Shearn Delamore &co.

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CORPORATE/M&A

Will the battle between the taxi industry and the e-hailing operators be finally put to rest?

IN THIS ARTICLE, LAI ZHEN PIK DISCUSSES THE NEW REGULATORY FRAMEWORK FOR E-HAILING OPERATORS.

Introduction

The introduction of the e-hailing system had changed the landscape of public transport in Malaysia and, at the same time, intensified the competition in the taxi industry. Whilst the taxi industry was subject to specific regulatory requirements there was previously no express law to regulate the operation of the e-hailing

system. Many taxi drivers had spoken out against the unfairness of burdening the taxi industry with such requirements when the e-hailing industry was not regulated[1].

The **Land Public Transport (Amendment) Act 2017** ("LPT Amendment Act") and the **Commercial Vehicles Licensing Board (Amendment) Act 2017**("CVLB Amendment Act") were enacted to amend the existing **Land Public Transport Act 2010** ("LPTA") and the **Commercial Vehicles Licensing Board Act 1987** ("CVLB") respectively. The amendment Acts which came into force on 12 July 2018 have provided the regulatory framework for the operation of the e-hailing system.

The LPTA applies to the land public transport industry in Peninsular Malaysia; whereas the CVLB applies to Sabah, Sarawak and the Federal Territory of Labuan.

In this article, we focus on the important regulatory requirements introduced under the LPTA affecting the e-hailing industry in Peninsular Malaysia.

Licence to operate

Under the LPTA, taxi cabs operators or providers are subject to the requirement to obtain an operator's licence being a person who operates or provides a public service vehicle service using a class of public service vehicles[2].

The term "*public service vehicle service*" means the carriage of passengers by means of one or more public service vehicles of the same class or different classes, whether for hire or reward or for any other valuable consideration or money's worth or otherwise[3].

The public service vehicles listed under the First Schedule of the LPTA included taxi cabs but not e-hailing vehicles. In addition, any application for an operator's licence must be submitted by a sole proprietor, partnership, private or public company or co-operative[4].

A person is deemed to be operating or providing a public service vehicle service if he:

a. uses or drives a public service vehicle himself; or

b. employs one or more persons to use or drive a public service vehicle, to operate or provide a public service vehicle service, and he

A. owns the said public service vehicle; or
B. is responsible, under any form of arrangement with the owner or lessor of the said public service vehicle to manage, maintain or operate such public service vehicle[5].

In contrast, companies operating or providing e-hailing services are not required to obtain an operator's licence as they are merely involved in the business of facilitating bookings or transactions between private car drivers and passengers, and do not fall within the ambit of section 16 of the LPTA.

With the LPT Amendment Act coming into force, the following amendments were made:

i. A new chapter relating to "*Licensing of Intermediation Business*" was inserted into the LPTA, in which "*intermediation business*" was defined to mean business of facilitating arrangements, bookings or transactions for the provision of land public transport services whether for any valuable consideration or money's worth or otherwise.

ii. "*E-hailing vehicle*" was inserted as one of the classes of public service vehicles under the First Schedule of the LPTA to mean:

"*a **motor vehicle** having a seating capacity of four persons and not more than eleven persons (including the driver) used for the carriage of persons on any journey in consideration of a single or separate fares for each of them, in which **the arrangement, booking or transaction**, and the fare for such journey are facilitated through an **electronic mobile application** provided by an **intermediation business**.*"[6]

Based on the above, any person operating or providing e-hailing services is required to obtain an intermediation business licence from the Land Public Transport Commission or *Suruhanjaya Pengangkutan Awam Darat* ("SPAD")[7]. An applicant for an intermediation business licence or the e-hailing company must observe the following requirements:

a. be registered with the Companies Commission of Malaysia or Malaysia Co-operative Societies Commission;

b. have a minimum share capital of RM100,000;

c. one of the members on the board of directors or the board of the co-operative has to be a Malaysian who resides in Malaysia; and

d. such other conditions in relation to the intermediation business as may be issued from time to time[8].

Licence to drive

Any driver of a public service vehicle on a road is required to obtain a vocational licence issued by the Road Transport Department or *Jabatan Pengangkutan Jalan Malaysia*[9].

A reference to "*public service vehicle*" under the **Road Transport Act 1987**("RTA") is to have the same meaning as assigned under the LPTA[10].

With the extension of the classes of "*public service vehicle*" under the First Schedule of the LPTA to include e-hailing vehicles, any driver of an e-hailing vehicle will be required to obtain a vocational licence (similar to that of a driver of a taxi cab) under the RTA.

As part of the requirements to obtain a vocational licence, the applicant will be required to show that he is a fit and competent person to be licensed and will be required to, amongst others, attend and complete a course of instruction and be issued a certificate of attendance for such course of instruction (the latter of which

shall be valid for a period of 12 months)[11].

In addition to the above-mentioned statutory requirements relevant to intermediation business operators and drivers of e-hailing vehicles, the following requirements apply to e-hailing vehicles:

i. **Inspection of vehicles**

It is mandatory for e-hailing vehicles which have reached the age of three years from their registration dates to be inspected once every 12 months at PUSPAKOM, an authorised vehicle inspection company[12], in accordance with the prescribed inspection standard[13]. A vehicle which fails to meet the stipulated inspection standards must undergo a re-inspection at PUSPAKOM inspection centres[14].

ii. **Vehicle model**

All e-hailing vehicles are also limited to brands and models which achieve at least a three-star safety rating under the ASEAN New Car Assessment Program ("NCAP")[15]. This model is identical to the one adopted by the SPAD during the liberalisation of the taxi industry in August 2016 which provides wider options for taxi cabs[16].

iii. **Display of distinguishing mark**

A driver of an e-hailing vehicle must display at all times whilst carrying a passenger a distinguishing mark on the vehicle which is to be determined by the SPAD[17]. This is similar to a taxi cab which is required to display on the dashboard in front of the front passenger and at the rear of the left front seat, an identification card of the driver in the prescribed form determined by the SPAD.[18]

iv. **Insurance**

It is a requirement for e-hailing drivers to have insurance policies covering the vehicle, passenger and third party[19].

Grace period

Notwithstanding the above, there is a one-year grace period granted to any intermediation business operator who has commenced its business operation prior to 12 July 2018 to make an application for a licence in accordance with the LPTA[20].

Passenger fare

The fares to be charged for an e-hailing vehicle shall be determined by the intermediation business licensee[21]. Notwithstanding that, the following are to be observed by e-hailing operators or companies in respect of their fare structures[22]:

i. A maximum of 10% commission can be charged for each journey undertaken by taxi drivers providing e-hailing services;

ii. A maximum of 20% commission can be charged for each journey undertaken by other e-hailing drivers; and

iii. Surge pricing can be charged at two times the fare incurred.

Conclusion

The introduction of regulatory requirements on the e-hailing industry players is a laudable effort to regulate e-hailing operators.

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[1] www.nst.com.my/news/nation/2018/07/391319/taxi-drivers-stage-protest-against-e-hailing-ruling-outside-parliament

[2] Section 16(1) of the LPTA.

[3] Section 2 of the LPTA.

[4] Circular No 6 of Year 2017 on the "*New Policies for Taxi Cab, Hire Car and Limousine Taxi Cab classes of the Public Service Vehicles*" *(Pekeliling Bil. 6 Tahun 2017: Dasar-Dasar Baharu Bagi Perkhidmatan Kenderaan Perkhidmatan Awam Kelas Teksi, Kereta Sewa dan Teksi*

Mewah) issued by the Land Public Transport Commission *(Suruhanjaya Pengangkutan Awam Darat or* SPAD*)* on 31 October 2017 ("SPAD's New Policies").

[5] Section 16(2) of the LPTA.

[6] Paragraph 1 of the First Schedule of the LPTA.

[7] Section 12A of the LPTA.

[8] Paragraph 7 of the FAQ relating to the Implementation of e-Hailing Services*(Soalan Lazim Pelaksanaan Perkhidmatan E-Hailing*") issued by the SPAD — www.spad.gov.my/ms/node/3490 ("SPAD's FAQ").

[9] Section 56 of the RTA.

[10] Section 2 of the RTA.

[11] Rule 4(b)(iv) of the Public Service Vehicles (Licensing and Conduct of Drivers, Conductors and Passengers) Rules 1959 ("**PSV Rules**").

[12] Rule 4 of the Motor Vehicles (Periodic Inspection, Equipment and Inspection Standard) Rules 1995 ("Inspection Rules").

[13] Rule 7 of the Inspection Rules.

[14] Rule 5 of the Inspection Rules.

[15] Paragraph 12 of the SPAD's FAQ.

[16] The SPAD's New Policies.

[17] Rule 15B of the PSV Rules.

[18] Rule 15A of the PSV Rules.

[19] Section 90(1) of the RTA and paragraph 12 of the SPAD's FAQ.

[20] Section 32(1) of the LPT Amendment Act.

[21] Item 23 of Part I of the Fifth Schedule of the Motor Vehicles (Commercial Transport) Rules 1959.

[22] Paragraphs 13 and 14 of the SPAD's FAQ.

For further information regarding corporate and commercial law matters, please contact our Corporate/M&A Practice Group.

REAL ESTATE

The Valuers, Appraisers and Estate Agents (Amendment) Act 2017

IN THIS ARTICLE, DING MEE KIONG CONSIDERS THE AMENDMENT MADE TO THE VALUERS, APPRAISERS AND ESTATE AGENT ACT 1981 WITH REGARDS TO PROPERTY MANAGERS.

Introduction

The **Valuers, Appraisers and Estate Agents (Amendment) Act 2017**("Amendment Act"), which came into force on 2 January 2018, amended the **Valuers, Appraisers and Estate Agents Act 1981** ("Principal Act") by inserting, among others, a new Part VB which relates to property managers.

The Amendment Act

Prior to coming into force of the Amendment Act, only a registered valuer, appraiser or estate agent duly authorised by the Board of Valuers, Appraisers and Estate Agents (as it was then known) was permitted to undertake property management.

After the coming into force of the new Part VB (Property Managers), subject to the provisions of the Principal Act, every person shall be entitled to have his name entered under Part IV of the Register of Valuers, Appraisers, Estate Agents and Property Managers ("Register") to practise property management upon making an application to the Board of Valuers, Appraisers, Estate Agents and Property Managers ("Board") and proving to the satisfaction of the Board that he:

a. has attained the age of 21 years and is of sound mind, good character and has not been convicted of any offence involving fraud, dishonesty or moral turpitude during the five years immediately preceding the date of his application;

b. is not an undischarged bankrupt;

c. has not made a statement, or affirmed or attested a document that is false or misleading in a material particular;

d. has not dishonestly concealed material facts;

e. has not furnished false information;

f. has been registered as a probationary property manager under the Principal Act and has obtained the practical experience and has passed the Test of Professional Competence prescribed by the Board or any equivalent test or examination recognised by the Board;

g. has made a declaration in the form and manner prescribed by the Board;

h. has paid the fees prescribed by the Board; and

i. is not under suspension from valuation or estate agency practice nor has his name been cancelled from the Register.

Notwithstanding paragraph (i), a person who is disqualified from valuation or estate agency practice may, if the Board considers him fit to practise property management, have his name entered under Part IV of the Register as a property manager.

Under the Principal Act:

"***Property management***" means the management and control of any land, building and any interest in the land or building, excluding the management of property-based businesses, on behalf of the owner for a fee.

"***Property-based business***" includes a hotel, motel, hostel, plantation, quarry, marina, port, golf course, cinema, stadium, sports complex and hospital.

"***Property manager***" means a person, a firm or a company who, on behalf of the owner of any land, building and any interest therein, manages or maintains or controls such land, building and interest.

The property management practice referred to in the Principal Act includes the following:

a. enforcing the terms of leases and other agreements pertaining to the property;

b. preparing budgets and maintaining the financial records for the property;

c. monitoring outgoings for the property and making payments out of the income from the property;

d. advising on sale, purchase and letting decisions;

e. advising on insurance matters;

f. advising on the opportunities for the realisation of development or investment potential of the property;

g. advising on the necessity for upgrading the property or for the merging of interests;

h. managing and maintaining the building and facilities attached to the building; and

i. making or checking of inventories of furniture, fixtures, trade stocks, plant or machinery, or other effects.

No person (or a firm) shall, unless he is a registered property manager and has been issued with an authority to practise under section 16 of the Principal Act:

a. practise or carry on business or take up employment under any name, style or title containing the words “*Property Manager*”, “*Managing Agent*”, or the equivalent thereto in any language or bearing any other word whatsoever in any language which may reasonably be construed to imply that he is a registered property manager or he is engaged in property management practice or business;

b. act as a property manager;

c. carry on business or take up appointment or engagement as a property manager;

d. display any signboard or poster, or use, distribute or circulate any card, letter, pamphlet, leaflet, notice or any form of advertisement, implying either directly or indirectly that he is a registered property manager or he is engaged in property management practice or business;

e. undertake for a fee or other consideration any of the property management practice mentioned above; or

f. be entitled to recover in any court any fee, commission, charge or remuneration for any professional advice or services rendered as a property manager.

The owner of any land, building and any interest therein who manages such land, building and interest is allowed to act as property manager. For this purpose, “owner” in relation to any land, building and any interest in the land or building means:

a. the registered owner;

b. the beneficiary of any estate or trust of a deceased person; and

c. a lessee whose interest is registered under the National Land Code [Act 56 of 1965], the Sarawak Land Code [Sarawak Cap. 81] and the Sabah Land Ordinance [Sabah Cap. 68].

A registered owner or a lessee may be an individual or a company but shall not include any shareholder in the company owning such land, building and interest in the land or building unless such land, building and interest is wholly owned by the company.

Conclusion

The amendment to the Principal Act allows any person (whether or not he is a registered valuer, appraiser or estate agent) to practise property management if he proves to the Board the required conditions under the Principal Act have been satisfied.

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For further information regarding real estate law matters, please contact our Real Estate Practice Group.

TAX AND REVENUE

Inland Revenue Board Issues Updated Tax Investigation Framework in 2018

IN THIS ARTICLE, SHARON LAU FOONG YEE HIGHLIGHTS THE KEY CHANGES IN THE TAX INVESTIGATION FRAMEWORK 2018.

Introduction

"*Tax investigation*" entails an examination of a taxpayer's business books, records and documents as well as his personal documents to ensure that the correct amount of income is reported and tax is calculated as well as paid by the taxpayer. The revised Tax Investigation Framework ("2018 Framework") issued by the Malaysian Inland Revenue Board ("Revenue") took effect from 15 May 2018 and replaced the Tax Investigation Framework issued in 2013 ("2013 Framework").

Some of the more pertinent changes are highlighted below.

- **Revenue officers can obtain assistance from any relevant/connected persons**

The 2018 Framework allows Revenue officers to record statements or documents from any person who is connected to the case under investigation to assist the tax investigation. The 2018 Framework generically states that a taxpayer can be charged in court for tax evasion.

- **Safeguards when recording statements from relevant/connected persons**

An additional safeguard is that a qualified lawyer can be present during the recording of such statements.

- **Taxpayer's rights during tax investigations**

The 2013 Framework stipulated and allowed the taxpayer's right to appoint a lawyer during the investigation process and/or the prosecution following a tax investigation. The 2018 Framework has surprisingly omitted any reference to this right.

The 2013 Framework allowed the taxpayer to appoint a tax agent or a group of qualified advisors "*at any time*" whereas the 2018 Framework only stipulates that the taxpayer can appoint a tax agent "*for the purposes of investigations*".

Previously, the 2013 Framework allowed the taxpayer to apply for copies of investigation documents held by the Revenue while under the 2018 Framework the taxpayer is allowed to make copies of the taxpayer's documents that are under investigation and within the Revenue's control.

- **Completion of investigations**

After the tax investigation, the Revenue will issue a settlement or confirmation letter to the taxpayer. The taxpayer who accepts the settlement will sign an agreement or a letter of undertaking.

The 2018 Framework states that taxpayers who have been subjected to a tax investigation will be monitored by the Revenue. However, the 2018 Framework did not elaborate further on the specifics of the monitoring by the Revenue. It is not

stated if this monitoring program would be similar to the Monitoring Deliberate Tax Defaulter Program stipulated in the Tax Audit Framework issued in April 2018.

The 2018 Framework stipulates that even where the taxpayer disputes the tax investigation findings, the Revenue retains the discretion to issue tax assessments with penalties. Under the 2013 Framework, assessments are only raised after a successful prosecution in court.

- **Lump sum payment as general rule**

Payment procedures are more elaborate under the 2018 Framework. The 2013 Framework merely stated that the fine imposed by court is to be satisfied in accordance with the court's decision.

The 2018 Framework stipulates the full payment of tax and penalties in one payment. The taxpayer may request to pay in instalments. If allowed, the first instalment must be at least 25% of the total taxes and penalties and remitted on the date of the agreement. The balance is payable in accordance with a Revenue-approved instalment plan. Higher penalty rates would be imposed in cases with longer instalment payment periods.

In the event of any default in meeting the instalments, the usual 10% and 5% increase in accordance with section 103(7) and (8) of the **Income Tax Act 1967** ("ITA 1967") will be applied.

- **Taxpayer's rights of appeal**

The 2013 Framework only stated that the taxpayer has a right to appeal to a higher court against a conviction in court.

The 2018 Framework further stipulates that under the ITA 1967, the taxpayer can appeal against assessments raised by the Revenue following a tax investigation by submitting a Form Q to the Director of the relevant Investigation Branch and refers to section 99(1) of the ITA 1967 which gives a taxpayer the right to appeal to the Special Commissioners of Income Tax within 30 days after service of the notice/notices of assessment raised by the Revenue.

Conclusion

The changes under the 2018 Framework are primarily intended to reflect relevant legislative changes to date but reveals further emphasis towards a more robust tax investigation and enforcement process.

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INTELLECTUAL PROPERTY

Dr H K Fong Brainbuilder Pte Ltd v Sg-Maths Sdn Bhd & Ors [2018] MLJU 682

A CASE NOTE BY ELYSE DIONG TZE MEI.

Introduction

This case highlights the importance of registering a franchise with the Registrar of Franchises and the consequences of not doing so. In particular, the effect and applicability of section 6(1) of the **Franchise Act 1998** ("FA 1998") are discussed.

Facts

The subject matter was "*Dr. Fong's Method*" of teaching mathematics to students in primary and secondary school, which was developed by Dr Fong Ho Kheong ("Dr Fong"). Dr Fong incorporated the plaintiff, Dr H K Fong Brainbuilder Pte Ltd

("Dr H K Fong Brainbuilder"), in Singapore which then entered into a Master Licence Agreement dated 18 December 2013 ("MLA 2013") with the first defendant, Sg-Maths Sdn Bhd ("Sg-Maths"), for the operation and management of the "*BrainBuilder*" business ("the Business") in Malaysia.

Both the second defendant ("Lum Sau Leong") and third defendant ("Leong Chun Piew") have been Dr Fong's "*best friends*" for 55 years. They own a total of 85% of the paid up shares in Sg-Maths and are the only directors of Sg-Maths. Dr Fong held 15% of the paid up shares in Sg-Maths.

Dr H K Fong Brainbuilder alleged, amongst others, that Sg-Maths had breached the MLA 2013 when Sg-Maths sub-licensed the Business to Mr Suhaimi bin Ramly to operate a Brainbuilder Centre at Setapak. The defendants, amongst others, sought in turn for a declaration that the MLA 2013 was invalid[1].

High Court decision

When the case came before the High Court, the following issues were considered:

- Whether Malaysian courts have jurisdiction to hear the case in view of clause 37 of the MLA 2013 and, if yes, whether the law of Malaysia or Singapore applied?
- If Malaysian law applied, whether the FA 1998 applied to the MLA 2013?
- If the FA 1998 applied, whether there was a breach of sections 6(1)[2]and 6A(2)[3] of the FA 1998?
- If there was a breach of sections 6(1) and 6A(2) of the FA 1998, whether the MLA 2013 was void under section 24(a) and/or (b) of the **Contracts Act 1950** ("CA 1950")[4].

Do Malaysian courts have jurisdiction to try this case?

Clause 37 of the MLA 2013 provides as follows:

"*The construction, interpretation and enforcement of [MLA 2013] is governed by the laws in force in Singapore and the parties unconditionally and irrevocably*

submit to the non-exclusive jurisdiction of the Courts in Singapore."

The High Court decided that the Malaysian High Court has the jurisdiction to hear the case for the following reasons:

- The causes of action for breaches of the MLA 2013 and a guarantee executed by Lum Sau Leong and Leong Chun Piew in favour of Dr H K Fong Brainbuilder arose in Malaysia and not Singapore;
- The second to fourth defendants resided in Malaysia;
- Sg-Maths has its place of business in Malaysia;
- The Malaysian court was the "*forum conveniens*" (appropriate forum) because the documents were prepared, executed and performed in Malaysia, the alleged breaches took place solely in Malaysia and all the witnesses except Dr Fong resided in Malaysia.

Clause 37 does not bar the Malaysian High Court from hearing the case and, even if it did, the contractual clause was held unenforceable because there was a breach of sections 6(1) and 6A(2) of the FA 1998 which rendered the MLA 2013 void.

Does the FA 1998 apply to the MLA 2013?

Although the MLA 2013 was not named a "*franchise*" contract, the High Court held that the courts are not bound by labels or descriptions given by the parties in the contract.

The High Court perused the MLA 2013 and found that it clearly satisfied all four cumulative conditions of a "*franchise*" where:

i. The franchisor grants to the franchisee the right to operate a business according to a franchise system as determined by the franchisor during the term to be determined by the franchisor;

ii. The franchisor grants to the franchisee the right to use a mark, or trade secret, or any confidential information or intellectual property, owned by the franchisor;

iii. The franchisor possesses the right to administer continuous control during the term over business operations in accordance with the franchise system; and

iv. The franchisee may be required to pay a fee or other form of consideration[5].

In particular, the High Court Judge found that Dr H K Fong Brainbuilder had provided Sg-Maths with a "*Franchise Operations Manual*" and Sg-Maths was required to comply with the manuals.

Dr Fong had actually referred to Sg-Maths as the Master Franchisee and this is supported by the admission by Dr Fong that he had been advised by Dr H K Fong Brainbuilder's solicitor to register the Business as a franchise.

Has there been a breach of sections 6(1) and 6A(2) of the FA 1998?

As a franchise, the High Court held that both the franchisor and franchisee of the Business are obliged to register the franchise with the Registrar. The requirement that a franchisor should register a franchise extends to include both local and foreign franchisors.

Applying a purposive construction of the FA 1998, the High Court rejected Dr H K Fong Brainbuilder's argument that section 6(1) of the FA 1998 only mandates a local franchisor to register its franchise business.

In support, the High Court also had regard to the title of the FA 1998 which states that the FA 1998 is "*to provide for the registration of, and to regulate, franchises, and for incidental matters*" and the parliamentary debates on the implementation of the **Franchise Act (Amendment) Act 2012** on 17 July 2012 which made reference to the purpose and objective of registering a franchise under the FA

1998.

The High Court based its decision on the following grounds:

- It would create absurdity where local franchisors have to register their franchises with the Registrar under section 6(1) of the FA 1998 but foreign franchisors are exempted from such requirement.
- The Court further noted that under section 58 of the FA 1998, only the Minister (defined under section 4 of the FA 1998) may exempt a franchisor, local and foreign, from the requirement under section 6(1) of the FA 1998.

Injustice will be caused to franchisees of foreign franchises as a foreign franchisor would not have to comply with the mandatory provision under section 6(1) of the FA 1998.

Whether the MLA 2013 was void

Based on the High Court's finding that the both the foreign franchisor and franchisee of the Business franchise had failed to register with the Registrar under sections 6(1) and 6A(1) of the FA 1998 respectively, the MLA 2013 was held to be void in its entirety and unenforceable.

The High Court found that the MLA 2013 was void in its entirety notwithstanding clause 48.1 of the MLA 2013 which provides for the severability of any provisions in the MLA 2013 which the Court finds to be invalid without invalidating other provisions of the MLA 2013.

The High Court in this instance did not exercise its discretion to "*save*" the lawful part of a contract on the following grounds:

i. It would be an unlawful circumvention of the imperative provisions of sections 6(1) and 6A(1) of the FA 1998 which were intended by Parliament to be mandatory provisions; and

ii. The failure to comply with sections 6(1) and 6A(1) of the FA 1998 did not amount to non-compliance of any particular term of the MLA 2013. Rather,

they concerned failure or lack of registration of the Business and this in itself taints the MLA 2013 in its entirety.

Conclusion

The High Court in the present case took a purposive interpretation of the FA 1998 in holding that, although the term "*franchise*" was not used in the agreement or contract, the arrangement between the parties may still be considered a franchise under the FA 1998.

Owing to the consequences that may result following the non-registration of franchises, it is prudent, not only for self-acknowledged franchise businesses to comply with the FA 1998, but also other businesses to re-examine their business models and consider if they fall within the definition of a "*franchise*" as provided for by FA 1998.

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[1] There were other issues that were also raised in this case, including

i. the validity of the Guarantee executed by Lum Sau Leong and Leong Chun Piew, and if in fact MLA 2013 and the Guarantee were invalid, whether the Court may grant remedy under sections 66 and 71 of the CA 1950;
ii. whether there was tort of conspiracy and breach of confidence committed by the second to sixth defendants against Dr H K Fong Brainbuilder;
iii. whether there was misrepresentation by Dr Fong to the first to third defendants;
iv. whether Dr H K Fong Brainbuilder's suit was an abuse of court process ("Other Issues").

However, as the crux of this article deals with franchise, these Other Issues will not be discussed here.

[2] A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.

[3] Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval.
[4] The consideration or object of an agreement is lawful, unless — (a) it is forbidden by a law or (b) it is of such a nature that, if permitted, it would defeat any law.
[5] Section 4 of the FA 1998.

For further information regarding intellectual property law matters, please contact our Intellectual Property Practice Group.

EMPLOYMENT AND ADMINISTRATIVE LAW

A Radical Departure

IN THIS ARTICLE, REENA ENBASEGARAM LOOKS AT THE ISSUE OF RESTRUCTURING THE WAGE SYSTEM OF HOTEL EMPLOYEES.

Introduction

Service charge is a practice unique to the hotel industry whereby it is imposed on the bills issued to the customers. The collected amount is then distributed to the hotel's employees in accordance with the service charge points allocated to each employee, save for 10% which is retained by the hotel to defray the administrative cost incurred in the maintenance of the service charge account, collection and distribution of the service charge. One of the primary objectives of service charge is to supplement the basic salary of employees which is kept low due to the fluctuating nature of the hotel industry.

However, with the introduction of minimum wage legislation, namely, the Minimum Wages Order 2012[1] ("MWO"), made pursuant to the **National Wages Consultative Council Act 2011**[2] ("Act"), there would no longer be the need to have service charge to cushion the impact of low wages.

In fact, the accompanying Guidelines on the Implementation of the Minimum Wages Order 2012 ("Guidelines") permit employers in the hotel industry to include all or part of the service charge meant for distribution as part of the minimum wage.

The Crystal Crown decision

Against the above background, the hotel in **Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restaurant Semenanjung Malaysia v Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya)**[3] had proposed the implementation of the clean wage system whereby service charge would be incorporated into the minimum wage or, alternatively, that service charge (or a part thereof as the case may be), be used to top-up the minimum wage, to bring the same up to minimum wage requirements under the MWO.

In **Crystal Crown**, the dispute involved the terms and conditions to be incorporated into the first collective agreement between the parties, and whether the Industrial Court's power to determine a trade dispute would include adjudicating on the hotel's wage structure, as envisaged by the MWO.

The Industrial Court chose to disregard the hotel's evidence that the impacted employees would not be financially worse off following such incorporation and that, conversely, the hotel would be economically affected should it be compelled to continue paying the service charge whilst topping up the basic wage to meet minimum wage requirements from its own pocket. The latter scenario would also result in a pecuniary windfall for the impacted employees.

In Award No 874 of 2015, the Industrial Court held that the service charge component of the remuneration package or part thereof could not be utilised to top up the basic wage to meet the then recently introduced minimum wage requirements on the basis that the impacted employees' contract of employment provided for the payment of both basic salary and service charge.

The Industrial Court's decision in **Crystal Crown** rejecting the argument was affirmed by the High Court as well as the Court of Appeal, and is currently pending

appeal before the Federal Court.

The decision has far-reaching consequences on the hotel industry. Subsequent Industrial Court decisions dealing with the issue of restructuring the basic wage to include the service charge element deemed themselves bound by the **Crystal Crown** decision which had been affirmed by the superior courts.

The Andaman/Sheraton decisions

However, two recent decisions[4] handed down on 13 July 2018, Award No 1608 of 2018 involving **Inter Heritage (M) Sdn Bhd (Sheraton Imperial Kuala Lumpur Hotel)** and Award No 1609 of 2018 involving **The Andaman, a Luxury Collection Resort, Langkawi (Andaman Resort Sdn Bhd) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia**, radically held that the hotels in question were entitled to restructure the employees' wages by converting part or the whole of the service charge payable to be included with the basic salary to form the minimum wage rate of RM900.00 in compliance with the MWO.

The Industrial Court justified its departure from **Crystal Crown** by distinguishing the facts/evidence.

However, a perusal of the Awards indicate that, in essence, the Industrial Court was willing to accept that the impacted employees would not be earning less favourable wages following the restructuring and that the hotels would suffer adverse financial impact should they be compelled to utilise their own funds to top up the basic wage to the minimum wage rate.

The Industrial Court had performed its statutory obligation under section 30(4) of the **Industrial Relations Act 1967**[5] ("IRA 1967"), as well as considered the discriminatory effect it would have on employees not covered under the collective agreement — similar arguments that were raised in **Crystal Crown**.

The Industrial Court considered the intention behind the introduction of service charge, as well as the basis for the implementation of the minimum wage

legislation, its statutory obligation to consider section 30(5) of the IRA 1967[6], and took a purposive approach in its interpretation of the wording of the Act.

The Industrial Court further supported its decisions by taking into account the Guidelines. While acknowledging that the Guidelines has no legal force, the Court nonetheless opined that it remained a persuasive tripartite document and ought to be given due consideration by virtue of section 30(5A) of the IRA 1967[7].

Conclusion

It remains to be seen whether the **Andaman/Sheraton** decision would be upheld by the superior courts[8] or they would hold that the principle of *stare decisis*[9] applies and there was no basis for any distinction on the facts/evidence to have been made.

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[1] Now superseded by the Minimum Wages Order 2016.

[2] With a deferment date of compliance until 31 September 2013 for the hotel industry.

[3] [2014] 3 ILR 410

[4] Heard together as they are part of the same group.

[5] In making its award in respect of a trade dispute, the Court shall have regard to the public interest, the financial implications and the effect of the award on the economy of the country, and on the industry concerned, and also to the probable effect in related or similar industries.

[6] The Court shall act according to equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.

[7] In making its award, the Court may take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister.

[8] The Union has three months to challenge the aforesaid decisions by way of filing an application for leave to commence judicial review proceedings under Order 53 Rules of Court 2012.

[9] *Stare decisis* is Latin for "*to stand by things decided*". In short, it is the doctrine of precedent.

For further information regarding employment and administrative law matters, please contact our Employment and Administrative Law Practice Group.

DISPUTE RESOLUTION

Breach of Natural Justice under the Construction Industry Payment and Adjudication Act 2012

IN THIS ARTICLE, MARINAH RAHMAT EXAMINES HOW AN ADJUDICATION DECISION CAN BE SET ASIDE FOR BREACH OF NATURAL JUSTICE.

Introduction

The **Construction Industry Payment and Adjudication Act 2012** ("Act") was introduced to address cash flow issues affecting contractors in the construction industry as a result of delays and/or lengthy periods of payment under construction contracts.

Under the Act, an unpaid party[1] is entitled to initiate an adjudication proceeding in order to claim any amounts due and/or owing to them under a construction contract.

Briefly, an adjudication proceeding must consist of a payment claim[2] and payment response[3], followed by an adjudication claim[4], adjudication response[5] and adjudication reply[6], all of which are to be filed strictly within the time periods stipulated under the Act (it may vary from five working days to 10 working days).

Once the necessary pleadings are filed, an adjudicator is then tasked with the duty to resolve payment-related issues and possibly ease the cash flow between parties by delivering a decision within 45 working days.

Setting aside an adjudication decision for breach of natural justice

Once an adjudication decision has been obtained, parties are provided with an avenue to set aside an adjudication decision. Parties can only make an application to set aside the decision on four specific grounds listed under section 15 of the Act. One of the four grounds for setting aside an adjudication decision is the denial of natural justice (section 15(b) of the Act).

However, it may not be an easy task to satisfy the court that there has been a breach of natural justice for setting aside an adjudication decision.

The Court of Appeal in **Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd**[7] upheld the position on breach of natural justice taken in the English case of **Primus Build Limited v Pompey Centre Limited & Slidesilver Limited**[8] that:

"*…if there has been a breach of natural justice, but it cannot be demonstrated that it goes to the heart of the adjudicator's decision, it will not affect the enforcement of that decision.*"

Likewise, in **Kerajaan Malaysia v Shimizu Corp**[9], the High Court emphasised that an allegation of breach of natural justice by an adjudicator must be material and not made on mere grounds of dissatisfaction.

"*…a breach of natural justice must be 'either decisive or of considerable potential importance to the outcome and not peripheral or irrelevant, it must be material'...*"

There has been a few recent cases where aggrieved parties were successful in their setting aside applications on the ground that the adjudicator had denied them natural justice. Below are some examples.

- The Federal Court in **View Esteem Sdn Bhd v Bina Puri Holdings Bhd**[10] ruled, amongst others, that the adjudicator had acted in breach of natural justice in excluding and refusing to consider certain defences raised by the appellant (the respondent in the adjudication proceeding) on the basis that it was not firstly raised in the payment response. The Court found

that the adjudicator had wrongly construed the scope of his jurisdiction by refusing to consider the defences raised in the adjudication response.

- The Court of Appeal in **Leap Modulation** concluded that, regardless of the Court's views, it was bound by the decision in **View Esteem.** As such, the Court of Appeal found that it could not depart from the established position that a failure by an adjudicator to consider defences, though not set out in the payment response but are submitted in the adjudication response, amounts to a breach of natural justice resulting in the award of the adjudicator being set aside.
- A similar rationale was relied on by the High Court in **TYL Land and Development Sdn Bhd v SIS Integrated Sdn Bhd**[11] in deciding that there was a material breach of natural justice where the defence of "*waiver*" or "*estoppel*" was not considered at all and that the adjudicator had failed to hear a dispute properly submitted for his adjudication.
- The adjudicator in **Syarikat Bina Darul Aman Berhad & Anor v Government of Malaysia**[12] made a ruling that the claimant's "*loss and expense claim*" was not a valid claim under the Act as "*evaluating a loss and expense claim is a very tedious exercise which requires some expertise*" and "*cannot be done within the short timelines given in CIPAA*". Despite concluding that he had no jurisdiction to decide the matter, the adjudicator went further to dismiss the claim in totality. The High Court in finding in favour of the claimant in the adjudication proceeding held:

"*A refusal to assume jurisdiction and decide on the matter submitted to it on the erroneous understanding of his lack of jurisdiction would be equally a breach of natural justice in that the Claimant's Claim, in this case, under Claim No. 4 for 'Loss and Expense Claim' was not heard at all when it has been properly submitted for Adjudication*."

The High Court echoed the decision in **Pilon Ltd v Breyer Group Plc**[13] where the Court stated that, when an adjudicator erroneously takes

a restrictive view of is own jurisdiction, it is tantamount to a breach of natural justice.

Conclusion

Although an application to set aside an adjudication decision on the ground of breach of natural justice is a difficult task, an aggrieved party may still be successful if he is able to show that the breach of natural justice was in fact material and, in some instances, arose out of the adjudicator's too narrow interpretation of his own jurisdiction under the Act.

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[1] Defined under Section 4 of the Act as "*a party who claims payment of a sum which has not been paid in whole or in part under a construction contract*".

[2] Section 5 of the Act.

[3] Section 6 of the Act.

[4] Section 9 of the Act.

[5] Section 10 of the Act.

[6] Section 11 of the Act.

[7] [2018] MLJU 773

[8] [2009] EWHC 1487

[9] [2018] MLJU 169

[10] [2018] 2 MLJ 22

[11] [2018] MLJU 217

[12] [2017] MLJU 673

[13] [2010] EWHC 837 (TCC)

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