Newsletter

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Competition Law & Antitrust

First Successful Merger: First Ever Voluntary Notification and Application of an Anticipated Merger Approved under the Malaysian Aviation Commission Malaysia ("Merger Notification") — Korean Air Lines Co Ltd and Asiana Airlines Inc

In this article, Kelly Choo talks about the first successful merger approved under the Malaysian Aviation Commission Malaysia.

In November 2020, Korean Air Lines Co Ltd ("Korean Air") had entered into a share subscription agreement with Asiana Airlines Inc ("Asiana") which had been in a situation of financial distress. The merger of the two airlines (collectively referred to as "Airlines") required regulatory approval from competition and antitrust agencies of other jurisdictions, which included but were not limited to, Korea, UK, US, EU, Malaysia and Singapore.

For the Merger Notification in Malaysia, our team handled the filing of the notice and application for the anticipated merger in conjunction with clients and instructing foreign counsel. This Merger Notification was the first ever successful Merger Notification under the **Malaysian Aviation Commission Act 2015**. In fact, it is the first Merger Notification under any statute or regime in Malaysia.

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The Merger Notification between the Airlines was approved by the Malaysian Aviation Commission ("MAVCOM") in September 2021 after it accepted the failing firm defence put forth by the Airlines as Asiana could not be "*rehabilitated but for the Anticipated Merger*".

MAVCOM concluded that the merger, if carried into effect, would not infringe the prohibition in section 54 of the **Malaysian Aviation Commission Act 2015**. Particularly, the relevant flight route (which was an overlapping route between the Airlines) would not act as a barrier to entry to other competitors as, amongst others, a "*hypothetical price increase above the competitive levels will attract entry or expansion by competing carriers*".

On 22 February 2022, Korea's Fair Trade Commission announced that it had granted a conditional approval for Korean Air's proposed acquisition of 63.88% of shares in Asiana Airlines subject to certain actions to be undertaken thereafter.

This Merger Notification sets an important precedent for subsequent merger notifications in Malaysia and has an impact wider than just the aviation industry, especially in the light of the proposed merger control legislation by the Malaysia Competition Commission. While Malaysia does not have a fully-fledged merger control regime, the sectoral regulators for air transport (MAVCOM) and telecommunications (Malaysian Communications and Multimedia Commission) can consider competition issues in deciding whether to approve mergers which are regulated by them respectively.

To read the final MAVCOM decision, please refer to https://tinyurl.com/y4w5nzw3.

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Should you require further information, you may direct them to the team that worked on this Merger Notification, ie, Mr Anand Raj at anand@shearndelamore.com, Ms Jeevitha Thurai Rathnam at Jeevitha@shearndelamore.com and Ms Choo Kelly at kellychoo@shearndelamore.com.

Corporate/M&A

Auspicious Journey: The Federal Court decides on minority shareholders rights

A case note by David Lim Wei Choon.

Introduction

The Federal Court ("FC") in **Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd**[1] has affirmed in its reasoning on whether the remedy in section 181 of the Companies Act 1965 ("CA 1965") (now section 346 of the **Companies Act 2016** ("CA 2016")) in a case where an organ of a company is exercising its power in an oppressive manner to the minority that liability may be imposed onto parties other than the majority shareholders.

In essence, the FC held that directors and third parties may be held liable personally in actions of oppression depending on the facts and circumstances of the case.

Main parties in the proceedings

The appellant, Auspicious Journey Sdn Bhd ("AJ"), was a 20% minority shareholder in the 1st respondent, Ebony Ritz ("ER").

The 2nd respondent, Hoe Leong Corporation Ltd ("HLC"), was the 80% shareholder of ER. The Kuah Brothers, 3rd and 4th respondents, were common directors of HLC and ER.

Material facts

ER is a joint venture company ("JV") between AJ (holding 20%) and HLC (holding 80%). ER was formed to acquire 49% of the total shares in Semua International Sdn Bhd ("Semua").

The remaining 51% shares in Semua were held by Sumatec Resources Berhad ("Sumatec").

ER, Sumatec and AJ had entered into an Options and Financial Representation Agreement ("OFRA") and the salient terms included:

- an unconditional and irrevocable guarantee was given by Sumatec to ER to make good any shortfall if Semua's audited profit after taxation falls short ("Profit Shortfall Guarantee");

- Sumatec would grant an irrevocable call option to ER and in the event of shortfall, ER may exercise the call option to require Sumatec to sell not less than 2% of the issued and paid up capital of Semua to ER ("2% Call Option"). If exercised, this would give ER a majority stake and control over Semua; and

- Sumatec would grant an irrevocable call option to AJ which if exercised by AJ would require Sumatec to sell not less than 49% of the shares in Semua to AJ ("49% Call Option").

Semua faced financial distress that resulted in a profit shortfall which Sumatec had to make good under the OFRA. Arising from this, ER gave notice to Sumatec to make good the sum but Sumatec was unable to do so. Sumatec also failed to comply with its obligations under the OFRA in relation to the Profit Shortfall Guarantee.

AJ then discovered that HLC had entered into a conditional sale and purchase agreement ("Conditional SPA") with Setinggi Holdings Ltd ("Setinggi"), ER and Sumatec for the disposal of the entire retained 51% equity interest of Sumatec in Semua which AJ was not aware of previously.

The effect of the Conditional SPA was that 2% was to be purchased by HLC and 49% was to be purchased by Setinggi. Therefore, the entire retained 51% would be held by HLC as Setinggi was in effect its nominee.

HLC justified its actions as when Sumatec and Semua had run into financial difficulties, the JV fell apart due to AJ wanting to withdraw. HLC alleged that it was necessary to enter into the Conditional SPA, which was termed as effectively a "*salvage and warehousing arrangement*". Nonetheless, the Conditional SPA was never completed.

HLC had maintained that it was prepared to place the all-important 2% shareholding in Semua into ER, provided AJ came up with its proportionate contribution but this was refused by AJ.

The High Court ("HC") decision

AJ brought an action against HLC as the majority shareholder and the Kuah brothers as directors, contending that both HLC and the Kuah brothers have:

- conducted the affairs of ER in an oppressive manner to AJ, disregarding its interests as minority members of ER; and

- caused/threatened actions against ER that would unfairly discriminate/be prejudicial to AJ as a member of ER.

HLC on the other hand, contended that AJ brought this action to recover the money that AJ has placed as its investment into Semua, by *inter alia*, having its 20% shareholding in ER bought over by HLC, thus seeking a buy-out.

The HC found there was oppression and ordered ER to be wound-up. However, the HC dismissed AJ's claim and refused to hold the Kuah Brothers personally liable as directors. The HC mentioned that this was an arrangement whereby the Directors breached the respective contracts in the best interest of the company (ER) in relation to its investment in Semua. The HC held that directors are agents of the company and are not liable for the company's actions.

The Court of Appeal ("COA") decision

The COA held (which the FC affirmed) that an unavoidable inference to be held from the circumstances of this case is that AJ did not wish to throw good money after bad, as it was not prepared to come up with the requisite funds to purchase either its share of the 2% call option available to ER, far less the 49% call option in its own favour. In essence, the COA held that to order a buy-out would unjustly enrich AJ, and that it should not be allowed to use these proceedings to divest itself of a bad bargain.

On AJ's attempt to extend liability to the directors of HLC, the COA affirmed that the directors could not be held personally liable for the acts of the company, unless it was a personal act or wrongdoing by the directors and that act is outside its obvious agency.

FC decision

The FC read section 181(1)(a) CA 1965 together with section 181(2) and held that it is granted wide discretion to bring oppressive conduct to an end, or to remedy the minorities' grievances.

Therefore, there is no prohibition against a Court granting a remedy which encompasses the directors of the company personally. Instead, the legislature intended to allow the Court freedom to determine a remedy it thinks fit.

The FC noted that section 181(1) limb (b) appears to concentrate on acts of the company and its members as compared to limb (a) which refers to the company as well as the directors' personal exercise of their powers. The latter construction would allow for liability to devolve onto the directors personally.

The series of acts in section 181(2) are not exhaustive to circumscribe the powers of the Court. The Court may order remedies including imposing liability on other persons, including directors, who have perpetrated acts giving rise to the oppressive conduct.

The FC adopted the legal test in the Canadian Supreme Court decision of **Wilson v Alharayeri**[2]:

- There should be evidence of deliberate involvement or participation in, or sufficiently close relationship to the oppressive, detrimental or prejudicial conduct that the minority complains of, to warrant attribution of liability to a director or third party;

- The imposition of liability should be fair or just;

- Liability may be more easily assessed where a director has breached his duties, acquired personal benefit or prejudiced other shareholders. However, these are not exhaustive and the assessment is dependent on the facts, undertaken on an objective basis.

- The attribution of liability should be circumspect, only to remedy the breach or to stop the oppressive or prejudicial conduct.

- Such imposition must be reasonable, to alleviate the legitimate concerns of the shareholders of the company;

- In exercising its powers the Court should bear in mind general corporate law principles, such that director liability does not become a substitute for other common law or statutory relief; and

- Is the defendant so connected to the oppressive, detrimental or prejudicial conduct that it would be fair and just to impose liability for such conduct.

The FC acknowledged that the Kuah brothers and HLC effected the Conditional SPA in the best interests of ER as AJ had expressly refused to further finance ER in contrast to HLC's having injected no less than RM38 million into Semua to keep it afloat.

The applicability of the "*fair and just*" test, requires all these matters to be taken into consideration in determining whether liability ought to be imposed upon the directors personally.

Whilst the acts may be categorised as prejudicial and detrimental to the minority shareholder AJ, they weres ultimately related to salvaging ER. Therefore, this weighs in favour of the Kuah brothers and HLC in these circumstances.

AJ's appeal was thus dismissed.

Remedies — winding up order maintained, buy-out request dismissed

Section 181(2) CA 1965 grants the Court an open-ended range of remedies.

> "… *(2) If on such application the Court is of the opinion that either of those grounds is established the Court may, with the view to bringing to an end or remedying the matters complained of, make such order as it thinks fit and without prejudice to the generality of the foregoing the order may—*
>
> > *(a) direct or prohibit any act or cancel or vary any transaction or resolution;*
> >
> > *(b) regulate the conduct of the affairs of the company in future;*
> >
> > *(c) provide for the purchase of the shares or debentures of the company by other members or holders of debentures of the company or by the company itself;*
> >
> > *(d) in the case of a purchase of shares by the company provide for a reduction accordingly of the company's capital; or*
> >
> > *(e) provide that the company be wound up."*

This includes the discretion to refuse relief the Court feels inappropriate. Whilst winding up may be considered drastic, the Court has an unfettered discretion which ought not to be restricted by a general rule.

The remedy granted would depend on the complaint and the circumstances prevailing at the time of the hearing, not at the start of the proceedings. As there is a deadlock between the parties such that the business cannot effectively continue, coupled with a potential statutory contravention if AH was bought out and ER's insolvent state, the FC decided that winding up is justified.

From seeking a buy-out of its shareholding in ER, AJ seems to be seeking to escape a bad bargain or to recoup its investment. This is contrary to the intention of section 181. The FC concluded that whilst a buy-out may be most practical and efficacious in many oppression cases, winding up is not precluded.

Conclusion and orders granted

Personal liability on the directors and third parties may be imposed in oppression actions although it will ultimately depend on the circumstances of a particular case.

This is a favourable development in the law that further focuses on improving minority shareholder's rights. As decided by the FC, there is no longer a blanket immunity for directors and third parties in relation to personal liability in oppression actions.

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Endnotes:

[1] [2021] MLJU 307.
[2] [2017] SCC 39.

Dispute Resolution

Mkini Dotcom Sdn Bhd v Raub Australian Gold Mining Sdn Bhd [2021] 5 MLJ 79

A case note by Yap Jun Cheng.

Background facts

The plaintiff, Raub Australian Gold Mining Sdn Bhd ("Raub"), was a company involved in gold mining. The 1st defendant, Mkini Dotcom Sdn Bhd (collectively with the 2nd, 3rd and 4th defendants is referred to as "Mkini" where applicable) owns and operates the online news portal known as Malaysiakini. The 2nd, 3rd and 4th defendants were the assistant news editor, senior journalist and intern of Malaysiakini respectively.

Raub brought the suit against Mkini for defamation and malicious falsehood in respect of three articles and two videos published by Mkini on the Malaysiakini portal in essence alleging that Raub had used cyanide in its gold mining activities which had caused serious illness to humans and death of wildlife and vegetation as well as environmental pollution.

Mkini defended the suit by relying on the defences of qualified privilege (in that they had exercised responsible journalism) and fair comment. Upon the conclusion of the trial, despite not having pleaded the defence of reportage in their defence, Mkini asserted in their submissions that they had exercised responsible journalism and/or were able to rely on the defence of reportage.

Findings of the High Court[1]

The High Court dismissed both Raub's claim for defamation and its claim for malicious falsehood, and held that although the words complained of in the articles were defamatory, Mkini had successfully raised the defence of qualified privilege which encompassed both the Reynolds defence of qualified privilege (that is "*responsible journalism*"), whereby Mkini was protected from being held liable for defamation as they had exercised responsible journalism in reporting on matters of public concern and the defence of reportage (that is "*neutral reportage*"), whereby Mkini was protected from being held liable for defamation as they had reported neutrally, without adopting or endorsing the matters reported on.

Findings of the Court of Appeal[2]

Raub appealed to the Court of Appeal in respect of the High Court's dismissal of its claims for defamation and malicious falsehood.

The Court of Appeal allowed Raub's claim for defamation and awarded Raub the sum of RM200,000 in general damages, thereby setting aside that part of the High Court judgment but affirmed the dismissal by the High Court of the claim for malicious falsehood.

The Court of Appeal observed as follows:

- Mkini had not acted fairly and reasonably and could not rely on the Reynolds defence of responsible journalism as they failed to meet the test for the application of the Reynolds defence.
- Reportage as a defence must be specifically pleaded. Mkini could not rely on reportage simply by pleading the defence of responsible journalism. Reportage and responsible journalism are mutually exclusive and incompatible and, as such, it is not possible to fall back on responsible journalism if the defence of reportage fails.

Findings of the Federal Court[3]

Mkini appealed to the Federal Court on the application of the defence of reportage in the context of qualified privilege and the Reynolds defence of responsible journalism.

The Federal Court, in dismissing Mkini's appeal (by a majority decision) and thereby agreeing with the decision of the Court of Appeal, made the following important observations in respect of the interplay between the Reynolds defence and the defence of reportage:

- A publisher (being a journalist) must choose either to plead reportage or responsible journalism, as it would be contradictory to plead on the one hand that he believes in the truth and accuracy of the defamatory statement and on the other to plead that he does not.
- A publisher will lose the protection of reportage by adopting the defamatory contents and making them his own or by not being fair, disinterested and neutral in his reporting.
- A publisher who seeks to rely on the defence of reportage must make it clear that he does not believe the information to be true. In the event such a publisher makes allegations of his own or espouses or concurs with the allegations in the source material, he will lose the protection of the

defence of reportage. Espousing or concurring with defamatory statements need not necessarily be express, but can be implied by, for example, the use of headlines that promote and give prominence to the defamatory statements.

- The defendant must make it clear in his pleading whether he is relying on the Reynolds defence of responsible journalism, in that he had a subjective belief in the truth of the defamatory statements, or on the defence of reportage, in that he had no belief in the truth of the statements.
- Apart from public interest, neutral reporting is the most important ingredient for the defence of reportage, which is not an element in the Reynolds defence of responsible journalism.

It is worthwhile to note that in the dissenting judgment, two out of the five judges sitting for the appeal were of the view that the defence of reportage is not a distinct and separate defence from qualified privilege, and on that basis a defendant publisher may attempt to rely on both defences.

Conclusion

The Federal Court decision clarifies that the current position of the law is that the defence of reportage is a separate defence from qualified privilege, and that the two defences are separate and irreconcilable.

A defendant publisher must choose which defence it wishes to rely on, and the two cannot be pleaded in the alternative, as qualified privilege allows the publisher to portray the defamatory material as being true, while reportage does not.

It must, however, be noted that the way the courts will interpret this decision remains to be seen, particularly considering the minority dissenting judgment.

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Endnotes:

[1] [2016] 12 MLJ 476.
[2] [2018] 4 MLJ 209.
[3] [2021] 5 MLJ 79.

Intellectual Property

Legislative Change to the Copyright Law: **Copyright (Amendment) Act 2022**

In this article, Elisia Engku Kangon explores the salient features of the Copyright (Amendment) Act 2022.

Introduction

The **Copyright (Amendment) Act 2022** (Act A1645) ("the Amending Act") came into force on 18 March 2022 except for sections 4, 5, 6 and 10 therein[1]. The Copyright (Voluntary Notification) (Amendment) Regulations 2012 [P.U. (A) 62/222] also came into force on the same day.

In tandem with the change in laws, the Intellectual Property Corporation of Malaysia ("MyIPO") has issued Practice Direction Bil. 1/2022 which clarifies certain aspects relating to the change in procedures for voluntary notification.

Briefly, the Amending Act covers five main aspects namely:

- collective management organization;
- rights of persons with print disability;
- voluntary notification;
- streaming technology; and
- enforcement power under the **Copyright Act 1987** ("CA").

Collective management organization

Under the Amending Act-

- the term "*licensing body*" in the CA has been replaced with "*collective management organization*". The change in the term brings the CA in line with international practices, as "*collective management organization*" is the current term used by the World Intellectual Property Organization ("WIPO").

- only a body corporate that is a company limited by guarantee incorporated under the **Companies Act 2016** may be a collective management organisation. Prior to this amendment, a society was allowed to be a licensing body.

Rights of persons with print disability

One of the main amendments under the Amending Act is to give effect to Malaysia's eventual participation in the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled ("Marrakesh Treaty").

The Marrakesh Treaty is an international copyright treaty administered by WIPO, which requires member states to allow the reproduction, distribution and making available of published works in accessible formats, as well as to allow cross-border exchange of such works for the benefit of persons who are print disabled[2].

To this end, section 3 of the CA has been amended, among others, to define a "*person with print disability*" as a person who is registered as a person with disability under the **Persons with Disabilities Act 2008** who is

(a) blind;

(b) visually impaired or has a perceptual or reading disability which cannot be improved to give visual function substantially equivalent to that of a person without such impairment or disability, and due to such impairment or disability is unable to read printed works to substantially the same degree as a person without such impairment or disability; or

(c) unable to hold or manipulate a book or to focus or move the eyes, to the extent that would be normally acceptable to read due to physical disability.

Section 13(2) of the CA was amended by section 4 of the Amending Act by insertion of a new paragraph (ggggg) to allow the making and issuing of copies of any work into an accessible format copy by:

i. an authorized entity; or

ii. a person with print disability or any other person acting on his behalf including his caregiver.

Each authorized entity will be prescribed by the Minister and the list is expected to be gazetted via the Copyright Order (Authorised Entity) 2022.

At the time of writing, sections 4, 5, 6 and 10 of the Amending Act which concern such rights of persons with print disability have not come into force.

Voluntary notification of copyright

Previously, section 26A of the CA provided that a voluntary notification may be made by or on behalf of the author, the copyright owner, an assignee of the copyright, or a person to whom an interest in the copyright has been granted by licence.

Under the Amending Act, the words "*the author of the work*" and "*a person to whom an interest in the copyright has been granted by licence*" have been deleted. Simply put, only the copyright owner or its assignee may now submit a voluntary notification to the Copyright Registrar.

Under the Copyright (Voluntary Notification) Amendment Regulations 2022, there are several changes relating to the procedures to submit a voluntary notification. One of the changes is the standardised use of Form CR-1 to submit a voluntary notification without a distinction being made on whether the work is an original work or a derivative work. More pertinently, the requirement to submit a statutory declaration as a supporting document has now been removed, thus simplifying the process.

Enforcement powers

The enforcement powers in respect of copyright-related offences have been strengthened by the Amending Act.

Under the previous section 39 of the CA, the Assistant Controller or the police may only search and seize infringing copies imported into Malaysia upon receipt of an application by the copyright owner. It has now been amended to allow the search and seizure of any infringing copy by the Assistant Controller or the police even without an application by the copyright owner.

Other additional powers include the power of the Assistant Controller to direct the copyright owner or an authorised person to make a test purchase of any goods for the purposes of determining whether the CA is being complied with, and the power of the Assistant Controller to require provision of information in the course of an investigation under the CA.

Conclusion

The amendments to our copyright law are timely, as they will enhance the copyright regime in Malaysia considering the changes in how works are being created and used in recent times.

In particular, the amendments relating to rights of persons with print disabilities should be applauded, as the Amending Act demonstrates Malaysia's continuous dedication in harmonising its local intellectual property laws with international standards, while at the same time recognising the right to information and knowledge without discrimination.

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Endnotes:

[1] Appointment of Date of Coming into Operation of the Copyright (Amendment) Act 2022 [P.U. (B) 167/2022].

[2] WIPO, "*Summary of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled (MVT) (2013)*", accessed at https://www.wipo.int/treaties/en/ip/marrakesh/summary_marrakesh.html.

Employment & Administrative Law

Gig workers — where do they stand?

In this Article, Grace Chai Huey Yann discusses the importance of addressing the status of gig-worker and certain developments of law applicable to this atypical engagement.

Introduction

Based on a statistic published by World Bank[1], in 2020 alone, about 26% of the Malaysian workforce were "*gig workers*" — a term that is familiar to many by now. Working relationships and patterns have changed drastically over the recent years. With the demand for more flexibilities in a working relationship and low entry level, it is not surprising that the gig economy has been a constant growing trend, not only in Malaysia but also globally.

One of the biggest debates that the gig economy has sparked is whether gig workers should be treated as employees and be accorded legal protections such as minimum wages, social security and protection against unfair dismissal — rights that are generally enjoyed only by individuals engaged as "*employees*" or "*workmen*". The status of gig workers was highlighted during the COVID-19 pandemic which caused many uncertainties in the demand for manpower across various sectors.

Current position in Malaysia

Employee, workman, independent contractor

Under the law, the definitions of "*employee*" and "*workman*" refer to personnel engaged via contracts ***of*** [emphasis ours] service. For those who are engaged under contracts ***for*** [emphasis ours] services, they are considered as "*independent contractors*".

The classification status of a person is important from an employment law perspective as it will determine the rights and protections that such person is entitled to under the law. These include:

a) protection against unfair dismissal under the **Industrial Relations Act 1967**;

b) entitlement to minimum terms and conditions of employment under the **Employment Act 1955**; and

c) entitlement to minimum wages, provident fund and social security protections, minimum retirement age under various legislation.

At the time of writing, the law in Malaysia has yet to recognise gig workers as employees/workmen as was decided in the case of **Loh Guet Ching v Myteksi Sdn Bhd (berniaga atas nama Grab)**[2].

In that case, the High Court held that e-hailing drivers are not workmen under the definition of the **Industrial Relations Act 1967**, and that the contract between Grab and its drivers is essentially a commercial agreement. Hence, as it stands, e-hailing drivers are considered "*independent contractors*" and do not have the right to be heard before the Industrial Court for the alleged unfair dismissal by Grab.

Currently, gig workers only receive social protection under the Self-Employment Social Security Scheme under the Social Security Organisation ("SOCSO").

Proposal to presume gig workers as employees

In December 2021, the Deputy Human Resources Minister of Malaysia indicated in the Dewan Rakyat that pursuant to the proposed Employment (Amendment) Bill 2021, gig workers would in effect be included into the definition of "*employees*" under the **Employment Act 1955**.

It is proposed that new provisions will be added to the **Employment Act 1955** which will presume that a person is an employer or employee based on the following criteria:

- Degree of control as to the manner the work is conducted;
- Degree of control as to the hours of work;
- Whether tools, materials or equipment are provided;
- Whether the work constitutes an integral part of the business;
- Where payment is made in return for work done whether such payment constitutes most of the the personnel's income; and
- Where the work is performed solely for the company's benefit.

These criteria are largely consistent with the common law test enunciated in the leading case of **Dr A Dutt v Assunta Hospital**[3]. The main impact of the proposed provision will be on the shift in burden of proof from the individual to prove that he/she is an employee, to the engaging entity to disprove that such individual is not an employee.

If the Deputy Minister's proposal to include gig workers under the purview of the **Employment Act 1955** is eventually passed, Malaysia would be one of the first countries in the region to expressly recognise gig workers as employees.

Whether this a welcomed move remains to be seen — to recognise gig workers as employees under the law would mean that the gig workers are bound by the usual obligations of employees, that is, to subject themselves under the full control of their employer, to provide their services exclusively or faithfully for the employer, etc. After all, the ethos of the gig economy is to move away from the strict control *ala* master-servant of an employment relationship.

It is therefore important for stakeholders to bear in mind the purpose in including gig workers under the category of "*employees*". If the main concern is on the legal rights of gig workers, just including them as "*employees*" under the main legislation governing private sectors employment may not be ideal.

Other jurisdictions

The Supreme Court of the United Kingdom recently ruled in the case of **Aslam v Uber**[4] that gig workers may be classified as "*workers*" instead of "*independent contractors*" under the law. It must be cautioned that this decision should not be adapted directly and cited as the blanket ruling that gig workers' employment status is being recognised by the Court. This is because in the UK, there is an intermediary category of workmen between "*employees*" and "*contractors*", that is, the "*workers*". Workers in the UK are entitled to lesser rights and protections as compared to "*employees*". In Malaysia, there is no class comparable to that of "*workers*" in the UK.

In Australia, the States of New South Wales and Victoria have recently introduced a new minimum standard which will be applicable to all workers in the gig economy to offer certainty and protections to them.

The standards aim to set a unified approach to force platforms to outline "*key information*" about their potential pay packets, and what they can expect to face on the job, along with additional resources about why workers might be booted from a platform for poor performance.

Takeaways

Gig and non-employee workers often have little bargaining power, and sometimes few options but to work in a precarious and insecure work environment.

Whilst the idea of allowing gig workers to enjoy the same rights as "employees" may sound attractive, there are differences in the way gig workers work from 9-to-5 employees. Flexibility in working hours and locations, lower entry level, option for side income rather than primary way of earning a living, are the reasons why people moved away from the traditional sense of employment in the first place.

Given its characteristics, gig economy may be better considered a sui generis[5] class with different legal rights and obligations from 9-to-5 employees as a new dimension to the labour force.

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Endnotes:

[1] https://tinyurl.com/3uhtzk6e.
[2] (Judicial Review Application No. WA-25-296-10/2020).
[3] [1981] 1 LNS 5.
[4] [2021] UKSC 5.
[5] Sui generis is a Latin expression that translates to "*of its own kind*".

Real Estate

What is the length of notice required to terminate a tenancy validly?

In this article, Ng Lyn Ee considers the length of notice required to validly terminate a tenancy.

Introduction

If the parties to a tenancy wish to have the right to terminate that tenancy prior to the expiry of the term, the tenancy agreement should include terms and conditions governing such early termination which includes the notice period required for the termination of the tenancy. If a tenancy agreement includes such notice of termination clause, the parties are bound by the clause.

What happens if there is no tenancy agreement, if a tenancy agreement expires and the tenant continues in occupation of the demised premises with the consent of the landlord or if the tenure/expiry date of the tenancy is not set out in the tenancy agreement?

Periodic tenancy

A periodic tenancy is a tenancy that continues for successive periods until the tenant gives the landlord notification that he wants to end the tenancy. For a periodic tenancy, the length of notice depends on the period of the tenancy and, in the case of periodic tenancy of less than a year, the notice to quit shall be one full period, expiring at the end of a completed period[1]. Therefore, a weekly tenancy requires a week's notice and a monthly tenancy requires a month's notice. For a year-to-year tenancy, the general rule at common law is that half a year's notice must be given[2].

For the purposes of determining the cycle of the periodic tenancy, it is settled law that a letting of a house at a monthly rent raises the presumption of a monthly tenancy[3]. Whilst the mode of payment of rent is a crucial factor to determine the periodic tenancy and in turn the sufficiency of the period of a notice to quit, it is not necessarily a decisive factor.

In **Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd**[4], the High Court held that where there was no written tenancy agreement, factors to be taken into account included not just the mode of payment of rent but also the conduct

and intention of the parties, the contemplated user of the subject matter of the tenancies and other relevant circumstances of the case as a whole.

On the facts of the case, the tenants' families had been staying on the land for over 100 years, paying rent every month and had converted the land from a jungle into a farm, the High Court held that three months' notice would be reasonable for the determination of the tenancies of the farm as this would afford the tenants sufficient time to harvest their crops and to yield vacant possession of the plot concerned.

After the expiry of fixed-term tenancy

A fixed-term tenancy is one that lasts for a specific amount of time as specified in a tenancy agreement.

Where a fixed-term tenancy expires and the tenant holds over at the end of the term, a new periodic tenancy will ordinarily be established by the acceptance of rent by the landlord unless the intention to create such a new tenancy can be disproved[5].

Where a tenant holds over and where the rent payable under the tenancy is expressed as a yearly sum so that weekly, monthly or quarterly payments are instalments of that yearly rent, the new periodic tenancy will be a yearly tenancy; but where the rent is expressed in the lease as being a weekly, monthly or quarterly sum, the new tenancy will be respectively a weekly, monthly or quarterly tenancy[6].

In **Rohasassets Sdn Bhd v Weatherford (M) Sdn Bhd**[7], the tenants continued to occupy the premises for about two years after the expiry of fixed-term tenancies whilst the parties were in negotiations for fresh tenancies. As the parties were in negotiation for renewal of the tenancies and the landlord accepted tenders of monthly rent from the tenants without any complaint and did not issue notice to quit, the Federal Court held that the landlord had by conduct waived its right to charge double rent during the negotiation period.

When the negotiations failed, the landlord gave the tenants a notice dated 19 August 2011 to deliver vacant possession of the premises on 1 October 2011. It was held that after the expiry of the fixed-term tenancy, the tenants became monthly tenants and therefore the notice to quit was not unreasonable.

Imperfect lease

S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd[8] is a case where the sub-lessor by a sub-lease agreement granted the sub-lessee a lease for a term

of 25 years and the rent payable for the sub-lease period was divided into eight consecutive terms of three years respectively and one final term of one year. The sub-lessor failed to register the sub-lease with the relevant land authority and the sub-lessee terminated the agreement on the ground of the non-registration of the sub-lease three years after the commencement of the sub-lease.

The Federal Court held that equity could compel specific performance of the sub-lease which would be treated as if registered. However, it was the sub-lessee who acquired the equity to protect its occupation and it would be unjust to turn the equitable lease for the full term against the sub-lessee to secure rent for the sub-lessor.

The Federal Court held that an unregistered lease is an imperfect lease which is an agreement for a lease. If the tenant is let into possession under the imperfect lease, he becomes a tenant at will. When the tenant pays or expressly agrees to pay rent, the tenancy at will changes into a periodic tenancy. As there was an equity in favour of the sub-lessee in the instant case, the unregistered sub-lease became a year-to-year tenancy and either party in the case of a yearly tenancy could, in the absence of agreement, determine the tenancy by six months' notice.

If the tenant under an imperfect lease pays monthly rent to the landlord and is unable to show that an equity has been created in the tenant's favour, the monthly tenancy will be terminable with one month's notice[9].

Conclusion

If a tenancy agreement contains a notice of termination clause, the parties are bound by that clause by agreement. Where there is no agreement on the length of notice:

- for a periodic tenancy of less than a year, the notice to quit shall be one full period, expiring at the end of a completed period.

- for year-to-year tenancy, the general rule is that half a year's notice must be given.

Where a fixed-term tenancy expires and the tenant holds over at the end of the term with the consent of the landlord, the tenancy becomes a periodic tenancy. Where a lease is not registered in accordance with the law, the "*lease*" may turn into a periodic tenancy depending on the circumstances. In both situations, the rules on the length of notice for a periodic tenancy will apply.

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[1] **Saadian Bte Karim v Ong Ting Chai** [1996] 5 MLJ 646.
[2] **S & M Jewellery Trading Sdn Bhd v Fui Lian-Kwong Hing Sdn Bhd** [2015] 5 MLJ 717.
[3] **Veeriah v Mal Singh** [1969] 2 MLJ 93 Federal Court.
[4] [1993] 3 MLJ 352.
[5] **Syarikat Rani' S v Zain Building Property Development Co Ltd** [1980] 1 MLJ 247.
[6] **Syarikat Rani' S v Zain Building Property Development Co Ltd** [1980] 1 MLJ 247.
[7] [2020] 5 CLJ 202 for Court of Appeal judgement; [2020] 1 CLJ 638 for Federal Court judgement.
[8] [2015] 5 MLJ 717.
[9] **Tan Khien Toong v Hoong Bee & Co** [1987] 1 MLJ 387.

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