidated by the Court on the basis that the registration should have been refused on absolute or relative grounds, or that the registration was obtained by fraud or misrepresentation.

Section 45 in the 1976 Act states that an aggrieved person may apply to rectify the Register on the grounds, among others, that an entry was made without sufficient cause or an entry wrongfully remains on the Register. The phrase "*without sufficient cause*" is ambiguous, particularly as it was not defined in the 1976 Act

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PROSPECTIVITY TRUMPS RETROSPECTIVITY, AND NO, IT'S NOT FAKE NEWS!

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The FC highlighted several other provisions of CIPAA that would adversely affect the substantive rights of the parties to construction contracts if the Act were to operate retrospectively. Section 5 which restricts the adjudicator's power of determination to a single construction contract as opposed to multiple construction contracts would mean that parties are prohibited from relying on cross-contract set-offs pursuant to multiple construction contracts such as those in *Ireka*. Further, section 28 (enforcement of adjudication decision as if it is a High Court judgment), section 29 (right to suspend or reduce rate of performance of construction contract when any part of an adjudicated sum is unpaid) and section 30 (right of sub-contractor to seek direct payment from principal of party who fails to pay the adjudicated amount) of CIPAA will have profound impact and adversely affect the substantive rights of parties if CIPAA is applied retrospectively.

The FC also rejected the contention in both appeals that CIPAA ought to be given retrospective effect by reason that it is a social legislation. According to the FC, CIPAA applies only to the construction industry and is not for the benefit of society at large.

In light of the foregoing reasons, the FC opined that the application of section 35 of CIPAA to the facts in *Bauer* would exclude and impair the respondent's express right under its agreement to pay the appellant only after it had received the related progress payment from the employer. Thus, any construction that section 35 applies to clause 11.1 would inflict a detriment on the respondent and alter the construction contract, in particular clause 11.1, in that an act allowed at the time of doing it is now prohibited by a new statute, namely CIPAA. Thus, the FC concluded that clause 11.1 must prevail over any provision in CIPAA. Accordingly, the FC answered both questions of law in *Bauer* in the negative and dismissed the appeal. The FC also held that the whole of CIPAA should be applied prospectively.

Applying the same reasoning, the FC reached a similar conclusion in the *Ireka* appeal. The FC took the view that clause 13.1, which provides rights for cross-contract set-offs, concerns substantive rights which had in this case existed before CIPAA was enacted. Section 5 of CIPAA which prohibits the appellant in *Ireka* from relying on the cross-contract set-off provisions in the construction contracts would undoubtedly have a significant impact as it takes away the substantive rights of the parties. Hence, section 5 cannot be applied retrospectively in the absence of plain legislative intention of the same expressed with clarity of language therein.

The FC answered the leave question in *Ireka* in the affirmative and held that CIPAA gives rise to substantive rights and is consequently not retrospective in nature. The FC then ordered the decisions of the High Court and the Court of Appeal to be set aside and allowed the appellant's application to set aside the adjudication decision.

GAME OVER?

The categorical pronouncements by the FC in *Bauer* and *Ireka* that CIPAA operates prospectively in its entirety appear to resolve one of the main dilemmas faced by stakeholders in the construction industry. Based on these two decisions of our apex court, it is clear that CIPAA does not apply to construction contracts made before CIPAA came into operation on 15 April 2014 and that parties to such contracts are not entitled to resort to statutory adjudication proceedings to resolve payment disputes.

The construction industry had barely come to terms with the implications of the judgments in *Bauer* and *Ireka* that were delivered on 16 October 2019 when the FC reignited the debate on the following day by granting leave to appeal on a similar question as to the prospective application of CIPAA in an unrelated case. While it may seem that the game is not quite over, it remains to be seen whether the FC will overturn the decisions of Tan Sri Idrus Harun FCJ in *Bauer* and *Ireka* which appear to be grounded on cogent reasoning and well-established principles of statutory interpretation.

Two issues that will arise from the FC's decisions in *Bauer* and *Ireka* in relation to construction contracts made before 15 April 2014 are as follows -

(1) Whether adjudication decisions relating to pre-CIPAA construction contracts which have been enforced and payments made may be set aside and payments returned.

    This issue could have been resolved if the FC had applied the doctrine of prospective ruling to its decisions in *Bauer* and *Ireka*, as it recently did in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526 and *Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd* [2015] 7 CLJ 584. We understand that some of the litigants affected by the decisions in *Bauer* and *Ireka* have commenced proceedings to challenge the existing decisions. It will be interesting to see how the Courts will rule on this issue.

(2) In the event that such adjudication proceedings are discontinued, whether the party who initiated the proceedings is to bear the costs incurred in the proceedings.

    According to section 17(1) of CIPAA and Rules 9(5A) and 9(11) of the Asian International Arbitration Centre Adjudication Rules & Procedure, a claimant who withdraws an adjudication claim or the party who requested an adjudication which it was not entitled to do, will have to bear the costs unless otherwise ordered. In light of these provisions, the FC's decisions in *Bauer* and *Ireka* may have inadvertently caused financial hardship to claimants who commenced adjudication proceedings in respect of pre-CIPAA construction contracts in reliance on the High Court's decision in *UDA Holdings* that CIPAA operates retrospectively.

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A DOUBLE-BARRELLED APPROACH?

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The Court of Appeal also acknowledged that there is an exception to the principle against reflective loss. Such exception is when the breach of duty by the wrongdoers had the effect of disabling the company from pursuing such a cause of action. However, the Court of Appeal concluded that this was not the case in *Mak Siew Wei*.

JOINDER OF CLAIMS NOT PROHIBITED

It is pertinent to note that the Court of Appeal's decision in *Mak Siew Wei* does not stand as authority that a shareholder's personal action and a derivative action can never be brought under the same suit. In fact, the Court of Appeal recognised the possibility of such claims being joined under a same suit, such as in the case of *Ranjeet Singh Sidhu & Anor v Zavarco PLC & Ors* [2016] 2 CLJ 975.

Nallini Pathmanathan JCA added that for there to be a valid joinder of a shareholder's personal action and a derivative action under the same suit, the causes of action should be pleaded in such a manner that the claims *qua* shareholder are distinct and clearly separable from the relief sought in the derivative action. This requirement was not met in *Mak Siew Wei*.

Her Ladyship further observed, *per obiter*, that even if the claims are commenced in separate proceedings, the issue of multiplicity of proceedings ought not to arise. If both actions proceed to trial separately, the findings of fact made in the first trial would, in the Learned Judge's view, be binding in any subsequent trial. Hence, the issue of multiplicity should not arise.

CONCLUSION

The Court of Appeal's decision in *Mak Siew Wei* is noteworthy in two respects. First, it is a reminder to litigants who wish to join both a shareholder's personal action and a derivative action under the same suit that they must ensure that the statement of claim is pleaded in a way that it clearly distinguishes between the two separate causes of action and the separate reliefs sought.

Secondly, the decision adds to the body of Malaysian cases on the application of the principle of reflective loss to exclude certain claims in a personal action by a shareholder.

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MERGER CONTROL ON THE HORIZON?

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structure that the incoming merger regime will take (e.g. whether reporting will be pre- or post-merger, whether reporting will be made voluntary or involuntary, or what thresholds and tests will be applied), competition law will become an important consideration at the preparatory and due diligence stages of M&A transactions once the proposed merger control regime comes into effect.

In the event of an investigation, competition authorities will usually request a large number of internal documents that will be used to assess the transaction. Preparatory documents evidencing a company's rationale for the transaction, e.g. the commercial justification and/or pro-competition aspect of the transaction can therefore be very important in any later competition law assessment, in particular since such documentation may need to be disclosed to competition authorities.

With the increasing enforcement of competition laws in Malaysia and competition authorities worldwide uncovering more cross-border cartels, it is also important that buyers conduct due diligence to assess whether the target company has engaged in any competition law infringement and address it. At a minimum, the transaction documentation should include appropriate safeguards to ensure apportionment of risk, such as *via* a specific indemnity indicating who bears the financial risk if following completion a competition authority uncovers a breach of competition law by the target, and whether liabilities should be capped and subject to past conduct only. This will avoid significant problems not only financially but also potential reputational repercussions at a later stage.

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ANNOUNCEMENT I

APPOINTMENT AS JUDICIAL COMMISSIONER

Our Firm congratulates Quay Chew Soon on his appointment as a Judicial Commissioner. Chew Soon retired as a Partner of Skrine to assume his position on the Bench.

SECTION 31 OF THE EMPLOYMENT ACT 1955

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(b) as section 31(2) provides that except for the *second proviso*, the term "*wages*" includes the Statutory Payments, "*wages*" in the substantive part of section 31(1) *includes* Statutory Payments while "*wages*" under the *second proviso* does not.

Thus, the High Court answered the 2nd Question in the negative.

CONCLUSION

In summary, the effect of the High Court's decision is as follows:

(1) section 31 of the EA applies to a company that has been wound up;

(2) it is immaterial whether the Charged Lands are secured under a floating charge or a fixed charge;

(3) there is no requirement that the employees must be working at the place of employment that is sold at the time it was sold; what is required is that the employee to whom wages are due under section 31(1) of the EA was employed or had worked at the place of employment at the time when such wages were earned or such money accrued due;

(4) under paragraph (a) to the *second proviso* to section 31(1) of the EA, the total amount due to an employee who enjoys priority is limited to four consecutive months of wages (excluding Statutory Payments); and

(5) Statutory Payments are not subject to the limit imposed under paragraph (a) to the *second proviso* and there is no limit as to the amount of Statutory Payments payable to an employee who enjoys priority under section 31(1) of the EA.

The High Court's decision is illuminating as the issue as to whether section 31 of the EA prevails over the priority provisions of the CA has been one that has long vexed receivers. While the interpretation of section 31 of the EA in this case may have certain undesirable side effects to secured creditors particularly in respect to the inability to determine the extent of the employer's liability which would affect the value of security, as the learned High Court judge has pointed out, the Court's role in the interpretation of legislation is to give effect to the intention of the Legislature. This decision accords with the intention of the legislation in question, the EA, as a piece of social legislation.

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TRADEMARKS ACT 2019: WHAT IS INVOKED TO REVOKE?

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or given any statutory explanation. Section 47 in the 2019 Act has omitted this phrase and instead specifies that a trademark registration may be invalidated if it was registered in breach of sections 23 or 24 (which respectively provide absolute and relative grounds for refusal of registration) or was registered by fraud or misrepresentation.

A trademark shall not be declared invalid if it has acquired a distinctive character after its registration as a result of its use in relation to the goods or services for which it is registered or if the proprietor of an earlier trademark or earlier right had given its consent to the registration.

Where the ground for invalidation exists only for only some goods or services for which the trademark is registered, the 2019 Act provides for partial invalidation as regards those goods or services.

Where the registration of a trademark is declared to be invalid, the registration shall to that extent be deemed never to have been made. However, section 47(8) provides that such invalidation shall not affect past and closed transactions.

Also notable is section 76 in the 2019 Act that forms part of the chapter relating to international matters, specifically the Madrid Protocol. Under section 76, a proprietor of a well-known trademark may apply to the Court for a declaration of invalidation of a registered trademark on the ground that the registered trademark is identical with or similar to a well-known trademark in Malaysia or on the ground of fraud in obtaining the registration.

CONCLUSION

The 2019 Act contains vast changes, additional powers, clearer timelines to be observed as well as new grounds to expunge the registration of a registered trademark. More importantly, the 2019 Act specifies the date the registered trademark is considered unenforceable, be it *ab initio* or the date the application to expunge the registration is filed, which may affect commercial transactions relating to the expunged registration. It will be interesting to see how legal practitioners and the Court adopt and adapt to the 2019 Act.

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THE DECOMMISSIONING FRAMEWORK IN MALAYSIA

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(b) decommissioning is conducted in a way that reduces any environmental, safety and well integrity risks;
(c) decommissioning and the associated costs are the responsibility of the titleholders who have operated or installed the infrastructure;
(d) decommissioning should be considered early and often, as early as from project development as part of concept selection and design;
(e) complete removal is the "base case" for any decommissioning operation, together with plugging and abandonment of wells though other options such as partial removal, repurposing and reusing of property may be undertaken if the titleholder can demonstrate that the alternative approach will yield better environmental, safety and well integrity outcomes; and
(f) decommissioning must be completed before end of title to ensure that the onus for carrying out such works does not fall on the Australian government, and therefore Australian taxpayers.

There is a strong policy similar to the "polluter pays" regime in the UK in that titleholders who have been permitted to install infrastructure in offshore areas are expected to bear all forms of legal responsibility associated with the infrastructure.

An interesting facet of the current Australian framework is the ability of the National Offshore Petroleum Safety and Environmental Management Authority to issue remedial directions to current and former titleholders to perform certain limited remedial actions such as to remove all property brought into the title area by any person engaged or concerned in operations authorised by the titleholder. However, there are certain limitations with regards to remedial directions to former titleholders in that the remedial direction may not be issued to the former titleholder if the title has been surrendered or where the former titleholder has transferred its interest in the title.

The Minister also has power to issue remedial directions, but the scope of power is limited to directions which relate to resource management or resource security. One of the proposals in the Decommissioning Paper is for this power to be enhanced to ensure that a former titleholder operating under a remedial direction is subject to all the duties and responsibilities as if it were operating under its previous title.

It also appears from the Decommissioning Paper that the Australian Government has recognised the value of developing a Comparative Assessment Guidelines, similar to the 'comparative assessment tool' developed in the UK.

CONCLUSION

The regime in the UK and Australia are detailed yet flexible and some aspects could be considered to address the issues present in the current regime in Malaysia, in particular, making available historical decommissioning data in order for the industry to be in a better position to develop decommissioning strategies.

Ultimately, the optimal decommissioning solution will depend on what is technically feasible and also what is desirable from an environmental, economic and societal perspective. Decommissioning in Malaysian territorial waters and its Exclusive Economic Zone will require a balance of learning from best practices in other jurisdictions, but also recognition of challenges unique to our local situation.

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ANNOUNCEMENT II

SENIOR ASSOCIATES

The Firm congratulates Manshan Singh, Caroline Leong, Geraldine Goon, Karyn Khor and Annjili Gunendran on their promotion to Senior Associates.

Manshan is a member of our Trade Remedies, Competition and Disputes Practice Areas. He graduated from the University of Leeds in 2011.

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LEGAL INSIGHTS

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