Shearn Delamore & Co.

NEWSLETTER VOL 17 NO 4 | DECEMBER 2018

TAX AND REVENUE

The Implications of the Move from GST To SST

IN THIS ARTICLE, ABHILAASH SUBRAMANIAM DISCUSSES THE POTENTIAL IMPLICATIONS OF THE MOVE FROM GST TO SST.

Introduction

The much anticipated **Sales Tax Act 2018** and the **Service Tax Act 2018**(commonly referred to as "SST") was rolled out on 1 September 2018, together with their respective subsidiary legislations, to replace the previous **Goods and Services Tax Act 2014** ("GST").

GST provided for a multi-staged tax collection system in which every taxable person down the supply chain was taxed when a supply was rendered (output tax), but was allowed to reclaim from the Customs Department any taxes paid to the previous entity along the supply chain (input tax)[1].

GST was therefore very broad based, covering the supply of all prescribed goods or services made in Malaysia and any importation of goods into Malaysia[2].

Sales tax, however, is much more narrow based, being levied only on specific goods manufactured in Malaysia by a registered manufacturer[3] or imported into Malaysia by any person[4]. It was also announced in Parliament by the Minister of Finance that SST will only be imposed on 38% of the Consumer Price Index's basket of goods, compared with 60% under GST[5]. SST was therefore welcomed by the Malaysian public due to the perception that it will be a less burdensome tax on the public.

There are approximately 160 countries in the world that have moved from a single-stage type tax system like SST to a multi-stage system like GST in some form or another — many citing that a multi-stage tax system is consistent with a progressive and developed economy.

The reason behind this is that GST is designed to provide a more holistic, transparent and efficient system for the collection of taxes. Malaysia's move of switching back to SST from GST makes it the only country in the world to have done so and may have certain implications as set out below.

Transparency and regulation

During the GST system, there was a delay in receiving input taxes from the Government. Many traders therefore unlawfully increased their prices by incorporating the 6% tax into their supply price, ignoring that input taxes would be refunded by the Government. This was cited as one of the main arguments against GST and in support of SST by the Director General of Customs[6].

However, GST in reality prevented risk and provided a stronger anti-profiteering mechanism compared to SST. For one, GST was a self-policing and self-enforcing system. GST operated on collection in stages whereby each successive taxpayer down the supply chain claimed input tax on purchases and had to account for output tax on subsequent supplies.

Therefore if Company A supplied goods or services to Company B, Company A would know that Company B would be reporting that transaction in order to claim its input tax. This would ensure Company A reported that particular transaction as well. Therefore every entity along the supply chain was effectively self-audited. This made it easier for the Government to monitor tax compliance of every taxable person.

Furthermore, input taxes were only claimable if supported by purchase invoices. This ensured that taxpayers maintained a record of relevant transactions. Therefore, although GST may have been more broad based, it had a trail of invoices that allowed for improved tax compliance, enforcement and transparency.

This, however, does not necessarily occur in a single stage tax system where there is only a single tax point. In fact, it was acknowledged by the Minister of Finance that SST would not be as transparent or as efficient as the previous GST system[7].

It could be said that prices went up during the GST era not necessarily because of the tax system itself but because of delays in receiving input tax refunds resulting in taxpayers unlawfully raising prices. If, in spite of numerous penal provisions in the GST Act and the system of self-regulation, prices were still unlawfully raised, there is no guarantee that the same will not happen under the present system of SST. In fact, the greater lack of transparency and efficiency in the SST system may prove easier for taxpayers to avoid paying taxes and unlawfully raise prices in the long term.

Revenue leakage

There is also the risk of revenue leakage in a single-stage taxation system. With tax collection being generally confined to one stage of the supply chain, the system of natural checks and balances under the GST system would not be present. If a single taxable person succeeds in slipping past paying tax at the tax point, the revenue of the Government will drop accordingly. Under the GST system, even if tax is not collected at one stage, it is collected at other stages such that the drop in government revenue may be somewhat limited.

Cascading effect of taxes

One of the key advantages of the GST system is that it prevented a cascading effect of taxes. SST can potentially raise the price of goods depending on the taxes that are embedded in goods and/or services involved along the supply chain.

Under the GST system, input taxes of a business are claimed back from Customs and offset against the output tax payable by that entity (without matching purchases with the supplies made). Therefore, there is no "*tax-on-tax*" moving down the supply chain as the input taxes are already claimed from Customs and this is supposed to be accounted for when setting the prices of goods and services moving down the supply chain.

However under SST, there is no system for "*claiming back*" or offsetting input taxes. Therefore, if there is more than one SST registered entity along the supply chain (for instance more than one taxable manufacturer or a manufacturer and a service provider), it is possible for there to be a tax-on-tax, increasing the price of the final good/service received by the consumer compared to the GST system.

However, the extent to which this may increase the price of goods remains to be

seen and may be somewhat mitigated depending on the scope of tax exempt/zero-rated goods.

Conclusion

It has been reported that businesses in Malaysia have spent almost RM15 billion to implement GST systems that have been in use for less than four years[8]. These include the cost of software, tax recording tools and professional advice. Further costs were also incurred in shifting businesses from being GST to SST compliant. Although some of these costs may be recoverable, many will end up being sunk costs to businesses. Without the guarantee that prices will go down and with the lesser degree of transparency/regulation and the possibility of revenue leakage with SST, it remains to be seen if Malaysia's bold move of being the only country in the world to move back to SST was the right one.

ABHILAASH SUBRAMANIAM
TAX AND REVENUE PRACTICE GROUP

[1] See section 38 and 39 of the GST.
[2] See section 9 of the GST.
[3] Section 8(1)(a) **Sales Tax Act 2018**.
[4] Section 8(1)(b) **Sales Tax Act 2018**.
[5] Penyata Rasmi Dewan Rakyat Parlimen Keempat Belas (Penggal Pertama Mesyuarat Pertama) 19 Julai 2018.
[6] www.freemalaysiatoday.com/category/nation/2018/08/30/customs-department-tells-why-gst-saw-higher-prices/.
[7] Penyata Rasmi Dewan Rakyat Parlimen Keempat Belas (Penggal Pertama Mesyuarat Pertama) 19 Julai 2018.
[8] www.theedgemarkets.com/article/state-nation-previous-tax-regime-gets-facelift.

For further information regarding tax and revenue law matters, please contact our Tax and Revenue Practice Group.

FINANCIAL SERVICES

Sustainable Financing in the ASEAN Region

IN THIS ARTICLE, GOH HUI WEN LOOKS AT GREEN AND SUSTAINABLE INVESTMENTS IN THE ASEAN REGION.

The investment scene in the ASEAN region has been undergoing a

transformational change in recent years as it pivots towards a green and sustainable path of development[1]. Demand for sustainable investment opportunities in ASEAN is set to bloom within the next two decades, with the investment opportunity estimated to be worth a whopping USD3 trillion from 2016 to 2030[2].

In November 2017, the ASEAN Capital Markets Forum ("ACMF") launched the ASEAN Green Bond Standards ("ASEAN GBS") based on the International Capital Market Association's Green Bond Principles to address the need to support efforts to protect the environment and help in the allocation of resources towards climate-friendly investments in the region[3]. Since its launch in 2017, the ASEAN GBS have gained encouraging traction in the region, with three successful issuances from Malaysia and Singapore carrying the ASEAN Green Bond label[4].

Eleven months after the introduction of the ASEAN GBS, the ACMF met in Singapore on 11 October 2018 and launched the ASEAN Social Bond Standards ("ASEAN SBS") and the ASEAN Sustainability Bond Standards ("ASEAN SUS")[5]. According to the ACMF, the newly launched ASEAN SBS and ASEAN SUS together with the ASEAN GBS (collectively, "ASEAN Bond Standards"), provide "*a complete suite of standards to accelerate the development of sustainable finance in the region*" and are intended to "*enhance transparency, consistency, and uniformity of ASEAN green, social and sustainability bonds, which will reduce due diligence cost and assist global investors to make informed investment decisions*"[6].

Much like the ASEAN GBS, the ASEAN SBS are aligned and guided by four core components, which are:

- use of proceeds;
- process for project evaluation and selection;
- management of proceeds; and
- reporting[7].

While the ASEAN GBS caters for the financing of projects with environmental benefits, the ASEAN SBS is, on the other hand, designed for the financing of projects which aim to address or mitigate a specific social issue and/or seek to achieve positive social outcomes, including projects which provide affordable basic infrastructure or housing, access to essential services, food security, socioeconomic advancement and empowerment[8]. The ASEAN SBS also specifically excluded projects involving activities that give a negative social impact related to alcohol, gambling, tobacco and weaponry[9].

Aside from the ASEAN GBS and the ASEAN SBS, issuers may also opt to issue bonds or *sukuk* under the ASEAN SUS, which is essentially a combination of both the ASEAN GBS and the ASEAN SBS. The initiative behind the development of

the ASEAN SUS is driven by the recognition and understanding that certain green projects may also have social co-benefits, and that certain social projects may have environmental co-benefits[10]. Hence, issuers of ASEAN sustainability bonds/*sukuk* are required to comply with both the ASEAN GBS and the ASEAN SBS[11].

For example, the proceeds allocated for the projects financed by an ASEAN sustainability bond/*sukuk* must not be used for ineligible projects specified by the ASEAN GBS such as fossil fuel power generation projects, as well as ineligible projects specified by the ASEAN SBS such as projects involving activities that give a negative social impact related to alcohol, gambling, tobacco and weaponry.

In Malaysia, the issuance of any of the ASEAN green bond/*sukuk*, the ASEAN social bond/*sukuk* and the ASEAN sustainability bond/*sukuk* is subject to additional requirements set out in Chapter 8, Part 3 of the *Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework*("LOLA Guidelines") issued by Securities Commission Malaysia ("SC")[12].

Pursuant to the LOLA Guidelines, an issuer may only name its bonds/sukuk "*ASEAN Green*", "*ASEAN Social*" or "*ASEAN Sustainability*" and hold itself out as an issuer of such ASEAN bonds/*sukuk* if the issuance complies with the relevant ASEAN Bond Standards. Additionally, issuers may opt to issue bonds/*sukuk* which adopt both the ASEAN Bond Standards and SC's Sustainable and Responsible Investment ("SRI") *sukuk* framework[13]. This is illustrated by the successful issuance of the RM2 billion PNB Merdeka ASEAN Green SRI *Sukuk* Programme by Permodalan Nasional Berhad at the end of 2017 — which is by far the largest green sukuk to be issued in Malaysia to date[14].

It is undeniable that sustainable financing carries great potential. With a complete suite of the ASEAN Bond Standards now in place, the ASEAN region is set to be the catalyst for green, sustainable and ethical investments in the market.

GOH HUI WEN
FINANCIAL SERVICES PRACTICE GROUP

---

[1] DBS and UN Environment (2017). *Green Finance Opportunities in ASEAN*. See more at www.dbs.com/newsroom/Annual_ASEAN_green_investment_needs_to_grow_400pct_to_guard_against_environmental_risks.
[2] Supra at 1.
[3] Malaysian Islamic Capital Market Bulletin (2017). *Driving Sustainable Investments Through Green Sukuk*. See more at www.sc.com.my/wp-content/uploads/eng/html/icm/17_vol12_no2_msianicm.pdf.
[4] See more at www.thestar.com.my/business/business-news/2018/03/20/asean-green-bond-standards-gain-traction/.

[5]See more at www.businesstimes.com.sg/banking-finance/four-asean-nations-to-lift-barriers-to-cross-border-investment-advisory.
[6] See more at www.asiaasset.com/news/ACMFpmfbonds-gte_1012.aspx.
[7] See Paragraph 4.0 of the *ASEAN Social Bond Standards*.
[8]See Paragraph 4.1.6 of the *ASEAN Social Bond Standards* for a list of categories of eligible social projects.
[9] See Paragraph 4.1.6 of the *ASEAN Social Bond Standards* for a list of categories of eligible social projects.
[10] See the introduction of the *ASEAN Sustainability Bond Standards*.
[11] See the content of the *ASEAN Sustainability Bond Standards*.
[12] The additional requirements for the issuance of the ASEAN green bond/*sukuk*are incorporated into the LOLA Guidelines via a revision on 8 November 2017, whereas the additional requirements for the issuance of the ASEAN social bond/*sukuk* and the ASEAN sustainability bond/*sukuk* are incorporated into the LOLA Guidelines via a revision on 11 October 2018.
[13] See more at Chapter 7, Part 3 of the LOLA Guidelines.
[14] Supra at 3.

For further information regarding financial services matters, please contact our Financial Services Practice Group.

EMPLOYMENT AND ADMINISTRATIVE LAW

Discretion of the Minister: to exercise or otherwise

IN THIS ARTICLE, BENEDICT NGOH TI YANG EXAMINES THE POWERS OF AUTOMATIC REFERRALS OF THE MINISTER OF HUMAN RESOURCES UNDER SECTION 20 OF THE INDUSTRIAL RELATIONS ACT 1967.

Introduction

A workman[1] who is dismissed may seek recourse at the Industrial Court against the employer. The power to refer the workman's claim to the Industrial Court lies with the Minister of Human Resources of Malaysia ("Minister"). Recently, the newly appointed Minister had announced that all unfair dismissal claims brought before him shall automatically be referred to the Industrial Court[2].

Minister's powers under the Industrial Relations Act 1967

According to section 20 of the **Industrial Relations Act 1967** ("IRA 1967"), a workman who has been dismissed may write to the Director General of Labour

("Director General") within 60 days from the date of dismissal to be reinstated[3]. The Director General would then take steps to amicably resolve the dispute.

Typically, the Director General of Labour will schedule a conciliatory meeting between the workman and the employer in order to achieve an amicable settlement. Where the conciliatory meeting succeeds, the matter ends. On the other hand, where the conciliatory meeting does not achieve its intended target, the Director General of Labour is duty bound to refer the dispute to the Minister[4].

The Minister will then have to properly examine all the facts and documents placed before him and screen each case to decide whether the particular dispute warrants a reference to the Industrial Court[5].

Automatic referrals

The main proponents of automatic referrals would be the workmen. In the past, it is not uncommon for the Minister to refuse to refer an unfair dismissal claim to the Industrial Court. This would leave a workman with limited access to further recourse. In that scenario, a workman may:

i. File an action for wrongful dismissal in the civil courts; or
ii. File an application for judicial review[6] against the decision of the Minister.

Typically, a workman would not opt for a claim of wrongful dismissal in the civil courts. The rewards for such a challenge is meagre as it is only limited to the last drawn salary for the notice period. The courts may further reduce the compensation by taking into account gainful employment immediately or during the notice period[7].

A workman would, on most occasions, file an application for Judicial Review in the High Court. An application for Judicial Review is made to quash the Minister's decision and to compel the Minister to refer the matter to the Industrial Court.

However, a workman may find it costly to commence a Judicial Review application. Moreover, a typical Judicial Review application may take an extensive amount of time. It may take anywhere between the range of one to two years before a decision is handed down. Even then, the decision may not be in favour of the workman. The process is simply too slow.

With that in mind, the announcement for automatic referrals is a welcome one. No one should be denied the opportunity to seek recourse. The proposal for automatic referrals would address this concern.

Is the Minister exercising his powers properly?

According to the Minister, all section 20 claims are now automatically referred to the Industrial Court. However, is the Minister currently exercising his powers properly? What about claims which are evidently frivolous?

Based on the existing laws, the Minister is still under a legal duty to review each case and to decline to refer cases which are evidently frivolous.

In **Hong Leong Equipment Sdn Bhd v Liew Fook Chuan**[8], the Court of Appeal held that the Minister must consider each case by its merits and, where a case is evidently frivolous, it is justified to refuse reference:

"*The second question that the Minister must ask himself is whether, objectively speaking, the representations made under s 20(1) are frivolous or vexatious. If they are, then he may well be justified in refusing a reference. Whether they are or are not depends upon the facts of each case. But there are some pretty obvious cases where a reference may be properly denied.*"

This principle is long standing. In the recent case of **Sivasesan Muthusamy v Yang Berhormat Menteri Sumber Manusia, Malaysia**[9], the High Court reiterated the principle in **Hong Leong Equipment**:

"*49. It is also trite that the 1st Respondent was not bound to refer all disputes to the IC for adjudication. Under the law, he has a duty to sieve through all matters referred to him by addressing his mind to the facts that were placed before him objectively. He was not to act merely as a rubber stamp*."

Further, in **Michael Lee Fook Wah v Minister of Human Resources Malaysia**[10], the Court of Appeal described the role of the Minister as follows:

"*The law does not require the first respondent to do this, otherwise the position of the first respondent vis-a-vis the Act would be that of an intermediary or a mere postman. It is not a mechanical exercise for the first respondent in every case to refer to the Industrial Court*."

As the Minister no longer "*screens*" disputes brought before him, the Minister's current practice of automatic referrals may be open to challenge by employers by way of a judicial review application on the grounds of an improper exercise of discretion. The Court of Appeal in **Hong Leong Equipment** stated the position of the law:

"*I pause to emphasize that the Minister's decision, one way or the other, upon the question whether representations made under s 20(1) are frivolous or vexatious, is neither final nor conclusive, and may be reopened in judicial review proceedings*."

Conclusion

Whilst the intention of the Minister to do away with the screening process for unfair dismissal claims is appreciated, the law as it is today still requires the Minister to objectively assess each case before deciding whether to refer to the Industrial Court or otherwise.

To do otherwise may open the Minister to challenge by way of judicial review.

BENEDICT NGOH TI YANG
INDUSTRIAL RELATIONS AND ADMINSTRATIVE LAW PRACTICE GROUP

---

[1] "*workman*" means any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward and for the purposes of any proceedings in relation to a trade dispute includes any such person who has been dismissed, discharged or retrenched in connection with or as a consequence of that dispute or whose dismissal, discharge or retrenchment has led to that dispute.
[2] Please read https://www.thestar.com.my/news/nation/2018/06/06/minister-will-no-longer-screen-industrial-courts-cases/.
[3] Section 20 (1), IRA 1967.
[4] Section 20 (2), IRA 1967.
[5] "*Upon receiving the notification of the Director General under subsection (2), the Minister may, if he thinks fit, refer the representations to the Court for an award.*"
[6] Order 55 of the Rules of Court 2012.
[7] See the Federal Court in **Fung Keong Rubber Manufacturing (M) Sdn Bhd V Lee Eng Kiat** [1981] 1 MLJ 238.
[8] [1996] 1 MLJ 481
[9] [2015] 1 LNS 1451
[10] [1998] 1 MLJ 305

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

CORPORATE/M&A

Enhancing Investor Protection via Framework for Registration of Trustees and Issuing Houses

IN THIS ARTICLE, TAN WEI XIAN ANALYSES THE NEW GUIDELINES ON REGISTRATION AND CONDUCT OF TRUSTEES AND ISSUNG HOUSES.

Background and application of the new guidelines

The concept of "*regulated activities*" under the **Capital Markets and Services Act 2007** ("CMSA") in Malaysia presently covers the following activities:

a. Dealing in securities;
b. Dealing in derivatives;
c. Fund management;
d. Dealing in private retirement scheme;
e. Advising on corporate finance;
f. Advising on investments;
g. Financial planning; and
h. Clearing for securities and derivatives.

Pursuant to section 58 of the CMSA, the carrying out of such regulated activities by any person is subject to a Capital Market Services Licence issued under the CMSA.

With the evolution and development of capital markets, there are activities undertaken by capital market service providers that do not constitute the carrying out of "*regulated activities*", but nonetheless are regarded as important to ensure the smooth and seamless operation of capital markets.

To this end, Securities Commission Malaysia ("SC") in October 2018 introduced a new registration framework for capital market services providers that undertake the following activities with the objective of enhancing their standards of conduct and streamlining the registration process:

a. any entity providing trustee services for a unit trust scheme, prescribed investment scheme, private retirement scheme, corporate bond, *sukuk* or any other products as may be specified by SC; and

b. an issuing house.

Any entity providing the abovementioned capital market services are now required to be registered under the new *Guidelines on Registration and Conduct of Capital Market Services Providers issued by SC on 19 October 2018 ("Registration Guidelines"), effective 2 January 2019.*

From 2 January 2019 onwards, the requirements in relation to trustees in the Guidelines shall supersede the relevant requirements in the guidelines below:

a. Guidelines on Unit Trust Funds;
b. Guidelines on Private Retirement Scheme;
c. Guidelines on Real Estate Investment Trust;
d. Guidelines on Listed Real Estate Investment Trust;
e. Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors;
f. Practice Note issued pursuant to the Guidelines on the Offering of Private Debt Securities, and the Guidelines on the Offering of Islamic Securities;
g. Guidelines on Allowing a Person to be Appointed or to Act as a Trustee Under Subsection 69(2) of the **Securities Commission Act 1993**; and
h. Guidelines for the Appointment of a Related-Party Trustee.

For the avoidance of doubt, if not otherwise provided in the Registration Guidelines in relation to trustees' requirements related to a specific product**,** the aforementioned product-specific guidelines will still apply. For example, other requirements imposed on private retirement scheme trustees in the Guidelines on Private Retirement Scheme that are not mentioned in the Registration Guidelines are still applicable to private retirement scheme trustees.

Policy intent

SC recognises the key role of trustees in safeguarding investors' assets and interest. The issuance of the Guidelines is premised on the following key policy objectives:

a. strengthening investors' confidence and trust in the capital markets by placing greater emphasis on the board and management's responsibilities.

b. ensuring capital market services providers prioritise investors' interest in decision-making processes.

c. creating a level playing field among trustees and improving business efficiency.

d. enhancing the supervision of trustees and custodians to ensure that these registered entities continue to remain fit and proper when carrying out their obligations and responsibilities in protecting investors' rights and assets.

Salient features of the Registration Guidelines

The new registration framework was formulated after a consultation process which had started in 2016 and benchmarked against regulatory approaches in Australia,

Hong Kong, Singapore and the UK. The features of the new registration framework introduced by SCM, are, amongst others, as follows:

a. Featuring one-time registration to reflect activity-based regulation, instead of the current product-based approach which requires trustees to renew registration periodically.

b. Streamlining existing prudential and financial requirements on trustees and issuing houses (shareholders' fund and paid-up capital).

c. Introducing new registration criteria, including entry standards (for example professional indemnity insurance) and on-going conduct obligations.

d. Duties of trustees in safeguarding the rights and interests of investors, including trustees' oversight functions over the assets held in trust for investors, ensuring segregation of assets and specific duties applicable to real estate investment trust trustees.

e. Trustees' oversight functions, including monitoring the operation and management of the fund by the management company through independent reviews.

f. Requirements on the appointment of related-party trustees and registration of foreign trustees through recognition framework.

g. Fit-and-proper criteria for the registered person and individuals to be appointed to the board and as senior management under the Registration Guidelines.

h. Greater board and senior management accountability for the conduct of the registered entities and their representatives.

i. Requirements to put in place governance frameworks and controls to enhance the effectiveness of its oversight functions, including compliance, risk management and internal audit functions.

j. Outsourcing and delegating arrangements, including the functions constituting material outsourcing, the requirements on the relevant service providers, prohibition of certain functions to be outsourced and notification requirements to SC on material outsourcing arrangements.

Transitional arrangement

Existing trustees and issuing houses will be treated as having registered under the Guidelines as at 2 January 2019 and no new application for registration is required.

However, they are required to submit updated information or any additional information as required by SC.

Moving issuing houses from licensed entity to registered entity

Currently, issuing houses are Capital Markets Services Representative licence holders carrying out regulated activity under the CMSA. Upon the deemed registration of the issuing houses under the new regulatory framework under the Guidelines, their licences would cease upon 2 January 2019.

The main rationale for moving issuing houses from the group of entities carrying out regulated activities to registered entities providing capital market services under section 76A of the CMSA is premised on the main service provided by issuing houses being considered as ancillary and a form of enabling services which complement a regulated activity or complete a capital market transaction. As such, the services provided by issuing houses shall not be regarded as regulated activity for purposes of the CMSA.

Food for thought

The latest SC data as at 2016 counts 90 custodians and trustees safekeeping approximately RM1.7 trillion worth of assets on behalf of investors[1]. With the introduction of the Registration Guidelines which could possibly entail stricter governance and scrutiny from SC, there is a possibility that we will see some mergers and acquisitions or expansionary activity in the trustee industry.

As the new regulatory requirements bring about cost implications and scale considerations (for example minimum shareholders' funds), players could see incentives in expanding their offerings to provide trustee services covering additional types of products. Medium-sized service providers could benefit by consolidating with other players to achieve better scale.

TAN WEI XIAN
CORPORATE/M&A PRACTICE GROUP

---

[1] SC invites public feedback on regulatory framework for trustees and custodians, Securities Commission Malaysia, 2016, https://www.sc.com.my/news/media-releases-and-announcements/sc-invites-public-feedback-on-regulatory-framework-for-trustees-and-custodians.

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

INTELLECTUAL PROPERTY

Are prayer outfits eligible for copyright protection?

A CASE NOTE BY LEE CHIAO YING.

Introduction

Some may be wondering what a "*telekung*" is as it is probably not a common term. A *Telekung* is a Muslim prayer outfit for females. The general perception of prayer outfits is that they are dull and unfashionable as they have to be modest rather than trendy. However, there has been a drastic shift in the fashion industry in recent years where there are an increasing number of fashionable yet modest clothes in both local and international markets.

The recent High Court case of **Siti Khadijah Apparel Sdn Bhd v Ariani Textiles & Manufacturing (M) Sdn Bhd**[1] concerns the *telekung* sold by the plaintiff, Siti Khadijah Apparel Sdn Bhd ("Siti Khadijah"), and the defendant, Ariani Textiles & Manufacturing (M) Sdn Bhd ("Ariani Textiles"). Siti Khadijah sells the "*Telekung Siti Khadijah Klasik*" ("Siti Khadijah's *Telekung*") while Ariani Textiles sells the "*Ariani x WOW Telekung Nur Aleesya*". Siti Khadijah has commenced an action against Ariani Textiles for copyright infringement.

This article will focus on the following two main issues:

i. Whether a *telekung* is eligible for copyright under the **Copyright Act 1987**("CA") in view of its religious function (for prayers).
ii. If the answer to the above question is affirmative, whether the copyright in the *telekung* has ceased under the then applicable section 7(6) CA.

Is a *telekung* eligible for copyright under CA?

Under the CA, copyright will subsist automatically in the work if the following conditions under CA have been fulfilled:

i. It is original;
ii. It has been written down, recorded or otherwise reduced to material form;
iii. It belongs to one of the categories of protected works; and
iv. It complies with the qualifications for copyright.

(collectively referred to as the "Conditions")

Once the Conditions are fulfilled, a work is protected irrespective of the quality and

purpose for which it was created[2].

Relying on the Court of Appeal case of **The News Straits Times Press (M) Bhd & Anor v Admal Sdn Bhd**[3], Ariani Textiles argued that a *telekung* is not eligible for copyright under CA due to its religious function (for prayers). This argument raised by Ariani Textiles was dismissed by the High Court on the following grounds:

i. That a *telekung* (including Siti Khadijah's *Telekung*) fulfills the Conditions.
ii. Section 7(2) CA provides that works shall be protected by copyright "*irrespective of … the purpose for which they were created*". Therefore a purely functional work is entitled to copyright protection if it fulfills the Conditions.
iii. Contrary to the idea of a spelling competition which was the subject in **The News Straits Times Press,** a *telekung* (including Siti Khadijah's*Telekung*) is not solely an idea nor is it purely functional (for prayers). Siti Khadijah's *Telekung* also gives comfort and elegance to its user. A*telekung* is therefore protected by copyright.

Has Siti Khadijah's copyright in Siti Khadijah's *Telekung* ceased under s 7(6) CA?

Subsection 7(6) CA reads as follows:

"*Copyright in any design which is capable of being registered under any written law relating to industrial design, but which has not been so registered, shall cease as soon as any article to which the design has been applied has been reproduced more than fifty times by an industrial process by the owner of the copyright, or with his license, by any other person*."

Relying on section 7(6) CA, Ariani Textiles further argued that even if it was assumed that Siti Khadijah owned copyright in Siti Khadijah's *Telekung*, the copyright that subsisted in Siti Khadijah's *Telekung* had ceased when more than 50 of Siti Khadijah's *Telekung* were reproduced.

This argument was again rejected by the High Court. For a design to be registered under the **Industrial Design Act 1996** ("IDA"), the design must fall within the definition of an "*industrial design*" and fulfill the following three elements:

i. Industrial design means features of shape, configuration, pattern or ornament which in the finished article appeal to and are judged by the eye ("Eye Appeal Features")*;*
ii. the Eye Appeal Features are "*applied to an article by any industrial process or means*"; and
iii. the Eye Appeal Features cannot include:
    a. a method or principle of construction; or

b. features of shape or configuration of an article which –
    1. are dictated solely by the function which the article has to perform; or
    2. are dependent upon the appearance of another article of which the article is intended by the author of the design to form an integral part.

The learned Judge found that Siti Khadijah's *Telekung* is not applied to an article[4] by any industrial process or means. By failing to fulfill the second element stated above, Siti Khadijah's *Telekung* cannot constitute an "*industrial design*". Siti Khadijah's *Telekung* is not caught by section 7(6) CA as Siti Khadijah's *Telekung* is not "*capable of being registered under IDA*".

Conclusion

The novel issue of whether a work that is functional is eligible for copyright protection has been clarified and answered in the affirmative by the High Court. While an article that is functional may not qualify and enjoy the protection as an industrial design, it may still be entitled to copyright protection. The High Court has also affirmed, in **Siti Khadijah Apparel**, the position that a work is entitled to copyright protection once the Conditions are fulfilled.

LEE CHIAO YING
INTELLECTUAL PROPERTY PRACTICE GROUP

[1] [2018] MLJU 1118
[2] Section 7(2), Copyright Act 1987.
[3] [2013] 9 CLJ 955a
[4] Section 3 of the IDA.

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

DISPUTE RESOLUTION

Can the Defence of Qualified Privilege be Invoked Without Verification of Information Relied On?

A CASE NOTE BY LOO YING NING.

Introduction

To raise the Reynolds privilege established in the landmark English House of Lords decision in **Reynolds v Times Newspaper Ltd**[1] in a defamation claim, a defendant is required to establish that the matter was one of public interest and that the defendant practised "*responsible journalism*" in publishing the impugned words.

This article looks at the case of **Datuk Harris Mohd Salleh v Datuk Yong Teck Lee**[2] **which** held that one of the relevant elements in the determination of responsible journalism is the duty of verification, failing which the defendant would not be able to plead the Reynolds privilege defence.

Brief facts

The plaintiff, Datuk Harris Mohd Salleh ("Datuk Harris"), and the first defendant, Datuk Yong Teck Lee ("Datuk Yong")**,** were former Chief Ministers of Sabah. On 4 April 2010, Tengku Razaleigh Hamzah ("Tengku Razaleigh"), in a speech, referred to an air crash (the double six tragedy) in 1976 which killed all on board including the then newly appointed Chief Minister, the late Tun Fuad Stephens ("Tun Fuad"), and more than half of the cabinet ministers at that time. Tengku Razaleigh revealed that after he had been strapped into the aircraft on that fateful day, Datuk Harris invited him to visit Pulau Banggi. Upon accepting the invitation, Tengku Razaleigh along with two other individuals disembarked the aircraft.

After the passing of Tun Fuad, Datuk Harris, who was the Deputy Chief Minister, took over as the Chief Minister of Sabah. Datuk Yong, who was the head of the second defendant (a political party), latched on to the speech by Tengku Razaleigh which resulted in a news article being published calling for a reinvestigation of the air crash.

Datuk Harris then issued a press statement disputing the accuracy of the accounts given by Tengku Razaleigh and gave his own version of the events leading up to the air crash incident. Datuk Harris challenged the defendants to repeat their remarks more specifically and openly.

Datuk Yong accepted this challenge and a second article was published, again calling for a reinvestigation. Datuk Harris then commenced an action in defamation against the two defendants on the basis that the articles could be understood to mean that he should be investigated because he had conspired with others to assassinate the late Tun Fuad so as to become the Chief Minister of Sabah.

Decision of the High Court

The trial judge found that although the two statements appeared innocent and harmless on the surface, when read between the lines and in the context of the speech by Tengku Razaleigh, Datuk Yong's call for investigation was, in essence,

a call to investigate Datuk Harris for a possible involvement in a criminal act. The trial court held that the defendants failed to raise the defence of qualified privilege and fair comment.

Decision of the Court of Appeal

The defendants' appeal was allowed because the Court of Appeal found that the defence of qualified privilege was neither properly considered nor properly applied by the trial judge.

Decision of the Federal Court

The Federal Court held that the present appeal clearly concerned a matter of public interest given the nature of the air crash incident which resulted in the death of more than half of the then cabinet ministers.

However, the Federal Court held that even after giving the maximum latitude to editorial judgment, it was unnecessary for the defendants to embellish and spice up what Tengku Razaleigh had revealed in his speech with the insinuation that Datuk Harris was possibly complicit in the commission of a criminal act.

The Federal Court found that Tengku Razaleigh was merely expressing his sadness in recalling the double six tragedy and how Datuk Harris' invitation had saved his life. The Federal Court found that Tengku Razaleigh did not hint, let alone call for an investigation, into the crash nor suggest that Datuk Harris was an accessory to the double six tragedy.

The Federal Court found that Datuk Yong had gone beyond what Tengku Razaleigh had mentioned in his speech, and Datuk Yong had further speculated and embellished with the insinuation that Datuk Harris was possibly complicit in the criminal act which resulted in multiple deaths.

The Federal Court held that the application of the1 0-point test established in **Reynolds** for the determination of the element of responsible journalism is clear from leading authorities such as the Federal Court decision in **Syarikat Bekalan Air Selangor Sdn Bhd v Tony Pua Kiam Wee**[3] and the House of Lords decision in **Jameel v Wall Street Journal Europe SPRL**[4].

In explaining the Reynolds privilege defence, the Federal Court held that the non-exhaustive factors in determining the issue of responsible journalism are:

1. The seriousness of the allegation. The more serious the charge, the more the public is misinformed and the individual harmed if the allegation is not true.

2. The nature of the information and the extent to which the subject matter is a matter of public concern.
3. The source of the information. Some informants have no direct knowledge of the events. Some have their own axes to grind or are being paid for their stories.
4. The steps taken to verify the information. (Emphasis ours)
5. The status of the information. The allegation may have already been the subject of an investigation which commands respect.
6. The urgency of the matter. News is often a perishable commodity.
7. Whether comment was sought from the plaintiff. He may have information others do not possess or have not disclosed. An approach to the plaintiff will not always be necessary.
8. Whether the article contained the gist of the plaintiff's side of the story.
9. The tone of the article. A newspaper can raise queries or call for an investigation. It need not adopt allegations as statements of fact.
10. The circumstances of the publication, including the timing.

Duty of Verification

In considering step 4 above, all the defendants had to do was to establish that Tengku Razaleigh *made* the revelation. Their case was simply one where the publisher is merely reporting what others have said.

However, the Federal Court did not accept this contention. On the facts, it was clear to the Federal Court that not only did Datuk Yong adopt and embrace what Tengku Razaleigh had said in his speech, he had embellished it with speculation and insinuation that Datuk Harris was possibly involved in the assassination of Tun Fuad and further spiced it up by referring to assassinations of other prominent figures such as John F Kennedy, Martin Luther King and Benazir Bhutto. As such, it was held that Datuk Yong could not say that he did not believe in the truth of what Tengku Razaleigh said in his speech.

The Federal Court held that it is insufficient for Datuk Yong to merely establish that he had verified that the statement was made. He must also satisfy himself that Tengku Razaleigh's speech as well as the insinuation made in the impugned statements he published was true, and his belief in its truth must be the result of a reasonable investigation and that the belief must be a reasonable belief to hold. Datuk Yong had failed to do so.

Conclusion

The Federal Court held that the defendants had failed the responsible journalism test due the fact that Datuk Yong failed to verify Tengku Razaleigh's speech as well as the truth in the insinuation that was published. Therefore, they failed to

establish the elements required to rely on the Reynolds privilege defence.

LOO YING NING
DISPUTE RESOLUTION PRACTICE GROUP

---

[1] **Reynolds v Times Newspapers Ltd** [1999] 4 All ER 609, HL
[2] [2017] 6 MLJ 133
[3] [2015] 6 MLJ 187
[4] [2006] 4 All ER 1279

For further information regarding dispute resolution matters, please contact our Dispute Resolution Practice Group.

---

for detailed legal advice on specific matters or transactions.

Our mailing address is:

7th Floor, Wisma Hamzah-Kwong Hing
No 1, Leboh Ampang
50100 Kuala Lumpur, Malaysia
T: 603 2027 2727
F: 603 2078 5625/603 2078 2376
E: info@shearndelamore.com

Visit us at www.shearndelamore.com