

Shearn Delamore & Co.

Dear valued clients and business partners,

We are pleased to highlight the following legal updates for August 2018.

COMPETITION LAW AND ANTITRUST

On 13 August 2018, the competition law regulator for the civil aviation industry, the Malaysian Aviation Commission, issued a 55-page Technical Paper. The Technical Paper analyses the pricing patterns of airfares of domestic flights during selected peak seasons in Malaysia.

A comparative study of regulatory measures taken by other countries such as Indonesia, Philippines and the United States is also discussed in the Technical Paper. It is suggested in the Technical Paper that Malaysia could learn from Indonesia's experience in regulating airfares by imposing a floor price, a ceiling price and a surcharge rate for each domestic route.

For further information regarding competition law and antitrust matters, please contact our [Competition Law and Antitrust Practice Group](#).

T Sivam a/l Tharamalingam (Sebagai Wakil / Pentadbir kepada harta pusaka mendiang Nagamuthu a/l Periasamy) v Public Bank Berhad [Civil Appeal No. 02(f)-76-07/2017 (J)] (Federal Court)

This case involved yet another example of land fraud. The charge in favour of the

bank was the subsequent transaction which was sought to be protected pursuant to the proviso to section 340(3) of the **National Land Code 1965**.

That proviso provides that a subsequent *bona fide* purchaser for valuable consideration is clothed with the shield of indefeasibility and its charge may be enforced despite the fraudulent transfer. The question that arose for the Federal Court was whether the chargee bank could claim indefeasibility where its solicitors are said to have had knowledge of the disputed title on the land at the material time.

Held

Following the recent Federal Court case of **CIMB Bank Bhd v AmBank (M) Bhd & Ors** [2017] 9 CLJ 145, the Court held that the respondent bank (“Public Bank”), being a chargee bank, who acquires an interest in land, falls within the meaning of “*purchaser*” under the proviso.

With respect to the requirement of good faith, the burden of proof lies on the person asserting it, that is, Public Bank in the present case. The existence of good faith or otherwise is a question of fact subject to the Court’s determination based on the evidence placed before it.

The Court went on to explain that the concept of “*good faith*” does not simply mean absence of fraud, deceit or dishonesty; it also requires acting honestly, reasonably and fairly. Thus, the concept of “*good faith*” includes due inquiry showing that ordinary prudence has been exercised according to the standards of a reasonable person. It precludes pretence or deceit and also negligence and recklessness.

Hence, good faith can be vitiated by a purchaser’s mere knowledge of the fact that the predecessor’s title or interest is tainted with fraud (see **Datuk Jagindar Singh & Ors v Tara Rajaratnam** [1983] 2 MLJ 196).

In determining the question of good faith on the part of Public Bank, the central issue is whether the solicitor’s knowledge in regards to the adverse claims on the title of the land could and should be imputed to Public Bank.

Doctrine of Imputed Knowledge — Doshi v Yeoh Tiong Lay [1975] 1 MLJ 85 (FC) Overruled

In **Doshi v Yeoh Tiong Lay**, the Federal Court enunciated the principle that a solicitor's knowledge of fraud cannot be imputed to the client generally, irrespective of whether the solicitor is complicit in the fraud or not.

This Court, in overruling **Doshi** (*supra*), stated in agreement with the Court of Appeal in **Aik Ming (M) Sdn Bhd v Chang Ching Chuen & Ors and another appeal** [1995] 3 CLJ 639, that the law will not allow a person to deny knowledge of facts that his agent knew, subject to only one exception, that is, where the agent (the solicitor in the present case) is complicit in the fraud.

This means that the law imputes to the principal knowledge of facts, which the agent knows, except where the agent has committed a prior fraud thus making it certain that the agent would conceal the knowledge. Hence, Public Bank's argument that it has no knowledge of the adverse claims that the deceased have over the land is irrelevant since the parties did not allege fraud against the solicitor.

The second issue is whether the solicitor's knowledge acquired in a previous or different transaction could be imputed to Public Bank.

In this regard, the Court quoted *Bowstead & Reynolds on Agency* and Hoffmann LJ in **El Ajou v Dollar Land Holdings Ltd** [1994] 2 ALL ER 685, and held that where an agent is authorised to enter into a transaction in which his own knowledge is **material**, knowledge which he acquired outside the scope of his authority may also be imputed to the principal.

In this case, the solicitor's duty as an agent towards Public Bank is to prepare loan documentation, inquire about the title and inform Public Bank of any encumbrances that he was aware of in respect of the transaction.

The two connected transactions were separated from each other by a period of about three months. It is apparent that the two transactions were immediately

consequent on one another and were very closely connected that matters in respect of the first transaction ought to have been present in the solicitor's mind.

The Court further held that a third party could not know whether key information had in fact been passed by the solicitor to Public Bank and for reasons of third party protection, such key information is deemed to have passed. Hence, Public Bank's status as a subsequent purchaser with good faith is vitiated by the solicitor's material knowledge that there was a serious dispute on the proprietorship of the land.

The appeal was allowed.

For further information regarding dispute resolution matters, please contact our [Dispute Resolution Practice Group](#).

EMPLOYMENT AND ADMINISTRATIVE LAW

Proposed amendments to Judicial Review procedures

The Attorney General Chambers ("AGC") had on 23 July 2018 issued a media release whereby the AGC proposed to revise Order 53 Rule 3(3) of the Rules of Court 2012.

Under Order 53 Rule 3(3), applicants who have filed an application for Judicial Review are required to serve the cause papers to the AGC in relation to the application for leave to commence judicial review. The proposal by the Attorney General would dispense with such a requirement.

According to the Attorney General most, if not all, of the application for Judicial Reviews are made in relation to employment matters emanating from the Industrial Court. As such cases are intrinsically private between the parties, it would therefore not require the involvement of the Government.

For further information regarding employment and administrative law matters, please contact our [Employment and Administrative Law Practice Group](#).

FINANCIAL SERVICES

Issuance of Supplementary Notice (No 4) on Foreign Exchange Administration Rules

Bank Negara Malaysia (“BNM”) had on 17 August 2018 issued a Supplementary Notice (No 4) on Foreign Exchange Administration Rules (“Supplementary Notice”) aimed at facilitating operational efficiencies and risk management by businesses and financial institutions.

Some of the key highlights are as follows:

- i. Exporters may now automatically sweep export proceeds into their Trade Foreign Currency Account up to the higher of (a) 25% of export proceeds and (b) up to six months foreign currency obligation, subject to documentary proof. Any balance shall be converted into ringgit. The “*six months foreign currency obligation*” refers to foreign currency import and loan repayment obligations, as well as current international transaction as illustrated in the Appendix of the Supplementary Notice.
- ii. Upon approval from BNM, residents may hedge:
 - foreign currency obligations beyond six months; and
 - foreign exchange exposures arising from invoices issued in foreign currency under international pricing practices for domestic trade in goods and services.
- iii. (a) Non-residents (other than non-resident banking institutions) and (b) non-resident banking institutions which have a firm commitment are allowed to

trade in ringgit-denominated interest rate derivatives via the Appointed Overseas Offices. Notwithstanding the above, all interest rate derivatives embedded with buying and selling of ringgit against foreign currency (for example, cross currency interest rate swap) shall be subject to firm underlying.

For further information regarding financial services matters, please contact our [Financial Services Practice Group](#).

INTELLECTUAL PROPERTY

Chow Chuan Fat v Yeo Chai Seng & Ors

The Kuala Lumpur High Court in the recent case of **Chow Chuan Fat v Yeo Chai Seng & Ors** [2018] MLJU 914 had the opportunity to address the application of section 38(1)(a) of the **Patents Act 1983** (“PA”). Section 38(1)(a) provides for rights derived from manufacture or use in good faith by a third party prior to or at the priority date of the patent application as an exception to patent infringement.

Brief facts

- The plaintiff Mr Chow Chuan Fatt (“Mr Chow”) has been in the palm oil industry since 1989.
- On 26 January 2005, the first defendant (“Mr Yeo”) and second defendant (“Mr Choong”) jointly filed a patent application in Malaysia for an invention entitled “*Method and Apparatus for Sterilizing Oil Palm Fruit*” (the Invention) relating to sterilisation of oil palm fresh fruit bunches by using water (instead of air).
- On 31 January 2008, the patent application was granted a patent with serial number MY-134916-A (“Patent 916”).

- Mr Chow had claimed that he had before 26 January 2005 agreed with Mr Yeo and Mr Choong that the three of them would be partners in the research & development (“R&D”) of the Invention and that Mr Chow had funded the R&D.
- Mr Chow further claimed that Mr Yeo and Mr Choong had applied for Patent 916 without his knowledge and consent.
- Mr Chow further alleged that he had fabricated and marketed the Invention before the application for Patent 916 was jointly filed by Mr Yeo and Mr Choong on 26 January 2005.
- Mr Chow thus claimed, among others, that:
 1. He is co-inventor of the Invention together with Mr Yeo and Mr Choong, and thus entitled to be a co-owner of Patent 916 (and that two Assignments earlier executed by the Mr Yeo and Mr Choong are not valid); and
 2. He is a prior user of the Invention within the meaning of section 38(1)(a) PA and is thereby entitled to exploit commercially Patent 916 without being liable for patent infringement.
- The High Court made a finding of fact that Mr Chow was not a co-inventor or co-owner of the Invention.
- The High Court held that Mr Chow also could not rely on section 38(1)(a) for the following reasons:
 1. The Court made a finding of fact that Mr Chow had failed to prove his use of the Invention on or before the priority date of 26 January 2005.
 2. In any event, the Court held that Mr Chow was estopped from relying on section 38(1)(a) by his stand that the Invention is not novel in his defence and counterclaim in another suit in which one of the causes of action was infringement of Patent 916.
- The High Court however proceeded to discuss Mr Chow’s reliance on section 38(1)(a) in the event that the Court had erred in applying the doctrine of estoppel. This was discussed together with the application of sections 11, 14(1), 14(2)(a) and 58 PA.

The High Court's Discussion of "*Prior Use*" Under Section 14(2)(a) and "*Use*" under Section 38(1)(a)

The High Court was of the following view :

- If a person can prove **the use of an invention by any person before the priority date** of the patent application claiming the invention ("Prior Use"), the person may apply to court to invalidate the patent under section 11, section 14(1), section 14(2)(a) and section 56(2)(a) PA on the ground that the invention is not new. If a patent is invalid, there cannot be any cause of action for patent infringement under section 58 PA.
- Section 38(1)(a) Use applies if a person can prove. In such a case:
 1. The person relying on section 38(1)(a) Use has a right to exploit commercially the patented invention and cannot be liable for patent infringement under section 58 PA; and
 2. The patent is still valid (unlike the case of Prior Use).

Conclusion

In the above case, the High Court took the view that :

1. If a person claims that a patented invention lacks novelty, he is estopped from asserting that he was a prior user of the invention within the meaning of section 38(1)(a) PA.
2. If a person can prove that his or her own use of a patented invention falls within the meaning of section 38(1)(a), said person may rely on the section to commercially exploit the invention without being liable for patent infringement, and the patent remains valid.

The above view taken by the court leaves open the question of whether the court is of the view that if a person were to assert that he was a prior user of the patented invention within the meaning of section 38(1)(a), he could not then challenge the validity of the patent based on his own public use of the patented invention prior to the priority date.

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INTELLECTUAL PROPERTY PRACTICE GROUP

For further information regarding intellectual property law matters, please contact our [Intellectual Property Practice Group](#).

TAX AND REVENUE

Income tax

The [Inland Revenue Board of Malaysia](#) has issued an amendment to the following technical guideline on 17 August 2018:

- **Garis Panduan Potongan Bagi Perbelanjaan Berhubung Dengan Yuran Kesetiausahaan Dan Yuran Pemfailan Cukai** (available in Malay language only)

Proposed Sales and Service Tax (“SST”)

The **Transitional Rules** (as at 24 August 2018) have been published on the [Royal Malaysian Customs Department’s MySST website](#).

Proposed Sales Tax

The following materials have been published on the [Royal Malaysian Customs Department’s MySST website](#):

- i. **General Guide Sales Tax** (as at 25 August 2018)
- ii. **Guide on Sales Tax Registration** (as at 25 August 2018).

Further, the following Industry Guides have also been published on the [Royal Malaysian Customs Department’s MySST website](#):

- i. **Automotive Industry (Excluding Commercial Vehicle)** (as at 23 August 2018)
- ii. **Manufacturing and Import/Export** (as at 23 August 2018).

Proposed Service Tax

The following materials have been published on the [Royal Malaysian Customs Department's MySST website](#):

- i. **List of Proposed Taxable Services**
- ii. **General Guide Service Tax** (as at 25 August 2018)
- iii. **Guide on Service Tax Registration** (as at 25 August 2018).

Further, the following Industry Guides have also been published on the [Royal Malaysian Customs Department's MySST website](#):

- i. **Advertising Services** (as at 23 August 2018)
- ii. **Accommodation** (as at 25 August 2018)
- iii. **Betting and Gaming** (as at 23 August 2018)
- iv. **Courier Services** (as at 23 August 2018)
- v. **Credit Card and Charge Card** (as at 20 August 2018)
- vi. **Customs Agent Services** (as at 20 August 2018)
- vii. **Domestic Flight** (as at 20 August 2018)
- viii. **Electricity** (as at 23 August 2018)
- ix. **Employment Services** (as at 25 August 2018)
- x. **Food & Beverages** (as at 23 August 2018)
- xi. **Group C, D & E (Clubs)** (as at 23 August 2018)
- xii. **Hire Passenger Vehicles Services** (as at 20 August 2018)
- xiii. **Insurance and Takaful** (as at 23 August 2018)
- xiv. **Management Services** (as at 25 August 2018)
- xv. **Motor Vehicle Services Or Repair Centre** (as at 24 August 2018)
- xvi. **Paid Television Broadcasting Services** (as at 23 August 2018)
- xvii. **Parking Services** (as at 25 August 2018)
- xviii. **Telecommunication** (as at 23 August 2018)

For further information regarding tax and revenue matters, please contact our [Tax and Revenue Practice Group](#).



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