



Shearn Delamore & co.

# Newsletter

Volume 19 No 4 December 2021

---

**Shearn Delamore & Co**

**7<sup>th</sup> Floor**

**Wisma Hamzah Kwong-Hing,**

**No 1, Leboh Ampang**

**50100, Kuala Lumpur, Malaysia**

**T: 603 2027 2727**

**F: 603 2078 5625**

**E: [info@shearndelamore.com](mailto:info@shearndelamore.com)**

**W: [www.shearndelamore.com](http://www.shearndelamore.com)**

## FRONT PAGE FOCUS

# Employment Law

## An examination of the case of **Telekom Research and Development Sdn Bhd v Ahmad Farid Bin Abdul Rahman** by the Court of Appeal

In this article, Wong Kian Jun looks at a recent case relating to ground of misconduct for dismissal.

### Introduction

The Industrial Court had ruled that the company, Telekom Research and Development Sdn Bhd (“Telekom”), had proven the misconduct against a former employee, the claimant Ahmad Farid Bin Abdul Rahman (“Ahmad”), and that the dismissal was justified.

However, the High Court quashed the decision of the Industrial Court when it accepted Ahmad’s contention that he had submitted the claim to Telekom by an “*innocent mistake*”.

Telekom appealed against the decision of the High Court and the Court of Appeal overturned the High Court’s decision and affirmed the Industrial Court’s decision. Recently, the Federal Court dismissed Ahmad’s application for leave to appeal to the Federal Court.

### Facts

Ahmad was dismissed by Telekom as he had submitted a false dental claim when in fact he knew the claim was for the purchase of spectacles amounting to RM488.00. Ahmad had contended that

## Contents

<b>Employment Law</b> .....	<b>2</b>
<i>An examination of the case of <b>Telekom Research and Development Sdn Bhd v Ahmad Farid Bin Abdul Rahman</b> by the Court of Appeal</i> .....	
<b>Corporate/M&amp;A</b> .....	<b>5</b>
<i><b>Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) v Tengku Dato’ Ibrahim Petra bin Tengku Indra Petra: Indemnity for Directors in the Company’s Constitution</b></i> .....	
<b>Dispute Resolution</b> .....	<b>9</b>
<i>The High Court rejects a challenge against applying a vaccination programme for teenagers — <b>Clarence Ng Chii Wei (Mendakwa Melalui Wakil-Wakil Litigasi Ng Kean Pong Dan Wong Shiau Lan) v Menteri Kesihatan [2021] MLJU 2198 (“Clarence Ng Chii Wei”)</b></i> .....	
<b>Financial Services</b> .....	<b>13</b>
<i>Budget 2022 — Stamp Duty Exemption for Loan/Financing Agreements</i> .....	
<b>Intellectual Property</b> .....	<b>16</b>
<i><b>Qi Sheng Sdn Bhd v Foong Yit Meng [2021] MLJU 269</b></i> .....	
<b>Tax &amp; Revenue</b> .....	<b>20</b>
<i>Tax Highlights of Malaysia’s Budget 2022</i> .....	

he had purportedly made a mistake when he submitted the claim and was unaware of it.

Ahmad further contended that he had no intention to cheat as he had uploaded a copy of the receipt for the purchase of his new spectacles. The Court of Appeal held that the Industrial Court had duly considered Ahmad's defence when it had evaluated the following evidence:

- That under Ahmad's employment terms, he was entitled to submit dental claims but not optical claims.
- Ahmad was fully aware that he was not eligible to claim for the purchase of spectacles and despite this proceeded to claim under the dental claim.
- There was in fact no option for Ahmad to make a claim for optical expenses in Telekom's e-claim system.
- Ahmad had to go through a series of step-by-step processes prior to submitting the dental claim.
- Prior to the submission of the claim, Ahmad must agree to the disclaimer which states, amongst others, that disciplinary action could be taken by Telekom in the event the claim was found to be false.
- In the submitted claim, Ahmad made a note stating "*Remark — New Optical Lens*", thus indicating that he understood the claim was to get reimbursed for his purchase of a new pair of spectacles.
- That Ahmad falsely declared in the e-Claim system that the claim entailed dental "*extraction*" and "*filing*".

Based on the above, the Industrial Court and the Court of Appeal were of the view that Ahmad understood he was not eligible to claim for the purchase of spectacles but nevertheless proceeded to make a claim for it under the pretext of a claim for dental treatment. As a result of this, Ahmad could not later claim that he was unaware and/or mistaken when he submitted the claim.

Ahmad also contended that he was purportedly informed by a colleague that he was eligible to claim for the purchase of spectacles; however, the colleague was not called to testify. This also clearly ran contrary to the fact that there was no option to claim for optical in Telekom's e-claim system.

The Court of Appeal made an important finding when it held that Ahmad's contention that his claim was approved by his superior and the finance department, whether the payment was disbursed to Ahmad and whether Telekom suffered any financial loss were irrelevant considerations because the primary issue to be determined is whether he committed the misconduct.

In considering whether the punishment of dismissal was proportionate to the misconduct committed, the Court of Appeal held that the seriousness of the misconduct outweighs the length of service, whether Ahmad had a clean record prior to the misconduct and the amount involved in the false claim.

## Conclusion

Among the main points from the decision of the Court of Appeal are:

- The fact that a claim has been approved and/or disbursed does not stop an employer from acting against the employee if it was discovered later the claim was false;
- Long service and a clean disciplinary record do not prevent an employer from taking disciplinary action against the employee; and
- The submission of a false claim is a serious employment misconduct which will warrant dismissal from employment.

## **WONG KIAN JUN**

### **EMPLOYMENT & ADMINISTRATIVE LAW PRACTICE GROUP**

Please [contact us](#) for further information regarding employment & administrative law matters.



## Corporate/M&A

### Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra: Indemnity for Directors in the Company's Constitution

A case note by Cheong Jian Lock.

#### Introduction

Could the provisions of a company's constitution bind third parties such as the company's directors without the incorporation of such provisions in the terms of employment of its directors?

The recent Court of Appeal decision of **Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra**<sup>1</sup> has provided further clarity on the issue pertaining to whether a company's constitution alone can give rise to an indemnity from a company in favour of its directors or former directors.

#### Background

The respondents in this were four former directors of Perdana Petroleum Berhad ("Perdana") who had filed a claim to be indemnified by Perdana in respect of their legal fees and expenses in defending two separate legal proceedings, **Shamsul Bin Saad (Suing As Minority Shareholder of Petra Perdana Berhad and Bringing This Action for The Interest of Petra Perdana Berhad) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra**<sup>2</sup> ("Case 1") and **Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra**<sup>3</sup> ("Case 2"), which were alleged to have been resolved in their favour.

The claims for indemnity by the former directors depend on the enforceability of Article 170 of Perdana's Articles of Association ("Article 170") and section 289 of the **Companies Act 2016** ("CA 2016").

Article 170 provides as follows:

*"INDEMNITY*

*170. Every director, managing director, agent, auditor, secretary, and other officer for the time being of the Company shall be indemnified out*

*of the assets of the Company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the court in respect of any negligence, default breach of duty or breach of trust.”*

## Case 1

Case 1 relates to a derivative action by the minority shareholder of Perdana against the former directors, but the action was dismissed by the Court. This is because the respondents were removed from their position as directors of Perdana after the commencement of the action. Thus, there was no longer a basis for maintaining the derivative action and the action was held not “*suitable in fact and law*”.

Subsequently, the former directors had filed an action to be indemnified by Perdana for the legal expenses and costs incurred in Case 1<sup>4</sup>. However, this action too was dismissed by the Court on the ground that the former directors were not found to have been innocent of the allegations in Case 1 since there was no judgment in relation to the issue of liability for the alleged breaches of duty as directors. Therefore, the Court held that the conditions of Article 170 were not met and the former directors could not be indemnified in the circumstances.

## Case 2

Case 2 was Perdana’s action against the first, third and fourth respondents for breach of duties as directors. Case 2 was concluded with the dismissal by the Court of the action against the third and fourth respondents, but the Court found the first respondent negligent and ordered the first respondent to pay RM192,780 to Perdana.

The High Court in the present case had allowed the respondents’ claim for indemnity, hence, the appeal<sup>5</sup>. The issue that arose was whether Article 170 was incorporated, either expressly or impliedly, as a term in the contract of appointment of the respondents as directors of Perdana.

## Decision by the Court of Appeal

The Court of Appeal dealt with the issue of whether Article 170 was enforceable by laying out the history of the legal status of memoranda and articles of association, which were the former terms to refer to the constitution.

The Court of Appeal held that memoranda and articles of association of a company constitute a contract between the company and its members. Accordingly, the provisions of the articles of association do not form the terms in a contract between a company and a third party (that is, persons other than the members of the company) such as directors of the company.

Furthermore, the Court of Appeal held that there is no reason as to why the provisions of an article of association could not be incorporated into a contract between the company and a third party, be it a director or any other party. The provisions of the articles of association may be incorporated into such contracts, expressly or impliedly, and the Court of Appeal noted that comparatively little is required to incorporate a term in the articles of association that provides indemnity in appointing an auditor or director.

Nevertheless, it is required that the article in question be incorporated in such contracts. The Court of Appeal further held that the mere fact of appointment of officers of the company does not automatically result in the incorporation of specific provisions of the articles of association into the terms of their appointment. Whether there was sufficient incorporation of articles of association in such contracts depends on the facts and circumstances of the case.

On the present facts of the case, the Court of Appeal noted that there was nothing pertaining to the circumstances of the former directors' appointment as directors of Perdana. No evidence was tendered on the existence of any written or oral contract of appointment or employment as well as evidence whether their appointments were in writing or evidenced in writing.

In essence, the former directors' attempt to enforce Article 170 relied solely on the fact that they were the former directors of Perdana as there was no reliance as to the way Article 170 could have been incorporated in the terms of their appointment or any contractual basis. This was deemed insufficient by the Court of Appeal to hold that Article 170 was incorporated in the appointment of the former directors.

Lastly, section 289 of the CA 2016 which is in relation to indemnity for officers and auditors was also relied on by the former directors in their claim to be indemnified. However, the Court of Appeal held that the provisions of section 289 of the CA 2016 are merely permissive. The provisions serve only to authorise companies to indemnify their officers or auditors and do not on their own afford any statutory right to directors or auditors of companies such that it can be the sole basis for a claim of indemnity.

Consequently, the Court of Appeal allowed the appeal and set aside the decision of the High Court.

## Conclusion

This case maintains the position that the constitution of a company is a contract between a company and its members. Third parties to any contracts with a company, be it directors or other officers of the company, should take heed that provisions of the constitution should be incorporated in such contract, whether expressly or impliedly, before such third party may rely on them.

## **CHONG JIAN LOK CORPORATE/M&A PRACTICE GROUP**

Please [contact us](#) for further information regarding corporate/M&A matters.

### *Endnotes:*

- <sup>1</sup> **Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra** [2021] 6 MLJ 663.
- <sup>2</sup> **Shamsul Bin Saad (Suing as Minority Shareholder of Petra Perdana Berhad and Bringing This Action for The Interest of Petra Perdana Berhad) v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra** [2010] MLJU 837.
- <sup>3</sup> **Petra Perdana Bhd v Tengku Dato' Ibrahim Petra bin Tengku Indra Petra** [2014] 11 MLJ 1.
- <sup>4</sup> **Tengku Dato Ibrahim Petra bin Tengku Indra Petra v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd)** [2013] 8 MLJ 280.
- <sup>5</sup> **Tengku Dato' Ibrahim Petra bin Tengku Indra Petra & v Perdana Petroleum Bhd (formerly known as Petra Perdana Bhd)** [2021] 7 MLJ 439.



## Dispute Resolution

The High Court rejects a challenge against applying a vaccination programme for teenagers — **Clarence Ng Chii Wei (Mendakwa Melalui Wakil-Wakil Litigasi Ng Kean Pong Dan Wong Shiau Lan) v Menteri Kesihatan [2021] MLJU 2198** (“Clarence Ng Chii Wei”)

**A case note by Wong Jia Jing.**

### Introduction

In September 2021, Malaysia implemented the National Covid-19 Immunisation Programme which aims to vaccinate 3.2 million teenagers aged 12 to 17 (“Program”)<sup>1</sup>.

However, vaccine hesitancy has been an issue as illustrated in the recent case of **Clarence Ng Chii Wei**, where 18 teenagers (“Applicants”) filed judicial review proceedings in the Penang High Court against the Minister of Health (“Minister”), Director General of Health (“DG”), Ministry of Science, Technology and Innovation and the Government of Malaysia (collectively, “Respondents”).

In issue was the DG’s circular dated 12 August 2021 (“Circular”) directing the implementation of the Program, and the Minister’s Guideline dated 13 August 2021 naming Comirnaty (Pfizer-BioNTech) (“Comirnaty”) as the vaccine of choice for the Program (collectively, “Decision”).

The Decision was challenged on the basis that it is illegal or irrational. Among the grounds relied on were the infringement of the Applicants’ fundamental right to personal autonomy and a possible alternative treatment using Ivermectin<sup>2</sup>.

The Applicants accordingly sought to:

- quash the Decision and stay the Program pending the completion of Ivermectin clinical trials; and
- compel the Respondents to:
  - implement an Ivermectin program; or

- alternatively, provide a comprehensive disclosure of Comirnaty risks when obtaining consent, ensure that non-vaccinated teenagers are not discriminated, and conduct post-mortems on Comirnaty-related deaths.

The Court did not grant leave for judicial review and held, among others, that the Decision is “*not justiciable*”<sup>3</sup> and “*no one’s personal autonomy is being infringed*”<sup>4</sup>.

## Issues before the High Court

The Applicants argued that they had *locus standi* as:

- the Decision infringed their fundamental right to personal liberty/autonomy under Articles 5(1) and 8(1) of the Federal Constitution; and
- the subject matter falls within the ambit of public interest litigation.

The Respondents on the other hand argued that leave should not be granted as the Decision and the action sought by the Applicants are based on Government policy considerations and management prerogatives and are not justiciable.

## The Court’s findings and decision

The Court considered the competing arguments and held as follows:

- While there is a tendency to assume that the Court is normally not equipped to make a competent assessment of decisions born out of Government policy and management prerogative, that is not to say that all such decisions are non-justiciable. The decisions must still undergo the test of justiciability on a case-to-case basis<sup>5</sup>.
- While the Court has a role to check unconstitutional decisions of the executive or legislative arm of Government<sup>6</sup>, that does not mean that all such decisions are justiciable.
- This is especially so when the impugned decision is arguably non-justiciable, namely a matter that the Court is ill-suited to adjudicate upon, has restrained itself from interfering with or is more suitably left to the executive or legislative arm of Government, including a decision born out of Government policy and management prerogative<sup>7</sup>.

- When a Court considers the justiciability of an impugned decision, one of the factors considered is the gravity of the offence caused by that decision. If it infringes upon fundamental rights, the Court will be more amenable to judicial intervention<sup>8</sup>.

The Court relied on the English Court of Appeal's decision in **Dolan v Secretary of State for Health and Social Care**<sup>9</sup>, which rejected an appeal against the dismissal of an application for leave to challenge the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the British Government's decision to close schools and educational establishments in response to the pandemic<sup>10</sup>.

The Court of Appeal held that the measures taken by the British Government to combat the pandemic are a matter of political judgment about medical and scientific issues for the Government and are not suited to determination by the Courts<sup>11</sup>.

Therefore, the Court held that the principle of non-justiciability is not limited to political, social or economic policies to the exclusion of medical and scientific opinions<sup>12</sup>.

The Court also held that the Program is entirely voluntary and, therefore, the Decision does not infringe upon the Applicants' personal autonomy<sup>13</sup>.

Regarding the Circular and the Malaysian Medical Council guideline: *Consent for Treatment of Patients by Registered Medical Practitioners* ("Guideline") relied on by the Applicants, the Court held as follows:

- The Circular and Guideline do not impose any legal public obligation on the Respondents to do any of the acts sought by the Applicants, nor vest any legal right in the Applicants to enforce those acts<sup>14</sup>.
- The finer points, such as what and how to make disclosures, are matters of discretion and management prerogative that are not justiciable<sup>15</sup>.
- As for the Applicants' fear of possible discrimination by barring non-vaccinated teenagers from attending school, they should challenge such decisions as and when they materialise<sup>16</sup>.
- The implementation of the Ivermectin program is hypothetical and abstract, as the Ivermectin clinical trial has yet to be completed<sup>17</sup>.

The Court accordingly refused leave to proceed with judicial review.

## Conclusion

The Court made the following telling observation<sup>18</sup>:

*“The crisis is unprecedented and not static. As the medical and scientific communities learn more about the virus — how they mutate into more infectious and transmissible variants — so too are the measures to combat the virus evolving.”*

It is therefore clear that while the Government’s decisions in response to the pandemic may be challenged if justiciable, the bar for a successful challenge will be high.

## **WONG JIA JING DISPUTE RESOLUTION PRACTICE GROUP**

Please [contact us](#) for further information regarding dispute resolution matters.

### *Endnotes:*

<sup>1</sup> See <https://www.theedgemarkets.com/article/malaysias-covid19-vaccination-rollout-teens-among-worlds-fastest-says-khairi>.

<sup>2</sup> See paragraph [6] of the Grounds of Judgment.

<sup>3</sup> See paragraph [67].

<sup>4</sup> See paragraph [39].

<sup>5</sup> See paragraph [45].

<sup>6</sup> See paragraph [43].

<sup>7</sup> See paragraph [47].

<sup>8</sup> See paragraph [48].

<sup>9</sup> [2020] EWHC 1786.

<sup>10</sup> See paragraph [37].

<sup>11</sup> See paragraph [54].

<sup>12</sup> See paragraph [55].

<sup>13</sup> See paragraphs [39] and [52].

<sup>14</sup> See paragraph [61] to [63].

<sup>15</sup> See paragraph [63].

<sup>16</sup> See paragraph [64].

<sup>17</sup> See paragraph [65].

<sup>18</sup> See paragraph [26].

# Financial Services

## Budget 2022 — Stamp Duty Exemption for Loan/Financing Agreements

**In this article, Tang Jia Yi discusses the stamp duty exemption related to loan or financing agreements introduced in Budget 2022.**

### Introduction

On 29 October 2021, the Finance Minister, Tengkul Zafrul Aziz, announced Malaysia's Budget 2022 ("Budget") in Parliament, which builds upon three key pillars — strengthening recovery, building resilience and driving reforms. In line with this, various initiatives and measures have been introduced in the Budget, one of them being stamp duty exemption.

This article will be looking at stamp duty exemption that is related to loan or financing agreements, that is, the extension of stamp duty exemption for rescheduling and restructuring transaction documents and the stamp duty exemption on loan or financing agreements for peer-to-peer ("P2P") financing.

### Extension of stamp duty exemption for rescheduling and restructuring transaction documents

Currently, under the 2020 Economic Stimulus Package, the Government has, pursuant to the Stamp Duty (Exemption) (No. 2) Order 2020, the Stamp Duty (Exemption) (No. 2) 2020 (Amendment) Order 2021 and the Stamp Duty (Exemption) (No. 11) Order 2021 (collectively, "Orders") which were gazetted on 21 May 2020, 25 January 2021 and 15 September 2021 respectively, provided full stamp duty exemption on instruments of loan or financing agreement relating to the restructuring or rescheduling of a loan or financing between a borrower or customer and a financial institution executed between 1 March 2020 and 31 December 2021. The exemption is subject to the following conditions:

- the original loan or financing agreement has been duly stamped under Item 22 or 27 of the First Schedule of the **Stamp Act 1949**; and
- the restructuring or rescheduling loan or financing agreement does not contain the element of additional value to the original amount of loan or financing under the existing instrument of loan or financing agreement<sup>1</sup>.



Under the Orders, “*financial institution*” has the same meaning as that assigned to “*banker*” in section 2 of the **Stamp Act 1949** and “*restructuring or rescheduling*” has been defined in the Orders as:

*“Any modification made to the existing repayment terms and conditions of the loan or financing agreement pursuant to a concession provided by the financial institution due to the inability of the borrower or customer to comply with the existing repayment schedule consequent to deteriorating financial conditions.”*

One of the measures introduced under the Budget is the extension of stamp duty exemption on restructuring or rescheduling of loan or financing agreements for one year for restructuring or rescheduling loan or financing agreements executed between 1 January and 31 December 2022, with the intention to reduce the cost of borrowing to borrowers who restructure or reschedule loan/financing.

This measure was gazetted on 6 December 2021 under the Stamp Duty (Exemption) (No. 11) 2021 (Amendment) Order 2021 which will come into operation on 1 January 2022.

## Stamp Duty Exemption on loan or financing agreements for P2P Financing

P2P financing was introduced in Malaysia in 2016. Through this innovative form of fundraising, Micro-, Small- and Medium-Enterprises (“MSMEs”) are able to raise capital in the form of loan or financing directly from a pool of investors via online P2P platforms registered with the Securities Commission Malaysia (“SC”) under the SC’s Guidelines on Recognised Markets. Similar to a loan or financing granted by financial institutions, the P2P investors will receive interest payment and repayment of the capital lent to MSMEs.

P2P financing is aimed to assist the MSMEs, especially start-up and micro enterprise which are likely to face difficulties in obtaining financing or loan facilities from financial institutions. It simplifies the financing process for MSMEs while providing alternative investment opportunities for investors.

Under the existing stamp duty regime in Malaysia, every successful fundraising by the MSMEs through the P2P platform is subject to stamp duty on the loan or financing agreement at the rate between 0.05% to 0.50%.

It is now proposed under the Budget that stamp duty exemption be given on P2P loans or financing agreements between MSMEs and investors which is executed between 1 January 2022 and 31 December 2026<sup>2</sup>.

This is one of the few measures introduced to help MSMEs recover from the impact faced during the pandemic period. The proposed stamp duty exemption would facilitate broader access by MSMEs to alternative financing and reduce their financing cost.

## Conclusion

During the pandemic, businesses were severely impacted due to the prolonged Movement Control Order imposed by the Government to combat the rising cases of COVID-19. With COVID-19 vaccination, things are finally slowly going back to normal.

It is hoped that the proposed extension and granting of stamp duty exemption on loan or financing agreements introduced in Budget 2022 will <http://www.shearndelamore.com/practice-areas/financial-services/> assist the recovery of businesses and strengthen Malaysia's economic resilience.

## **TANG JIA YI FINANCIAL SERVICES PRACTICE GROUP**

Please [contact us](#) for further information regarding financial services matters.

### *Endnotes:*

<sup>1</sup> Pursuant to paragraph 2(b) of the Stamp Duty (Exemption) (No. 2) 2020 (Amendment) Order 2021 and paragraph 2(3) of the Stamp Duty (Exemption) (No. 11) Order 2021, any interest or profit accrued from the restructured or rescheduled payments is not considered to be an element of additional value to the original amount of loan or financing.

<sup>2</sup> At the time of writing, the proposed stamp duty exemption is yet to be gazetted.

# Intellectual Property

## Qi Sheng Sdn Bhd v Foong Yit Meng [2021] MLJU

269

**In this article, Raghuram Supramaniam explores the decision of the High Court in the above case which discusses the requirements of an “aggrieved person” under the new Trademarks Act 2019.**

### Background facts

The second plaintiff is the registered proprietor of the “Goco Comfort” and “Goco” trademarks under registration nos. 96003868 and 08008365 and the applicant for pending trademark application no. 2018015831, whilst the first and third plaintiffs were authorised by the second plaintiff to use the said Goco Comfort and Goco trademarks. The plaintiffs (“Qi Sheng”) claimed that the Goco Comfort and Goco trademarks are well-known trademarks in the footwear industry.

The first defendant, who was the director of the second defendant, was the registered proprietor of the “CONVERT” trademarks under registration nos. 05000826 and 2016007852. The defendants (“Foong Yit Meng”) also had registrations for the said mark in other classes in Malaysia as well as in Singapore and the Philippines.

Qi Sheng filed an action for the cancellation and expungement of Foong Yit Meng’s trademark registrations from the Register of Trademarks pursuant to section 47 of the **Trademarks Act 2019** (“TMA”). Qi Sheng relied on the following grounds:

- the registration of Foong Yit Meng’s CONVERT trademarks was obtained by fraud and/or misrepresentation;
- the use of the trademarks is likely to deceive or cause confusion to the public;
- the trademarks are not distinctive; and
- Qi Sheng is the person aggrieved by the registration of the said trademarks.

Amongst others, Qi Sheng argued that Foong Yit Meng’s trademark registrations were obtained by fraud, deception and/or misrepresentation, because the

stylised “C” in the trademark registration no. 05000826 for “CONVERT” was conspicuously similar to the stylised letter “C” in the well-known Camel Active mark and that the “CONVERT” trademarks were also confusingly similar to another well-known mark “Converse”.

Qi Sheng further pleaded that Foong Yit Meng had copied the Camel Active and Converse marks with an intention to pass off its products as those originating from the Camel Active and Converse marks, both of which were internationally well-known brands.

## Decision

In dismissing Qi Sheng’s action, the High Court held that the question of whether Qi Sheng is an “*aggrieved person*” under section 47 of the TMA must be first answered in the affirmative before the Court can go on to consider the substantive grounds for cancellation and expungement.

If the answer to the question is in the negative, the Court will dismiss the action without evaluating the merits. Essentially, if Qi Sheng fails to prove that it is an “*aggrieved person*” and/or it has *locus standi* to commence the cancellation and expungement action, Qi Sheng’s action will fall altogether regardless of whether the trademark registration in dispute ought to be cancelled and expunged.

In the present case, the Court found, amongst others, that Qi Sheng was not an aggrieved person within the meaning of section 47 of the TMA, and there was no necessity for the Court to consider the substantive grounds raised by Qi Sheng for the cancellation and expungement of Foong Yit Meng’s registrations.

By referring to the decisions of **Re Arnold D Palmer**<sup>1</sup>, **McLaren International Ltd v Lim Yat Meen**<sup>2</sup> and **Mesuma Sports Sdn Bhd v Majlis Sukan Negara (Pendaftar Cap Dagangan Malaysia, interested party)**<sup>3</sup>, the Court held that a Plaintiff in a trademark cancellation and expungement action must show a genuine and present intention to use his trademark in the course of trade and/or his trademark may be deemed identical or similar to the registered trademark sought for cancellation, in order to qualify as an “*aggrieved person*”. The High Court also held that the person seeking to cancel and expunge a registered trademark must not fall within the category of “*busy-bodies*”.

The Court went on to state that for Qi Sheng to “*pass the test*” and being recognised as an “*aggrieved person*”, they must first possess the *locus standi*, and secondly, not fall within the category of “*busy-bodies*”.

Qi Sheng’s main contention here was that Foong Yit Meng’s CONVERT trademarks contravened Camel Active and Converse marks, but Qi Sheng had

nothing to do, either legally, economically, socially, personally or through any form of business connection or otherwise, with these trademarks or the owners of those trademarks. Qi Sheng therefore lacked the legal basis to start the cancellation and expungement proceeding against Foong Yit Meng, as Qi Sheng was not an aggrieved persons within the meaning of TMA. Qi Sheng was a mere busy-body.

In concluding that Qi Sheng did not possess the *locus standi* but instead was a mere “*busy-body*”, the Court considered several factors including the following:

- There was an earlier *ex parte* application by Foong Yit Meng for, among others, declaratory orders pursuant to sections 8, 9(1) and 9(2) of the *Trade Description Act 2011*, that the use of the Goco and Goco Comfort trademarks by any third party in relation to footwear and other goods that were not from Foong Yit Meng, was a false trade description for the purposes of the **Trade Descriptions Act 2011**. Following the Trade Description Order (“TDO”) that was granted in favour of Foong Yit Meng, a raid was carried out at Qi Sheng’s premises and goods bearing the infringing marks were seized. Qi Sheng thereafter filed an action to set aside the *ex parte* TDO, but this was dismissed by the High Court. Qi Sheng subsequently had appealed to the Court of the Appeal. Qi Sheng was estopped from challenging the validity of Foong Yit Meng’s “CONVERT” trademarks as it had already raised the same challenge in its application to set aside the TDO, in which they have failed.
- As Qi Sheng’s trademarks had been found to have infringed and/or passed off the Foong Yit Meng’s trademarks through the TDO, Qi Sheng cannot seek a cancellation and expungement order now against Foong Yit Meng’s trademarks, which were the very subjects of the TDO proceedings. It will be in direct breach of public policy to agree that Qi Sheng is an “*aggrieved person*” considering the above facts.
- Qi Sheng failed to fulfil the statutory requirements of section 47 of TMA as Qi Sheng clearly had a delusion that it was an “*aggrieved person*”, having been aggrieved by the decision in the TDO proceeding and the decision of this court in dismissing its application to set aside that order.
- The actual proprietors of the Camel Active and Converse trademarks, who were parties unrelated to these proceedings, had not taken any issue with Foong Yit Meng’s “CONVERT” trademarks.

Section 47 of the TMA retains the requirement of an “*aggrieved person*” of its precursor — section 45 of the repealed Trade Marks Act 1976. However, just as many other provisions of the TMA, this provision *vis-à-vis* the requirement of an



“*aggrieved person*” was untested before the courts until now, which appears to have shed a good amount of light on the matter.

## Conclusion

Whilst any third party may file a cancellation and expungement action against a registered trademark, such an action may only be commenced by a party who has been genuinely aggrieved by the existence of the registered trademark. The party seeking the cancellation and expungement must possess the *locus standi* and/or must not be a mere a “*busy-body*”, in the words of the Court in this case. The judgment indisputably provides good direction to the IP community, as well as traders intending to cancel or expunge any registered trademark that conflicts with theirs.

## **RAGHURAM SUPRAMANIAM INTELLECTUAL PROPERTY PRACTICE GROUP**

Please [contact us](#) for further information regarding intellectual property law matters.

### *Endnotes:*

<sup>1</sup> [1987] 2 MLJ 681.

<sup>2</sup> [2009] 4 CLJ 749.

<sup>3</sup> [2015] 6 MLJ 46.

# Tax & Revenue

## Tax Highlights of Malaysia's Budget 2022

**In this article, Jeevitha Thurai Rathnam sets out some key highlights from Malaysia's 2022 Budget and the Finance Bill 2021.**

### Introduction

On 6 November 2021, the Malaysian Minister of Finance, YB Senator Tengku Datuk Seri Utama Zafrul Tengku Abdul Aziz, unveiled the Malaysian Budget 2022 ("**the Budget**") themed "*Keluarga Malaysia, Makmur Sejahtera*" ('A Prosperous Malaysian Family'). The Budget's allocation of RM 322.1 billion is the largest on record for the country<sup>1</sup>.

### Income Tax

#### *Tax on Income Received from Outside Malaysia*

Currently, foreign source income remitted to Malaysia is exempted from income tax pursuant to Paragraph 28, Schedule 6 of the **Income Tax Act 1967** ("ITA"). However, the tax exemption is not applicable to resident taxpayers carrying on the business of banking, insurance or air or sea transport.

It is proposed in the Budget that the above tax exemption be removed with effect from 1 January 2022 and foreign source income remitted to Malaysia will be chargeable to income tax in Malaysia.

#### *Prosperity Tax ("Cukai Makmur") on Companies other than Micro-, Small- and Medium-Enterprises ("MSMEs")*

Currently, the chargeable income of a MSME is taxed at the rate of 17% while companies other than MSMEs would be taxed at 24%.

In order to boost speedy economic recovery, it is proposed that companies other than MSMEs be subject to a one-off special tax of 24% on chargeable income up to the first RM 100 million and 33% on any remaining chargeable income.

### Income Tax Relief

*Widen the scope of income tax relief for medical treatment expenses for self, spouse and child, to include the cost of testing or consultation services related to mental health*

Currently, individual taxpayers are eligible to claim income tax relief up to RM8,000 on medical expenses incurred on self, spouse and child for serious diseases. The tax relief included in this amount for full medical check-up expenses is up to RM1,000 and up to RM1,000 for vaccination expenses.

It is proposed that with effect from Year of Assessment (“YA”) 2022, the scope of such income tax relief be expanded to include expenses incurred for testing or consultation services related to mental health provided by:

- psychiatrists registered with the Malaysia Medical Council under the **Mental Health Act 2001**; or
- clinical psychologists registered with the Malaysian Allied Health Professions Council under the **Allied Health Professions Act 2016**; or
- counsellors registered with the Malaysian Board of Counsellors under the **Counsellors Act 1998**.

In the Finance Bill 2021, the scope of this relief was further expanded to include Covid-19 detection tests with proof of receipt issued by a hospital or a medical practitioner registered with the Malaysian Medical Council or receipt for the purchase of Covid-19 self-detection test kit.

#### *Extension of the special income tax relief for domestic tourism expenses*

It is proposed that the special income tax relief of up to RM1,000 for domestic tourism expenses be extended for expenses incurred from 1 January to 31 December 2022. The foregoing income tax relief includes:

- Accommodation at accommodation premises registered with the Ministry of Tourism, Art and Culture Malaysia;
- Entrance fees to tourist attractions;
- Service fees for local tour guides;
- Purchase of local handicraft products;
- Food and drink; and
- Transportation, including the hop-on hop-off transportation.

#### *Extension of income tax relief for “TASKA” and “TADIKA” fees*

It is proposed that the income tax relief of up to RM3,000 given to a parent on the fees paid to a child care centre registered with the Social Welfare Department and to kindergarten or preschools registered with the Ministry of Education be extended to cover YA 2023 as well.

## *Review of income tax relief for lifestyle expenses*

It is proposed that in line with the new norm of working from home and Home-based Teaching and Learning, the income tax relief of up to RM2,500 for the purchase of mobile phones, computers and tablets be extended until 31 December 2022.

## Tax Deduction for Businesses

### *Extension of Tax Deduction on Renovation and Refurbishment of Business Premises*

Currently, businesses are allowed a tax deduction of allowable expenses of up to RM300,000 on the renovation and refurbishment cost of business premise, incurred from 1 March 2020 until 31 December 2021.

To minimise disruption to company cash flow as well as incentivise the improvement of business premises and facilities, it is proposed that the foregoing incentive be extended until 31 December 2022.

### *Extension of Tax Deduction on Rental Expenses for Employee Accommodation*

Under the People and Economic Strategic Empowerment Programme (“PEMERKASA”), a further tax deduction is available from 1 January 2021 to 31 December 2021 to manufacturing and manufacturing-related service companies for rental expenditure of up to RM50,000 on employee accommodation in accordance with the **Employees’ Minimum Standards of Housing, Accommodations and Amenities Act 1990**.

To incentivise employers in the manufacturing sector to continue complying with standard operating procedures under the National Recovery Plan, it is proposed that the foregoing tax measure be extended for another year.

## Income Tax Exemption

### *Extension of Tax Exemption for Organising Arts, Cultural, Sports and Recreational Activities*

Currently, the organisation of the following activities is given a 50% income tax exemption until YA 2022:

- arts and cultural activities approved by the Ministry of Tourism, Arts and Culture; and

- international sports and recreational activities approved by the Ministry of Youth and Sports.

To encourage and support the arts, cultural and sports sectors in Malaysia that have been struggling due to the Covid-19 pandemic, it is proposed that the foregoing tax exemption be extended for three years until YA 2025.

## Stamp Duty Exemption

### *Review of Stamp Duty on Contract Notes for Trading of Listed Shares*

Currently, the rate of stamp duty on contract notes for trading of listed shares is 0.1% equivalent to RM1 for every RM1,000 and part thereof, capped at RM200.

It is proposed that effective 1 January 2022, the foregoing rate be revised to 0.15% equivalent to RM1.50 for every RM1,000, with no cap.

### *Extension of Stamp Duty Exemption for Instruments Related to Merger and Acquisitions by MSMEs*

Currently, MSMEs that are carrying out merger or acquisition schemes (“M&A Schemes”) are exempted from stamp duty on the following instruments executed between 1 July 2020 to 31 December 2021 (and 1 July 2020 to 30 June 2021 for M&A schemes approved by the Ministry of Ministry of Entrepreneur Development and Cooperatives):

- contracts for the sale or lease of property;
- instruments of transfer and memoranda of understanding;
- loan/financing agreements; and
- the first rental agreement.

To ensure the survival of MSMEs as a core component of the Malaysian economy, it is proposed that the foregoing incentive be extended for another year.

### *Extension of Stamp Duty Exemption for Restructuring or Rescheduling Loan/Financing Agreement<sup>2</sup>*

Under the Economic Stimulus Package in 2020, the government announced a 100% stamp duty exemption on restructuring or rescheduling loan/financing agreement (subject to certain prescribed conditions) between borrowers and financial institutions executed from 1 March 2020 to 31 December 2021.

To reduce the financial burden on borrowers who restructure or reschedule loan/financing agreements, it is proposed that the 100% stamp duty exemption



on restructuring or rescheduling of loan/financing agreement be extended until 31 December 2022.

## *Stamp Duty Exemption for Peer-to Peer Financing*

Currently, stamp duty at a rate between 0.05% to 0.5% is imposed on peer-to-peer (“P2P”) loan/financing agreements for MSMEs.

To reduce the transaction costs associated with securing new financing for MSMEs affected by the pandemic, it is proposed that a 100% stamp duty exemption be given on P2P loan/financing agreements between MSMEs and investors for five years, provided the P2P financing is made through a P2P platform recognised and registered by the Securities Commission.

## Sales and Service Tax

### *Service Tax Imposed on Goods Delivery Services*

Currently, goods delivery service providers that are not licensed under the **Postal Services Act 2012** are not subject to service tax.

It is proposed that beginning 1 July 2022, service tax be imposed on all goods delivery services by providers including those on the e-commerce platform, except for food and beverages delivery and logistic services.

### *Service Tax Exemption on Brokerage Services Related to Trading of Listed Shares*

Currently, brokerage services related to trading of shares are subject to service tax pursuant to the First Schedule of Service Tax Regulations 2018.

It is proposed that brokerage services related to the trading of shares listed on Bursa Malaysia be exempted from service tax effective from 1 January 2022.

### *Extension of Sales Tax Exemption on Passenger Cars*

Currently under the Short-Term Economic Recovery Plan (“PENJANA”) and the People and Economic Strategic Empowerment Programme Plus (“PEMERKASA+”) package of incentives, 100% sales tax exemption is given on Completely Knocked Down (“CKD”) passenger cars and 50% sales tax exemption are given on imported Completely Built-Up (“CBU”) passenger cars.

It is proposed the existing sales tax exemption on passenger cars be extended for six months from 1 January 2022 to 30 June 2022.

## Excise Duty

### *Expansion of Scope of Excise Duty on Electronic Cigarettes*

Currently, electronic cigarettes including vapes are subject to:

- excise duty at the rate of 10% for all types of electronic and non-electronic cigarette devices including vapes; and
- excise duty at the rate of RM0.40 per milliliter will be imposed for non-nicotine liquid or gel used in electronic cigarettes including vapes.

It is proposed that the scope of excise duty be extended to include nicotine liquid or gel used in electronic cigarettes. Excise duty rates for both nicotine and non-nicotine liquid or gel used in electronic cigarettes is proposed to be increased to RM1.20 per milliliter.

## Real Property Gains Tax (“RPGT”)

### *Review of RPGT Rates for Citizens and Permanent Residents other than Companies*

Currently, RPGT of 5% is imposed on gains from the disposal by an individual (citizen or permanent resident other than a company) of real property or shares of a real property company in the 6<sup>th</sup> year and onwards.

It is proposed that the RPGT imposed on the foregoing gains be reduced from 5% to 0% effective 1 January 2022.

## Tourism Tax

### *Expansion of the scope of imposition of tourism tax on accommodation booked through online platforms*

Currently, tourism tax is only imposed on tourists (excluding Malaysian tourists and permanent residents) staying in accommodation premises registered under the **Tourism Tax Act 2017** at a flat rate of RM10 per room per night.

To support the recovery of the tourism sector affected by the COVID-19 pandemic, tourism tax was exempted from 1 July 2020 until 30 June 2021 through the announcement of PENJANA and further extended until 31 December 2021 through PEMERKASA.

It is proposed that the tourism tax exemption be extended for another year from 1 January 2022 to 31 December 2022.

## *Extension of Tourism Tax Incentive for Purchase of Tourism Vehicles*

Currently, capital expenditure incurred on the acquisition of excursion buses assembled locally is eligible for an initial Accelerated Capital Allowance (“ACA”) of 20% and an annual allowance of 40%.

It is proposed that the foregoing tax incentive be extended for another three years until YA 2024.

Other amendments proposed vide the Finance Bill 2021

## *Electronic Medium for Stamp Duty-Related Applications*

It is proposed that a provision be inserted into the **Stamp Act 1949** to specify that a duty payer can make the following applications by way of electronic medium effective 1 January 2022:

- Appeal against stamp duty assessments or additional assessments; and
- Application for stamp duty refunds under certain circumstances, including but not limited to, spoiled or misused stamps.

## *Intellectual Property (“IP”) Income Derived By A Labuan Entity to be Taxed under ITA*

It is proposed that royalty or other income from intellectual property be excluded from the definition of “chargeable profits” in the **Labuan Business Activity Tax Act 1990** (“LBATA 1990”).

IP income of a Labuan entity that does not fulfil the substantive requirement under LBATA 1990 is proposed to be subject to tax under the ITA. This amendment is proposed to take effect retrospectively from 1 January 2019.

Reading the above proposal together with Section 4(4) of the LBATA 1990 would mean that IP income of all Labuan entities (whether or not the substantive requirements are met) would be subject to tax under the ITA.

## *Withholding Tax on Payments to Agents, Distributors or Dealers*

Currently, payments made to individual agents, dealers and distributors who are tax residents in Malaysia are not subject to withholding tax (“WHT”).

Effective 1 January 2022, a 2% WHT is proposed on any payment in monetary form made to such agents, dealers or distributors arising from sales, transactions or schemes carried out by the agents, dealers or distributors, provided that the total sum of payments (whether in monetary form or otherwise) made to the agent, dealer or distributor in the YA preceding the year the payment is made exceeded RM100,000.00.

### *Length of Time To Carry Forward Unutilised Business Losses*

Currently, unutilised business losses arising under the ITA can only be carried forward for a maximum of seven consecutive YAs.

It is proposed that the current time limit to carry forward the unutilised business losses under the ITA be extended to 10 consecutive YAs. This amendment is proposed to take effect retrospectively from YA 2019.

### **JEEVITHA THURAI RATHNAM TAX AND REVENUE PRACTICE GROUP**

Please [contact us](#) for further information on tax & revenue law matters.

#### *Endnotes:*

<sup>1</sup> The 2022 Budget Speech <https://budget.mof.gov.my/pdf/2022/ucapan/ub22.pdf>.

<sup>2</sup> Please see Financial Services article "Budget 2022 — Stamp Duty Exemption for Loan/Financing Agreements" in this newsletter.



Follow us on:



[www.shearndelamore.com](http://www.shearndelamore.com)



<https://www.linkedin.com/company/shearn-delamore-&-co>

To subscribe to our legal updates, email us:



[km@shearndelamore.com](mailto:km@shearndelamore.com)

*COPYRIGHT © 2022 SHEARN DELAMORE & Co. ALL RIGHTS RESERVED.*

*THIS UPDATE IS ISSUED FOR THE INFORMATION OF THE CLIENTS OF THE FIRM AND COVERS LEGAL ISSUES IN A GENERAL WAY. THE CONTENTS ARE NOT INTENDED TO CONSTITUTE ANY ADVICE ON ANY SPECIFIC MATTER AND SHOULD NOT BE RELIED UPON AS A SUBSTITUTE FOR DETAILED LEGAL ADVICE ON SPECIFIC MATTERS OR TRANSACTIONS.*