Newsletter

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Real Estate

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah[1]: Calculation of Liquidated Agreed Damages commences from the Date of Payment of Booking Fee

A case note by Alexis Yong Mey Ling.

Introduction

In the recent case of **PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah**, the Federal Court delivered a landmark decision in affirming that where there is a delay in the delivery of vacant possession by a developer to the purchaser under a statutory form contract ("Scheduled Contract") prescribed in the Housing Development (Control and Licensing) Regulations 1989[2] ("Regulations 1989"), the date of calculation of liquidated agreed damages ("LAD") begins from the date of payment of booking fee and not from the date of the sale and purchase agreement.

Facts/common question of law

There were seven appeals before the Federal Court comprising three different set of cases.
The common question of law in all appeals was that where there is a delay in the delivery of vacant possession by a developer to the purchaser under the Scheduled Contract, whether the date of calculation of LAD commences from:

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- the date of payment of the deposit/booking fee/initial fee/expression by the purchaser of his written intention to purchase; or
- the date of the sale and purchase agreement.

This question arose because of the different interpretation of the meaning of the language "*from the date of this agreement*" contained in the Scheduled Contract.

Decision of the Federal Court

The Federal Court decided that the point of law at issue in the appeals remains very much decided. Where a developer fails to deliver vacant possession according to the time stated in the Scheduled Contract, the calculation of LAD runs from the date of payment of the booking fee and not from the date of the Scheduled Contract.

The Federal Court affirmed the Supreme Court cases of **Hoo See Sen v Public Bank Berhad**[3] and **Faber Union Sdn Bhd v Chew Nyat Shong**[4], both of which are authorities for the proposition that the date of calculation of LAD commences from the date of payment of a booking fee.

The Federal Court applied the concept of social legislation, legislative history and statutory interpretation in arriving at its judgement.

A social legislation is a legal term for a specific set of laws passed by the legislature for the purposes of regulating the relationship between a stronger class of persons and a weaker class of persons.

Statutory interpretation usually starts with the literal rule. However, when it concerns the interpretation of the protective language of social legislation, the literal rule is automatically displaced by the purposive rule.

In this case, the Federal Court did not apply the literal rule in arriving at the decision that the date of calculation of LAD begins from the date in the Scheduled Contract. It was held that in interpreting social legislation, the courts should give effect to the intention of Parliament instead of the parties.

The Federal Court also referred to the legislative history of the relevant legislations. The existing Regulation 11(2) of the Regulations 1989[5] makes it clear that the collection of a booking fee is absolutely prohibited. Therefore, to give effect to this legislative intent and taking the collective status of the **Housing Development (Control and Licensing) Act 1966** and Regulations 1989 as social legislation into consideration, it was determined that where the illegal practice of collecting booking fees takes place, the date of the contract cannot be taken to mean the date of the Scheduled Contract.

Developers who collect booking fees are in contravention of Regulation 11(2) of the Regulations 1989. If it is the developer's attempt to secure an early bargain through the illegal collection of a booking fee, the developer should be bound by the booking fee and, therefore, should bear the full extent of LAD with regard to late delivery of vacant possession.

It was further held that a valid contract is formed between the developer and the purchaser upon payment of a booking fee. Had the developer strictly complied with the terms of the Scheduled Contract, the payment of 10% deposit and the signing of the Scheduled Contract would have been done simultaneously and there would be no issue of there being separate dates for calculating LAD. The legislative intent was that the initial payment of

monies as deposit is sufficient to constitute an intention to enter a contract given that the agreement should have been signed simultaneously.

Having addressed the main issue of law, the Federal Court also made other significant rulings as set out below:

- Under the Scheduled Contract, the date of completion of common facilities is the date of issuance of the certificate of completion and compliance and not the date of issuance of the certificate of practical completion; and
- There is no unjust enrichment when LAD is calculated based on the actual purchase price and not the rebated purchase price. LAD is to be calculated by reference to the purchase price and not to the rebated purchase price.

Conclusion

It is now settled that where there is a delay in the delivery of vacant possession by a developer to the purchaser according to the time stipulated in the Scheduled Contract, the date of calculation of LAD commences from the date of payment of the booking fee. It has finally clarified the legal position as to when time begins to run with regard to the calculation of LAD for late delivery of vacant possession.

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Please contact us for further information on real estate matters.

Endnotes:

[1] [2021] MLJU 41.
[2] PU(A) 58/1989.
[3] [1988] 2 MLJ 170.
[4] [1995] 2 MLJ 597.
[5] Regulation 11(2) of the Regulations 1989 provides that "*No person including parties acting as stakeholders shall collect any payment by whatever name called except as prescribed by the contract of sale*".

Employment & Administrative Law

OSHA Bill 2020 — Proposed amendments to the Occupational Safety and Health Act 1994 ("OSHA Act") — What should be noted by the Employer

In this article, Nur Najehah Jalaldin discusses some of the proposed amendments to the OSHA Act.

On 2 November 2020, the Occupational Safety and Health (Amendment) Bill 2020 ("OSHA Bill") was tabled for first reading in Parliament and introduces noteworthy amendments to the OSHA Act.

A summary of the major changes to be made to the OSHA Act under the OSHA Bill is set out below:

1. Proposed amendments to section 1 of the OSHA Act broadens the applicability of the Act.

The current law provides that the OSHA Act would only be applicable to specific industries such as mining, finance, construction and others as stated in the First Schedule of the OSHA Act. The proposed amendments aim to extend the scope of the applicability of OSHA Act to all "*places of work*" across Malaysia, including those in public services and statutory authorities.

As set out in the OSHA Act, "*places of work*" are defined as "*premises where persons work or premises used for the storage of plant or substance*" and "*premises*" include "*any land or building*". With the proposed amendments, it appears that "*places of work*" would also include those who are required to work from home.

In view of the foregoing, as soon as the Bill comes into force, employers who fall under the purview of the OSHA Act have to take a pragmatic approach and ensure a safe and secure working environment for employees who work from home. This includes ensuring that the ergonomics of the employees' workstation conform to an acceptable standard to avoid health complications that can be caused by ergonomics-related injuries, for example, carpal tunnel syndrome and tendonitis.

2. Introducing/inserting a new section 26A to protect employees from imminent danger.

The newly proposed section 26A provides that an employee has the right to remove himself from his place of work or danger, if:

- there is a reasonable justification to believe that there exists an imminent danger at his place of work; and
- the employer does not take any action to remedy this imminent danger even after being informed by the employee or his representative of the same.

It further provides that any employee who removes himself from this danger shall be protected from any undue consequences and shall not be discriminated against.

The terms "*undue consequences*" and "*discriminated*" are, however, not specifically defined in the OSHA Bill. However, it is clear from the abovementioned provision that the

employer is not allowed to take disciplinary measures, such as "*insubordination*" or "*abandonment*", if an employee removes himself from the workplace if there is imminent danger.

Additionally, the OSHA Bill defines imminent danger as "*a serious risk of death of serious body injury to any person that is caused by any plant, substance, condition, activity, process, practice, procedure or place of work hazard*".

As the term "*imminent danger*" has been drafted in a general context, it is therefore reasonable to infer "*imminent danger*" extends to circumstances involving the possibility of contracting COVID-19.

In view of the above, should an employer fail to ensure that there is a proper policy/standard of practice in place to prevent the spread of COVID-19 in the workplace, the employee may refuse to attend work.

The employee, however, bears the burden of fulfilling the two requirements under the proposed section 26A in the event he removes himself from this "*imminent danger*". Failure to do so would entitle the employer to take disciplinary action against him/her.

3. Introducing new duties & responsibilities for employers/principals.

The OSHA Bill proposes to introduce new duties and responsibilities for the employers and, as part of the amendments, the principals. In this regard, these new duties and responsibilities will be briefly discussed in the following paragraph:

- Under section 15 of the OSHA Act, employers have the responsibility, so far as practicable, to ensure the safety, health and welfare at work of all their employees. The OSHA Bill proposes to expand these responsibilities to include the development and implementation of procedures for dealing with emergencies that may occur while employees are at work. The OSHA Bill, however, is silent as to what amounts to "*an emergency*". It would therefore be prudent for employers to look at the original meaning of emergency to interpret the scope of this section.

  Emergency in its literal meaning refers to any serious, unexpected crisis and/or dangerous situation requiring an immediate action. In this regard, examples of scenarios amounting to an emergency include, amongst others, fire, explosion, building collapse, flood, earthquake, pandemic disease, extreme heat wave, chemical spill, machinery breakdown and the like.

  Since pandemic diseases are set as an example and COVID-19 had been declared by the World Health Organization and the Malaysian Ministry of Health as a pandemic, the employer is thus required to follow the provisions of the proposed section 15.

  The proposed amendment would now also require employers to identify all potential "*serious, unexpected crisis and/or dangerous situation requiring an immediate action*" that may occur, and to establish a set of guidelines, policies, contingency plans or standard operating procedures to combat this situation.

This responsibility is greater for employers whose workplaces are at a greater risk of triggering dangerous situations, such as the ammonium nitrate explosion in Beirut port.

- Pursuant to the OSHA Bill, a new section 18A is introduced to impose a duty on principals to ensure, so far as practicable, the safety and health of every individual employed by the principal or under the control of the principal *(*including but not limited to subcontractors) at work. The OSHA Bill defines the term "*principal*" as,

  > *" … any person who in the course of or for the purposes of his trade business, profession or undertaking contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal."*

  This new section 18A would impose an obligation on a principal to ensure that its contractor and/or subcontractor comply with the health and safety policy put in place by the principal company.

- In addition, the OSHA Bill also introduces a new section 18B, placing a new duty on all employers/principals to conduct and implement risk assessments in relation to safety and health risk posed to any person who may be affected by his undertaking at the workplace.

  This proposed amendment places a greater responsibility on employers/principals to not only assess and identify risks related to the health and safety of their employees, but also to those who may be affected by such risks while performing their duties at the workplace. In this situation, these proposed amendments place a duty on both employers/principals to take necessary measures to remedy/eliminate these risks.

4. Higher penalties are imposed if there is a breach of any duty under the OSHA Act.

The OSHA Bill seeks to amend section 19 of the OSHA Act where maximum fines are now increased from RM50,000.00 to RM500,000.00 in the event employers/principals breach any of its duties and obligations (including new duties as discussed above) under the OSHA Act. It can be inferred that this proposed amendment is made to ensure that employers/principals do not ignore or neglect the performance of their duties and obligations to provide a safe and healthy working environment for their employees.

Furthermore, the OSHA Bill also seeks to amend section 52 of the OSHA Act by adding a clause stating that any violation committed by a company, a director or the officer may be charged severally or jointly in the same suit as the company and may be guilty of the same offence and liable to the relevant penalties.

Notwithstanding the foregoing, the proposed amendments further provides a defence for the director or the officer to avoid such liability where he can prove the following:

- the offence was committed without his knowledge; and
- the offence was committed without his consent or connivance and that all reasonable precautions and due diligence had been implemented to prevent the commission of the offence.

Once the OSHA Bill comes into effect, the proposed amendments will place a burden on the director or the officer to establish the statutory defence if they are sued for breaching their duties under the OSHA Act.

Based on the above, it is therefore pertinent for employers to ensure they have adopted the appropriate guidelines, policies, contingency plans or standard operating procedures so that they can rely on the same to show that "*reasonable precautions and due diligence*" have been taken.

Conclusion

Business and the workers thrive and flourish in a safe and healthy working environment. With the proposed amendments, it is hoped that employers provide a safe and healthy working environment which not only protects employees from injury and illness, but can also lower the cost of injury and/or illness that employers may be responsible for and, at the same time, improve productivity, quality and raise employee morale.

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Please contact us for further information on employment and administrative law matters.

Dispute Resolution

The Personal Liability of Directors and Third Parties in an Oppression Suit

A case note by Lyness Lim Wei Xeng.

Introduction

In the recent case of **Auspicious Journey Sdn Bhd v Ebony Ritz**[1], the Federal Court addressed the issue of whether liability can be imposed on directors and third parties in an oppression action under section 181 of the Companies Act 1965 ("CA 1965") (now section 346 of the **Companies Act 2016** ("CA 2016")). It was held that in an appropriate case, such liability can be imposed on directors and third parties.

Summary background facts

Auspicious Journey Sdn Bhd ("AJ") and Hoe Leong Ltd ("HL") entered a joint venture to form a joint venture company, namely Ebony Ritz Sdn Bhd ("Ebony"). AJ held 20% shareholding in Ebony whereas HL held the remaining 80%.

In 2010, Ebony acquired 49% shares in Semua International Sdn Bhd ("Semua International") from Sumatec Resources Berhad ("Sumatec"). Following the acquisition, Ebony held 49% shareholding in Semua International whereas Sumatec held the remaining 59%.

As part of the acquisition arrangement, Sumatec by way of an Options and Financial Representation Agreement ("OFRA") granted several options to Ebony and AJ to acquire its 51% equity in Semua International. The options would be exercisable if Semua International's audited profit after taxation fell short of the financial representations made by Sumatec ("Call Options").

Subsequently, AJ discovered that on 21 December 2012, HL entered into a conditional sale and purchase agreement ("Conditional SPA") with Ebony, Sumatec and a third party, Setinggi Holdings Ltd ("Setinggi"), for the disposal of the entire retained 51% equity interest of Sumatec in Semua International to HL and Setinggi. Pursuant to the Conditional SPA, AJ and Ebony would in effect lose the Call Options.

In this regard, HL maintained that at the material time it was necessary to enter into the Conditional SPA to salvage Ebony due to the AJ's attempt to extricate itself from its investment while HL wished to continue. Ultimately, the Conditional SPA never became unconditional and the sale did not go through.

AJ, as a minority shareholder who has not been made privy to these arrangements, filed the present originating summons ("OS") against, *inter alia*, Ebony, HL, nominee directors of HL in Ebony ("Nominee Directors"), Setinggi and the shareholder and director of Setinggi ("Third Parties") contending that the Conditional SPA had expropriated its rights as well as Ebony's rights under the OFRA and the latter had affected AJ's rights as a minority shareholder.

The decision of the lower courts

The High Court allowed AJ's claim in part but dismissed its claims against the Nominee Directors and the Third Parties. The High Court held that the directors were merely acting as an agent of the company and would not be personally liable for the acts of the company unless express written provisions exist to impose personal liability on them. AJ appealed against the decision of the High Court to dismiss the

actions against the defendants other than Ebony and HL.

The Court of Appeal dismissed the appeal and affirmed the High Court's decision. AJ appealed against the decision of the Court of Appeal.

The decision of the Federal Court

Five questions of law were raised by AJ before the Federal Court, namely:

- Question 1: Whether the principle in **Abdul Manaf Mohd bin Ghows v Nusantara Timur Sdn Bhd**[2] (to the effect that a director is an agent of a company and is thereby not personally liable for the breaches or acts of the company) applies to proceedings under section 181 of CA 1965 (now section 346 of CA 2016) where the shareholder is itself a company and the acts of oppression and unfair dealings are derived from the mind and acts of the principal directors?
- Question 2: Whether a director and/or directors of a subject company who are privy to the wrongdoings perpetrated and/or undertaken at the subject company level, and such wrongdoings have been found to be within the ambit of section 181 of CA 1965 (now section 346 of CA 2016) may be visited with liability pursuant to the said section 181 (now section 346 of CA 2016)?
- Question 2.1: If in the affirmative, what are the circumstances in which such a director or directors may be visited with liability?
- Question 3: Whether a third party and/or third parties, who are neither a director or a shareholder of a subject company in in which proceedings are brought pursuant to section 181 of CA 1965 (now section 346 of CA 2016) may be visited with liability, whether jointly and/or severally, for acts within the ambit of the said section 181 (now section 346 of CA 2016)?
- Question 3.1: If in the affirmative, what are the circumstances in which such third party and/or third parties may be visited with liability?

The Federal Court's decisions with respect to the questions above are as follows.

Question 1 was answered in the negative.

The Federal Court distinguished **Abdul Manaf** (supra) on the basis that it was a case of the breach of contract by a company as a purchaser in a sale and purchase transaction of shares with a third party, and it was not a case involving claims of oppression by minority shareholders. As such, this case has no application in an oppression matter, where the dispute is between shareholders of the company inter se.

Question 2 was answered in the affirmative. With respect to question 2.1, the Federal Court held that it would ultimately be dependent upon the circumstances of a particular case.

Firstly, the Federal Court relied on limb (a) of section 181 of CA 1965 (now section 346 of CA 2016) which expressly identifies the directors' exercise of powers and the conduct of the affairs of the company as a basis for establishing oppression, both of which falls within the management duties and powers of the directors.

Therefore, when section 181(1)(a) is read together with section 181(2) which in turn gives the Court very wide powers to bring such conduct to an end or to remedying the minorities' grievance, it was held that there is no prohibition against the Court granting a remedy

which encompasses the directors of the company personally.

Secondly, the Federal Court relied on the fact that oppression is a minority shareholder remedy against those controlling the company. That would naturally include the directors who manage the company at the behest of the company, as well as the majority itself. Therefore, reliefs against the directors would be a natural and logical consequence if they have behaved oppressively to the minority.

Thirdly, section 181 is a statutory remedy to arrest the mischief of the inadequacies of the common law in protecting the interests of the minority shareholders. Therefore, it requires a liberal and broad interpretation, not a narrow or restrictive one.

Lastly, the Federal Court relied on the authorities in other common law jurisdictions where the foreign courts held that personal liability can be imposed on directors (and third parties) in an oppression claim[3].

Having considered the position in the other common law jurisdictions, the Federal Court summarised the legal test applicable to determine whether liability should be imposed on a director (or a third party) as follows:

- Firstly, there should be evidence of deliberate involvement or participation in, or a sufficiently close nexus to the oppressive or detrimental or prejudicial conduct that the minority complaints of, to warrant the attribution of liability to a director or third party;
- The imposition of liability should be fair or just in all the circumstances of the particular case;
- In assessing whether the imposition of such liability is fair or just, the Court should be satisfied that the remedy results in fairness to the parties concerned as a whole;
- The attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct;
- Such imposition of liability must be reasonable, and serve to alleviate the legitimate concerns of the shareholders of the company in question;
- In exercising its powers under section 181 of CA 1965 (now section 346 of CA 2016) the Court should bear in mind general corporate law principles, such that director liability does not become a substitute for other statutory relief or under the common law;
- In summary, the question for the Court is whether, in the context of section 181 of CA 1965, the defendant was so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

Question 3 was answered in the affirmative. With respect to Question 3.1, the Federal Court held that it would ultimately depend on the circumstances of a particular case. In reaching this conclusion, the Federal Court relied on the same reasoning as set out under Questions 2 and 2.1. The legal test set out therein would equally be applicable to determine whether liability should be imposed on a third party.

The Federal Court's findings

Applying the legal test to the case, the Federal Court dismissed AJ's appeal and held that it would not be fair and just to impose personal liability on the nominee directors and the third party for the following reasons:

- It was the findings of the High Court and the Court of Appeal that while HL's, the Nominee Directors' and the Third Parties' acts themselves and the manner in which they were carried out may be categorised as prejudicial and detrimental to AJ, they were done to salvage Ebony as AJ did not wish to expend further monies to effect salvage of Ebony's investment.
- It could also be inferred that AJ was not prepared to come up with the requisite funds to purchase the shares from Sumatec by exercising the Call Options.
- These matters weighed in favour of a non-attribution of liability as the court was bound to consider what was "*fair and just*" in all circumstances of the case.

Conclusion

This is the first Malaysian case where the Federal Court held in no uncertain terms that directors and third parties are capable of being made personally liable in oppression actions. The circumstances in which such liability will devolve depend on the circumstances of a particular case and the Court would have to be satisfied that it would be just and fair to impose such liability to a director or a third party.

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Please contact us for further information on dispute resolution matters.

Endnotes:

[1]Civil Application No. (Civil Appeal No.: 02(f)-53-06/2019(W)) (The judgment is dated 9 March 2021).

[2][1997] 3 MLJ 661.

[3]For the UK, the Federal Court relied on **F & C Alternative Investments (Holdings) Ltd v Barthelemy (No 2)**; **Barthelemy v F & C Alternative Investments (Holdings) Ltd (No 2)** [2012] Ch 613; **Destiny Investments (1993) Ltd v TH Holdings Ltd (formerly Tonstate (Hotels) Ltd)**; **TH Holdings Ltd (formerly Tonstate (Hotels) Ltd) v Destiny Investments (1993) Ltd** [2017] EWHC 657 (Ch); **In re Dinglis Properties Ltd v Dinglis** [2019] EWHC 1664 (Ch). For the position in Canada, the Federal Court relied on **Wilson v Alharayeri** [2017] 1 SCR 1037; **Budd v Gentra** [1998] O.J. No. 3109. For the position in Singapore, the Federal Court referred to **Ho Yew Kong v Sakae Holdings Ltd** [2018] SGCA 33

Corporate/M&A

Catajaya Sdn Bhd v Shoppoint Sdn Bhd: Interpretation of Termination Clause

A case note by Charlie Wong Jing Xiong.

Introduction

It is important to deal with the termination of any contract in a delicate manner as there may be far-reaching consequences to the relationship and contractual obligations of the contracting parties. More so if the termination is not mutually agreed to by the contracting parties or is effected unilaterally as it would essentially end the commercial relationship and free parties from their respective future contractual obligations.

Recently, the Federal Court in **Catajaya Sdn Bhd v Shoppoint Sdn Bhd**[1] gave a significant decision on the construction of termination clauses.

Facts

This case is primarily concerned with a share sale and purchase agreement dated 29 August 2008 ("SSA") which was entered into between Catajaya Sdn Bhd ("Catajaya") and Shoppoint Sdn Bhd ("Shoppoint") and the two shareholders of Shoppoint ("Shareholders") where Catajaya was to acquire Shoppoint from the Shareholders.

The SSA provided a specific timeline for Catajaya to make payment of the purchase price which includes, *inter alia*, payment of the balance purchase price by the agreed completion date of 31 December 2008.

Catajaya had failed to pay the balance of the purchase price by 31 December 2008 and had requested for extension of time vide letter to Shoppoint dated 24 November 2008 prior to the completion date.

The request for extension of time by Catajaya was rejected by Shoppoint vide letter dated 12 January 2009 in which Shoppoint also terminated the SSA pursuant to clause 11 of the SSA on the basis that time was of the essence.

There are two relevant termination clauses in the SSA, namely clauses 11 and 12 of the SSA.

Clause 11 of the SSA reads:

> *"In the event that the Purchaser shall breach any of its obligations herein, the Vendors may by notice in writing terminate this Agreement … provided always that Completion has not taken place whereupon this Agreement shall forthwith ceased to have any further effect or force and neither party shall have any further claim against the other save for antecedent breach."*

On the other hand, clause 12.2(i) of the SSA reads:

> *"This Agreement may be terminated by either party by notice in writing to the other and wherein the consequences under Section 10 and Section 11 shall be applicable to the Purchaser and the Vendor respectively (i) if either of the parties hereto shall commit any material breach of its obligations under this Agreement and shall fail to make good such breach within thirty (30) days from the date of receipt of notice from the other party requiring it to do so…"*

On a cursory reading of clauses 11 and 12, the obvious difference is whether an innocent party is required to provide a 30-day cure period to the defaulting party to remedy a breach.

Decision of the High Court and Court of Appeal[2]

The High Court dealt with the question of whether the termination notice by Shoppoint (vide the letter dated 12 January 2009) was valid as Shoppoint had relied on clause 11 of the SSA to terminate the SSA and did not grant Catajaya the 30-day cure period as provided for in clause 12 of the SSA. Shoppoint argued that the SSA may be terminated without any prerequisite compliance with clause 12 of the SSA as clause 11 of the SSA is a stand-alone provision.

Upon examination of the evidence and witnesses, the High Court held that clause 11 of the SSA was an independent provision to terminate the SSA for a fundamental breach of the SSA (which in this case would be the failure by Catajaya to make payment of the purchase price by the stipulated timeline).

The High Court further held that the recourse to the two-tier process under clause 12 of the SSA (being the requirement to notify the breach and the 30-day cure period for the defaulting party) would lead to ludicrous consequences as it would allow Catajaya to complete the purchase of the shares of Shoppoint beyond the completion date of 31 December 2008, contrary to the express provision in the SSA that time was of the essence.

The High Court had then concluded that the termination notice vide letter dated 12 January 2009 was in fact valid and effective.

On appeal by Catajaya, the Court of Appeal upheld the decision of the High Court and dismissed the appeal. The Court of Appeal held that clauses 11 and 12 of the SSA are meant to cater for two different termination scenarios where clause 11 of the SSA is for a situation where completion of the SSA has not taken place while clause 12 of the SSA is for termination by either party.

While the Court of Appeal had agreed with Catajaya that termination clauses should be interpreted and construed strictly, it further held that the general rule of interpretation as enunciated in **Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd**[3] should also be complied with.

As such, the Court of Appeal had considered the clear meaning and intent of the SSA against the backdrop of the parties' intention during the negotiation leading to the SSA, in particular, the fact that time is of the essence for the SSA and that there was no intention to grant Catajaya an extension of time.

Decision of the Federal Court

The question that required determination by the Federal Court was whether termination clauses in a contract ought to be construed strictly in Malaysia. It is to be noted that a strict interpretation of the termination clauses would require exact and meticulous compliance with the formal or procedural requirements stipulated therein.

The Federal Court ruled in the affirmative, although it had reached an entirely different conclusion on the interpretation of clause 11 of the SSA by referring to a string of landmark judgments in Malaysia and in the United Kingdom including, among others, **Attorney General of Belize v Belize Telecom**[4] and **Charles Grenier Sdn Bhd v Lau Wing Hong**[5].

"[53] Lord Hoffman observed in Attorney General of Belize v. Belize Telecom [2009] UKPC 10:

> *The Court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. If it is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended...*
>
> *[55] In so far as construction of the terms of an agreement the role of the Court is merely to interpret the terms by examining the words and language used as well taking into consideration the factual matrix of the case. The Court must not even attempt to improve the words used in the clauses which the parties have made themselves, however desirable the improvement may be. His Lordship Dato Gopal Sri Ram JCA (as he then was) in Charles Grenier Sdn. Bhd. v. Lau Wing Hong [1997] 1 CLJ 625..."*

In interpreting clause 11 of the SSA, the Federal Court had concluded that clause 11 of the SSA cannot be interpreted in isolation from clause 12 of the SSA as both provisions are clear, unambiguous and complement each other. The Federal Court took this position as clause 12 of the SSA had referred to clause 11 and had expressly provided the requirement for the two-tier process.

The Federal Court also held that it would make commercial sense for Catajaya to be given the opportunity to remedy the purported breach as Catajaya has paid a substantial sum as a deposit for the SSA.

Consequently, the Federal Court had allowed the appeal by Catajaya and had set aside the orders of the High Court and the Court of Appeal.

Conclusion

This case shows that Malaysian courts have taken the view that termination clauses should be given a strict interpretation. Parties to any commercial contracts should take heed of the lessons in this case and be cautious when invoking termination rights to ensure strict compliance with the termination clauses.

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Please contact us for further information on corporate/M&A matters.

Endnotes:

[1]**Catajaya Sdn Bhd v Shoppoint Sdn Bhd** [2020] 1 LNS 2037.
[2]**Catajaya Sdn Bhd v Shoppoint Sdn Bhd** [2019] 1 LNS 922.
[3]**Berjaya Times Square Sdn Bhd v M-Concept Sdn Bhd** [2010] 1 CLJ 269.
[4]**Attorney General of Belize v Belize Telecom** [2009] UKPC 10.
[5]**Charles Grenier Sdn Bhd v Lau Wing Hong** [1997] 1 CLJ 625.

Intellectual Property

New Developments in Patent and Copyright: A Case Note on Sungei Kahang Palm Oil Sdn Bhd v YKL Engineering Sdn Bhd

In this article, Elisia Engku Kangon explores the decision of the Court of Appeal in Sungei Kahang Palm Oil Sdn Bhd v YKL Engineering Sdn Bhd[1], which discussed several significant points in the context of patent and copyright laws in Malaysia.

Background Facts

YKL Engineering Sdn Bhd ("YKL") is the registered owner of Malaysian Patent No. MY-139512-A ("Patent 512") in respect of a "*Fruit Bunch Splitter*". YKL further claimed to be the copyright owner in respect of the design drawings of the Fruit Bunch Splitter and its components parts ("Copyrighted Works").

Sometime in 2017, YKL commenced an action before the High Court against Sungei Kahang Palm Oil Sdn Bhd ("SKPO") and Profina Teknik Sdn Bhd ("Profina") for patent and copyright infringement.

In response, SKPO and Profina counterclaimed for the invalidation of Patent 512 on the grounds of lack of novelty and lack of an inventive step. SKPO and Profina additionally asserted that copyright does not subsist in the Copyrighted Works and hence there would be no copyright infringement. In the High Court, Zainal Azman Bin Ab Aziz J found in favour of YKL by allowing the claims of patent and copyright infringement while dismissing the counterclaims by SKPO and Profina.

SKPO and Profina appealed to the Court of Appeal.

Decision of the Court of Appeal

The Court of Appeal unanimously allowed the appeal and set aside the decision of the High Court. The Court of Appeal further allowed the counterclaim.

In the following section, this article will highlight the reasoning of the Court of Appeal on selected issues.

Construction of the patent

The Court of Appeal found that the High Court had failed to construe Patent 512 by leaving the entire exercise of construction in the hands of the experts. Mary Lim JCA held that this was erroneous as the construction of the patent is a task ultimately for the Court, having the assistance from the persons skilled in the art.

The Court of Appeal also stated that the construction of the patent is the first step to be undertaken by the Court in a patent infringement and/or invalidation case and that a purposive approach is to be adopted.

Pleading specific prior arts for novelty

SKPO and Profina had sought to amend their pleadings to include a new prior art relating to one Desa Kim Loong machine ("the Desa machine"). While the amendment was refused, evidence relating to the Desa machine was in fact led during the trial; however, the High Court appeared to disregard and not consider the Desa Machine.

On appeal, the question was thus posed whether each prior art must be specifically pleaded in the context of an invalidation attack for novelty. The Court of Appeal held that what must be pleaded is the defence of anticipation by prior art under section 14 of the **Patents Act 1983**.

The Court of Appeal further held that SKPO and Profina had made the specific plea by pleading certain prior arts, amongst which were the ones listed in their pleadings. In so deciding, the Court of Appeal held that SKPO and Profina were not limited solely to the prior arts specifically pleaded and that the High Court had erred by failing to consider the Desa Machine.

Disclosure of a prototype in the context of novelty

Another ground of appeal raised by SKPO and Profina was the failure of the High Court to consider the disclosure of the prototype, which SKPO and Profina contended to be a disclosure to the public under section 14(2) of the **Patents Act 1983**.

YKL argued that there was no disclosure of the prototype to the public by reason of confidentiality, privacy and secrecy. However, the Court of Appeal found that the following evidence suggested otherwise:

- The prototype was housed in a premise belonging to a third party for six years or more, with no evidence that YKL or its representative was present at all material times.
- There was no indication to alert that the prototype was in fact a prototype.
- There were no security measures in place to protect the prototype, nor was the area housing the prototype being fenced up or sectioned off.
- The access conditions at the premise were more for safety reasons and not due to confidentiality.
- There was no evidence of any undertakings or agreement stipulating a confidentiality obligation relating to the prototype being housed in a third-party premise.

As such, the Court of Appeal found that there was a disclosure of the prototype to the public within the meaning of section 14(2) of the **Patents Act 1983**.

Copyright in design drawings

The issues on copyright in the present case were two-fold:

- whether copyright subsists in the Copyrighted Works; and
- whether the making of a three-dimensional copy of a two-dimensional copyrighted work amounts to a copyright infringement?

Firstly, on the subsistence of copyright, the Court of Appeal found that the design drawings were in fact a substantial reproduction of the Desa machine and/or the other prior art documents. Thus, copyright does not subsist in the Copyrighted Works due to lack of originality.

There was, however, the important issue of the effect of sections 13A and 13B of the Copyright Act 1987 and their applicability in relation to copyright infringement of a design document embodying a design for anything other than an artistic work. This is often a difficult issue for practitioners and academics alike and it was hoped that the Court of Appeal would have provided some clarity on this issue with conflicting positions taken by the parties.

Unfortunately, the Court of Appeal did not address this issue and took the position that further establishment and determination of facts were required.

Appeal to the Federal Court

YKL subsequently applied for leave to appeal to the Federal Court. On 27 January 2021, the Federal Court granted leave to appeal on the following questions:

- Where a defendant invokes section 14(2)(a) of the **Patents Act 1983** to raise the issue of anticipation by prior art to dispute the novelty of the plaintiff's patent, whether the defendant is obliged by law to plead with specificity the particulars of prior art relied upon by him to defeat the registered patent?
- In a patent trial where anticipation is raised to challenge the validity of a patent, whether a defendant should be allowed to rely on prior art documents and/or prior use which were not specifically pleaded in its attempt to invalidate the patent?
- Whether a patent appeal had miscarried where the appellate court had disregarded a prior decision of the appeal court itself in the same case to disallow reliance on an item of alleged prior art which the High Court had loyally followed subsequently by disregarding the said item in arriving at its decision?
- Can section 14(2)(a) of the **Patents Act 1983** on public disclosure of a prior art apply where there has been an unauthorised disclosure to a third party of the prototype of the machine invented by the plaintiff?
- Whether a defendant could invalidate a patent on the ground of anticipation pursuant to section 14(2)(a) of the **Patents Act 1983** where it is a case of an unauthorised disclosure of the plaintiff's prototype machine installed on a private property for experimentation by the plaintiff?
- If Claim 1 of a patent is declared to be invalid, is there a legal duty for the Court to examine each and every dependent claim and decide individually whether the dependent claim is valid and thereafter to decide whether any of the dependent claims has been infringed?
- Having regard to the concept of originality in copyright law which is distinct from the concept of novelty in patent law, whether the design drawings of an article would independently be eligible for copyright protection under section 7(2)(2A) and (4) of the **Copyright Act 1987** as artistic works?

At the time of writing, this case is pending appeal to the Federal Court.

Conclusion

The Court of Appeal discussed several issues in its decision that are of great interest to IP owners and practitioners. Therefore, clarification by the Federal Court on these points is much anticipated.

Moreover, an important practical takeaway from this case is the point on the disclosure of the prototype. Substantial resources are often expended in obtaining the grant of a patent and it is important to protect the patent from being vulnerable to invalidation attacks. Future patentees should thus conduct regular reviews to ensure necessary safeguards are in place during the development process of a patent.

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Please contact us for further information on intellectual property law matters.

Endnotes:

[1][2020] 1 LNS 1072.

Tax & Revenue

The Coca-Cola Company & Subsidiaries, Petitioner v Commissioner of Internal Revenue, Respondent

In this article, Sharon Lau Foong Yee reviews the decision of the United States Tax Court in the case of the Coca-Cola Company & Subsidiaries, Petitioner v Commissioner of Internal Revenue, Respondent[1].

Introduction

In November 2020, the United States Tax Court ("USTC") decided in favour of the Internal Revenue Service ("IRS") against The Coca-Cola Company ("Coca-Cola") on certain transfer pricing issues, resulting in an additional tax payment of more than USD 3.3 billion.

Facts

The Coca-Cola Company and its US subsidiaries (collectively referred to as the "Petitioner") have foreign manufacturing affiliates ("Supply Points") which sold and distributed concentrate to hundreds of Coca-Cola bottlers in Europe, Africa and Asia ("Bottlers"). The Supply Points produced concentrate of syrups, flavourings and other ingredients used in the production of the Petitioner's beverages.

To enable the Supply Points to manufacture and sell concentrate, the Petitioner licensed its intangible property which includes brand names, logos, trademarks, secret formulas, proprietary anufacturing processes and logos ("Petitioner's IP") to the Supply Points.

The Petitioner filed consolidated federal income tax returns for tax years 2007, 2008 and 2009 by reporting income from its Supply Points using the "10-50-50" profit split method[2], an apportionment method as agreed between the Petitioner and the IRS in an agreement executed in 1996 which resolved the Petitioner's tax liabilities for tax years 1987 to 1995 ("1996 closing agreement").

Although the 1996 closing agreement did not cover subsequent tax years, the Petitioner continued using the same transfer price arrangement in subsequent tax years on the assumption that it provided tax certainty for these transactions in future years.

However, for the tax years 2007, 2008 and 2009, the IRS took the position that the "*10-50-50*" profit split method did not reflect the arm's length pricing on the basis that it overcompensated the Supply Points and undercompensated the Petitioner for the use of the Petitioner's invaluable IP.

The IRS reallocated income to the Petitioner using a comparable profits method ("CPM") by determining the average return on operating assets ("ROA") for a group of independent Coca-Cola Bottlers which the IRS deemed comparable, on the basis that the Bottlers and the Supply Points:

- operated in the same industry;
- faced similar economic risks;
- had similar contractual relationships with the Petitioner;
- used the Petitioner's IP; and
- shared the same income stream, that is, sale of the Petitioner's beverages.

Accordingly, the IRS made transfer pricing adjustments which increased the Petitioner's aggregate taxable income by more than USD 9 billion.

Dissatisfied, the Petitioner challenged the IRS and argued, among others, that:

- the IRS acted arbitrarily abandoning the "*10-50-50*" profit split method, having acquiesced to the use of that method during five prior audit cycles spanning a decade;
- the independent Coca-Cola Bottlers are not comparable to the Supply Points;
- a comparable uncontrolled transaction ("CUT") model and a residual profit split method ("RPSM") are the best methods for determining the Supply Points' true economic income;
- alternatively, if a comparable Bottlers ROA is applied to the Supply Points, the Petitioner contends that each Supply Point's asset base should be increased to reflect the value of the Supply Points' supposed "*marketing intangibles*" or "*IP associated with trademarks*" allegedly created when the Supply Points financed consumer advertising in foreign markets;
- the Bottlers, by comparison, are "*marketing-light*" businesses that operate on a different level of the market; and
- the Supply Points owned (in substance, if not in form) local rights to the Petitioner's valuable brands and should enjoy supranormal returns as long-term licensees.

Decision of the USTC

The USTC held in favour of the IRS based, among others, on the following reasons:

- a CPM analysis was appropriate given the nature of the assets owned and the activities performed by the Petitioner;
- the IRS had selected appropriate comparable parties. The Bottlers are comparable parties as the functions performed by the Bottlers resembled those performed by the Supply Points, except that the Bottlers performed those functions at a greater scale. The Bottlers' contracts with the Petitioner also afforded them a high degree of territorial exclusivity. Coca-Cola's agreements with most Bottlers included a geographically defined market in which the Bottlers were granted exclusive rights to produce and sell beverages;
- the IRS computed and applied the ROA using reliable data, assumptions and adjustments;
- the Bottlers in many respects enjoyed an economic position superior to that of the Supply Points, which would justify a relatively higher return for the Bottlers;
- where controlled transactions involve high-value intangibles, the most reliable transfer pricing method is often one which avoids any direct valuation of those intangibles;
- this case is particularly susceptible to a CPM analysis as the Petitioner owned virtually all the intangible assets needed to produce and sell Coca-Cola's beverages;
- the Petitioner was the counterparty to all Bottler agreements, giving it ultimate control over the distribution system for Coca-Cola's beverages;
- the Supply Points owned few (if any) valuable intangibles;
- the Supply Points' agreements with the Petitioner explicitly acknowledged that Coca-Cola owned Coca-Cola's trademarks, giving the Supply Points only a limited right to use the Petitioner's IP in connection with manufacturing and distributing concentrate; and
- notwithstanding that the Supply Points' agreements with the Petitioner granted them the rights to produce and sell concentrate, these agreements were terminable by the Petitioner at will and no Supply Point enjoyed any form of territorial exclusivity. No Supply Point was granted any right, express or implied, to guaranteed production of concentrate.

Conclusion

The USTC ultimately ruled that the 1996 closing agreement did not prevent the IRS from challenging the arm's length nature of the "10-50-50" profit split method in the subsequent tax years under US laws. It is reported that the Petitioner is appealing against the decision of the USTC.

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Endnotes:

[1]155 T.C. No. 10 Docket No. 31183-15, United States Tax Court.

[2]This method permitted the Supply Points to retain profit equal to 10% of their gross sales, with the remaining profit being split 50%-50% with petitioner.

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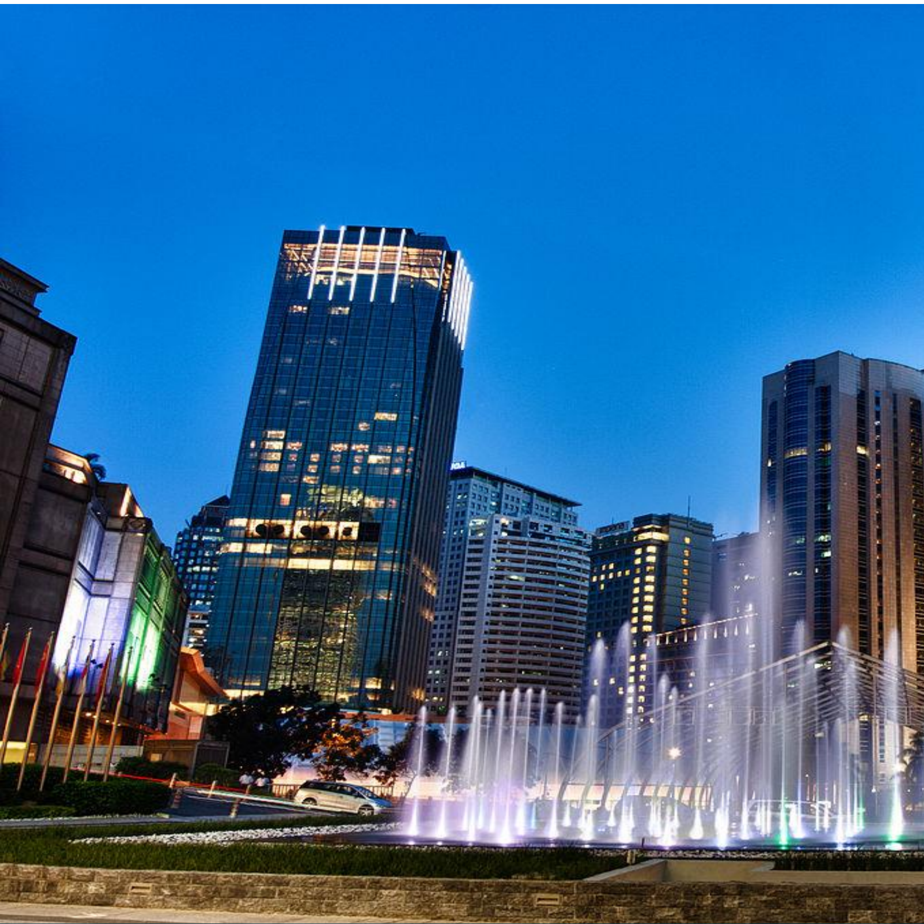

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