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Intellectual Property

The New Trademarks Act 2019 and Broader Enforcement Rights for Brand Owners

In this article, Raghuram Supramanium examines the provisions on trademark enforcement in the new Trademarks Act 2019.

Introduction

The much-awaited new **Trademarks Act 2019** (the "new Act") came into effect on 27 December 2019, repealing the previous Trade Marks Act 1976 ("TMA 1976"). For many international brand owners looking towards Malaysia, this change in the trademarks landscape will most certainly make a difference in their decision making for the new Act has introduced many significant changes that could benefit all brand owners.

The TMA 1976, amongst others, did not contain provision for criminal enforcement or penalties against counterfeits and infringement. Such recourse was only available under the **Trade Descriptions Act 2011** ("TDA 2011").

All provisions on trademark enforcement have been moved from the TDA 2011 to the TMA 2019. The new Act sets out a consolidated approach to comprehensively provide for civil and criminal enforcement, offences and penalties within the same piece of legislation.

The Ministry of Domestic Trade and Consumer Affairs will continue to have enforcement powers over trademark-related offences prescribed in the TMA 2019, as it previously did under the TDA 2011.

Trademarks Act 2019

In essence, the provisions of the new Act are broad in nature and provide new sanctions or tools to empower brand owners. Each provision now deals with multiple offences; thereby different offences of similar nature may have the same threshold.

For instance, where there were two separate provisions to deal with offences involving identical and non-identical marks in the TDA 2011, now both offences are being dealt with under one unified provision, with the same threshold to establish infringement of identical and non-identical trademarks.

Another most notable and significant change made to the enforcement provisions is the abolition of the Trade Description Orders for enforcement actions against offenders counterfeiting with non-identical trademarks.

Previously, under the TDA 2011, for non-identical trademarks, the complainant would be required to file an *ex-parte* application to the Court to obtain a Trade Description Order, and the burden of proving the similarities between the registered and offending marks rested with the complainant. This was a quasi-criminal relief whereby registered owners of registered trademarks could seek to immediately protect their registered trademark from further infringement by getting the Court to declare the infringing mark as a false trade description. Its purpose was for the speedy prevention of further and continuing damage that may be caused by the presence of the product carrying the false trade description being in the market.

With the new Act doing away with the need for a Trade Description Order, it will be easier for brand owners to now commence criminal enforcement actions against acts of passing-off without having to go through the hassle of applying to the Court for a Trade Description Order.

Where similar marks are concerned, in place of the Trade Description Order, the TMA 2019 provides that the Trademarks Registrar's verification must be first obtained. The Registrar's verification that the counterfeit mark is confusingly similar to the registered trademark will be accepted as *prima facie* evidence in any legal proceedings.

Over and above unifying the different offences, another significant change introduced by the new Act are the new penalties. Previously under the TDA 2011, there was a maximum cap of RM15,000 (for each good) for body corporate offenders and RM10,000 (for each good) or three-years imprisonment for individual offenders. In the new Act, the fine for the offences have been increased to RM1 million.

The enforcement provisions in the TMA 2019 now also extend to cover "*alteration, addition, effacement, partial removal*" of registered trademarks. This will make it easier for brand owners to commence actions against offenders who previously would deliberately attempt to change offending marks to easily circumvent the provisions of the TDA 2011.

Other additions to the TMA 2019 include the offence of falsely applying a registered trademark to goods or services. The predecessor provision under the TDA 2011 did not specifically cover trademarks but pertained to trade descriptions in general. Now, these provisions have been revamped and incorporated into the new Act to specifically cover trademarks and provides for a broader scope of protection against trademarks and any sign that may be taken as a trademark.

Under section 2 of the TMA 2019, a "*sign*" includes any letter, word, name, signature, numeral, device, brand, heading, label, ticket, shape of goods or their packaging, colour, sound, scent, hologram, positioning, sequence of motion or any combination thereof. From the wording of the new provision, this appears to be an additional cause of action brand owners can consider including in their criminal actions against counterfeiters, as it refers to non-genuine goods.

The above provision deals with the false application of a registered trademark on physical goods, advertisements and business documents relating to the goods and services. This means affixing of a trademark without consent or operating a business, offering services or delivering goods (even for goods or services not registered by the original brand owner) with the offending trademark are now offences under the new Act. This would be a very powerful tool for brand owners in their fight against stores and e-commerce sellers passing-off as their authorised retailers, resellers or distributors.

Another notable addition to the New Act is the provision that covers the act of making or possessing of an article for committing an offence. Such a provision did not exist under the TDA 2011, and brand owners were unable to act against offenders for use of offending contrivances, equipment and tools that are used to commit trademark infringement. They are now able to do so under the TMA 2019.

Conclusion

Unquestionably, the new Act is a major step in the development of the Malaysian trademarks landscape. Brand owners in Malaysia can now more easily enforce their rights.

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Tax and Revenue

Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2018] 7 CLJ 487, High Court of Malaya in Shah Alam — the existence of a domestic remedy does not act as a bar to an application for leave for judicial review

A case note by Haniza Abdul Ghani.

Introduction

The longstanding position of the Inland Revenue Board of Malaysia ("IRB") in regard to judicial review applications to challenge tax assessments raised by them is that the appeal procedure under section 99 of the **Income Tax Act 1967** ("ITA") is sufficient to address taxpayers' complaints. Accordingly, the IRB have always argued that since a domestic remedy is available, aggrieved taxpayers should not be given leave to apply for judicial review, much less be heard on the merits.

This issue was considered by the High Court in the recent case of **Flextronics Shah Alam Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri**[1].

Facts

The IRB had first conducted a tax audit on the taxpayer in late 2013 for the Years of Assessment ("Y/As") 2007 to 2012. In the course of the audit, the IRB disallowed certain commission payments made by the taxpayer to its related company in Y/As 2008 and 2009. However, just before the completion of the audit and issuance of tax assessments, the IRB for the first time made transfer pricing adjustments to certain transactions of the taxpayer, purportedly pursuant to sections 140 and 140A of the ITA.

In December 2017, the IRB raised Notices of Additional Assessments against the taxpayer for Y/As 2007-2012 for a substantial sum in additional taxes and penalties ("disputed NOAAs"). The taxpayer proceeded to lodge an appeal to the Special Commissioners of Income Tax ("SCIT").

Judicial Review application

In addition to lodging an appeal to the SCIT, the taxpayer initiated judicial review proceedings to challenge the disputed NOAAs on the following basis:

- The IRB has no power in law to make transfer pricing adjustments under section 140 of the ITA and further failed to give sufficient particulars in regard to any alleged tax avoidance. Accordingly, the IRB misused the general anti-avoidance provision for an extraneous and unlawful purpose;
- The IRB unlawfully relied upon its own Transfer Pricing Guidelines 2003 or 2012 ("TPGs") to make transfer pricing adjustments despite the same having no force of law;
- The IRB acted in contravention of the High Court Order in the case of **The Boston Consulting Group Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri**[2], where it was held, in substance, that the IRB did not have the power to make transfer pricing adjustments under section 140 ITA or the TPGs;
- The IRB was time barred from raising assessments for Y/As 2007-2010. The IRB disregarded the statutory limitation period of five years provided under section 91(1) of the ITA which was applicable at the time the NOAAs were raised, and further illegally attempted to read the statutory limitation period of seven years under section 91(5) retrospectively; and
- the IRB acted beyond its powers in making transfer pricing adjustments on what was essentially third party pricing.

Decision of the Court

The High Court allowed the taxpayer's leave application. The Court held that the taxpayer had *locus standi* and the "*low*" threshold for leave was met, that is, that the taxpayer's case was not frivolous or vexatious.

The High Court also held that the availability or non-availability of an alternative remedy is "*not to be considered at leave stage when the threshold test is low and where the court acts upon the affidavit of the applicant alone*".

Granting the taxpayer's application for leave, the learned High Court Judge Vazeer Alam Mydin Meera J (as his Lordship then was) held that:

> "*As to the issue of the exhaustion of the alternative statutory remedy of appeal to the Special Commissioners of Income Tax, I find that the non-existence of domestic remedy is not a pre-requisite under O. 53 of the Rules of Court 2012. It is pertinent to note that nowhere in O. 53 is it stated that the existence of a domestic remedy will bar an application for judicial review, neither is it a requirement established in case law. In this regard, I am of the opinion that the*

existence of the statutory appeal mechanism under s. 99 of the ITA does not by itself bar an application for leave for judicial review under O. 53 of the Rules of Court 2012.

… Thus, I accept the learned applicant's counsel's submission that …, the availability or non-availability of an alternative remedy is irrelevant at the leave stage and should be raised at the merits stage. The existence or non-existence of a sufficient alternative remedy is something that should be canvassed at the substantive stage and is therefore a premature objection to be raised now at the leave stage." (emphasis added)

The High Court further considered the taxpayer's argument that certain remedies sought could not in law be handed down by the SCIT, such as any orders for set-off or refunds or to stay enforcement, and accordingly it was not a clear cut case that an alternative remedy was in fact available.

The High Court also proceeded to grant an interim stay pending disposal of the judicial review, as the amount of the tax and penalties in dispute were large and which the taxpayer had contended would cause severe cash flow problems to the taxpayer.

Conclusion

This is an important case confirming the position that the existence of a domestic remedy does not act as a bar to an application for leave for judicial review and the IRB cannot merely refer to the existence of a separate appeal procedure under the ITA to oppose such an application. It further confirms that provided that the leave threshold is met, any issues of availability of domestic remedy is to be heard at the merits stage of the judicial review application.

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[1] [2018] 7 CLJ 487.
[2] Originating Summons No. 24-82-12/2013.

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

Dispute Resolution

RHB Islamic Bank Bhd v AmGeneral Insurance Bhd[1]

A case note by Yap Jun Cheng.

Background facts

The first Plaintiff, Veheng Global Traders Sdn Bhd ("Veheng"), had taken out fire material damage policies and fire consequential loss policies from the first defendant, AmGeneral Insurance Bhd, and the second defendant, Sun Life Malaysia Takaful Berhad (collectively "the Defendants"). Following a fire at its premises, Veheng made claims under the policies.

The second Plaintiff, RHB Islamic Bank Berhad ("RHB Bank"), was the mortgagee of one of the policies after having granted a financing facility in favour of Veheng. The policy included a "*mortgage clause*" or what is commonly known as "*the standard New York mortgage clause*".

The Defendants resisted the Plaintiffs' claim essentially on the basis:

- The fire was deliberately caused or occasioned by wilful acts of Veheng or with connivance of Veheng and, as such, the Defendants were entitled to repudiate liability;
- Veheng had used fraudulent means or device to obtain benefit under the policies and, as such, had failed to observe the terms of the policies; and
- RHB Bank had no *locus standi* to sue the Defendants based on the mortgage clause in the Deed of Assignment executed between Veheng and RHB Bank.

Findings of the High Court[2]

The High Court found the Defendants liable on two of the policies.

In assessing whether Veheng had acted fraudulently, the High Court applied the test in **Asean Security Paper Mills Sdn Bhd v CGU Insurance Bhd**[3] and held that the standard of proof for civil proceedings for commission of crime was that of beyond reasonable doubt and not on a balance of probabilities. The High Court was not satisfied on a standard of beyond reasonable doubt that the arson was linked to Veheng.

Regarding RHB Bank's claim, the High Court found that RHB Bank had the right to sue the insurers by virtue of the mortgagee clause in the Deed of Assignment.

Findings of the Court of Appeal[4]

The Defendants appealed to the Court of Appeal primarily on the basis that the High Court had erred as follows:

- In finding that arson was not linked to Veheng and, in so doing, applied the wrong standard of proof for civil proceedings for commission of crime by not following the decision of the Federal Court in **Sinnaiyah & Sons Sdn Bhd v Damai Setia Sdn Bhd**[5];
- In finding that there was no breach of warranties by Veheng; and
- In holding that RHB Bank was entitled to sue by virtue of the mortgagee clause in the Deed of Assignment.

The Court of Appeal allowed the Defendants' appeal and set aside the High Court judgment.

On the issue of the standard of proof for fraud in civil proceedings, the Court of Appeal held that **Sinnaiyah** was the state of the law even prior to the High Court decision. Applying **Sinnaiyah**, the Court of Appeal held that commission of crime in civil proceedings must be proved on a standard of balance of probabilities. Applying the standard of balance of probabilities, the Court of Appeal was satisfied that the arson was caused or occasioned by wilful acts of Veheng or with connivance of Veheng and that the lodgment of false invoices by Veheng tainted Veheng's whole claim under the policies.

On the issue of breach of warranties by Veheng, the Court of Appeal held that Veheng must strictly comply with the warranties under the policies. Strict compliance of the warranties is a condition precedent to the insured's right to claim and the insurer's obligation to pay.

On the issue of whether RHB Bank had the right to sue, the Court of Appeal held that RHB Bank had no *locus standi* to sue for the proceeds of the policy. The Court of Appeal reasoned that the mortgagee clause in the Deed of Assigment cannot confer the right to sue the insurers on RHB Bank. Further, there was a prohibition of assignment of the policies and Veheng was not in a position to assign the proceeds of the policies to RHB Bank without the Defendants' consent.

The Court of Appeal also held that given that the Defendants were entitled to repudiate the liabilities under the policies by reason of Veheng's fraudulent conduct, it would be against public policy to allow RHB Bank to claim.

Findings of the Federal Court

RHB Bank appealed to the Federal Court on, amongst others, the following questions of law:

- Whether a mortgagee clause which is a standard clause in all fire policies, where a mortgagee's interest is noted, confers the mortgagee with the right/*locus* to sue the insurer to recover any loss caused by the fire?
- Does it offend public policy for an innocent mortgagee to be paid on the Mortgagee Clause when the insured is in breach of the policy and the Mortgagee Clause explicitly provides that the insurer be subrogated to the rights of the mortgagee and can recover that loss from the insured?
- Other than the terms set out in the Mortgagee Clause is there any obligation on the mortgagee to comply with other terms and conditions of the policy of insurance?

The Federal Court, in allowing the appeal, observed that the Mortgagee Clause was a "*standard mortgagee clause*" and was not merely a "*loss payable*" clause.

The Mortgagee Clause created a separate and independent contract of indemnity between the mortgagee and the insurer, such that any finding of fraud against the insured does not diminish the mortgagee's right to indemnity. The validity and entitlement of the mortgagee to the insurance proceeds must be assessed on the conduct of the mortgagee alone. As there is a right of subrogation and the insurer has the right to bring a suit against the insured, the payment of the proceeds of the policies to the mortgagee will not offend public policy.

Conclusion

The Federal Court decision makes it clear that a mortgagee clause in an insurance policy creates a separate and independent contract between the mortgagee and the insurer and clothes the mortgagee with the necessary privity to sue in his own name under the policy. The mortgagee therefore has the right to sue for the insurance proceeds.

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[1] [2019] 5 MLJ 561.
[2] [2016] 1 LNS 1802.
[3] [2007] 2 CLJ 1.
[4] [2017] 1 MLJU 2319.
[5] [2015] 5 MLJ 1.

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

Employment & Administrative Law

Ng Boon Leh v Malaysian-American Commission On Educational Exchange (MACEE) (Industrial Court Award No: 284 Of 2020)

A case note by Grace Chai Huey Yann.

Background facts

Ng Boon Leh relied on section 20 of the **Industrial Relations Act 1967** ("the Act") under Part VI to file a claim for reinstatement against the Malaysian-American Commission on Educational Exchange ("MACEE"). In its (amended) Statement in Reply, MACEE pleaded that the Industrial Court is excluded from hearing this matter brought against it because the MACEE is a government entity within the meaning of section 52 of the Act.

MACEE is a binational commission established based on a binational agreement ratified by the governments of Malaysia and the United States of America to promote educational exchange between the two countries.

Issues

Before considering the merits of the case, the preliminary issue that had to be determined by the Industrial Court was whether MACEE falls under the definition of "*statutory authority*" under the Act which is beyond the jurisdiction of the Industrial Court. If in the affirmative, the claim cannot be heard by the Industrial Court.

The law

Section 52 of the Act provides that "*Parts II, III, IV and VI shall not apply to any Government Service or to any service of any statutory authority or any workman employed by Government or by any statutory authority*".

Whereas Section 2 of the Act defines "*statutory authority*" as "*an authority or body established, appointed or constituted by any written law, and includes any local authority*".

Decision and analysis of the Industrial Court

MACEE submitted that it is a government entity because it is neither a commercial entity nor a charity or association registered in Malaysia. It is an entity created pursuant to an agreement entered into between the two governments.

The functions and operations of MACEE are managed by a board of directors which consists of members to be elected by the Minister of Higher Education of Malaysia and the Chief of Diplomatic Mission of the United States of America to Malaysia respectively. MACEE is also funded by contributions from both governments and the expenses incurred by MACEE, including salaries of the employees, are to be shared between both governments.

On the other hand, Ng Boon Leh contended that MACEE is not a statutory body under section 52 of the Act for the very reason that its establishment is provided by the binational agreement. Further, since MACEE is not solely the province of a single State, which is Malaysia, its employees cannot be workmen under the services of the Government of Malaysia. Ng Boon Leh also argued that she did not report to either of the governments, neither was she a government servant nor employed under the government services.

The Industrial Court held that because MACEE was created by a bond between the two governments, it is clear that MACEE was intended to be a government entity to be controlled by both the governments of Malaysia and the United States of America.

Moreover, MACEE is impliedly controlled by the governments as it is overseen by a board consisting of members to be elected by each country and two honorary co-chairmen, who are the US Ambassador

to Malaysia and the Minister of Higher Education of Malaysia respectively. This reflects that MACEE was intended to be a government entity.

The Industrial Court further held that MACEE was deemed to be a government entity of Malaysia because its existence is dependent on the decision of Malaysia to whether continue or dissolve it. Further, the Industrial Court viewed the employees engaged by MACEE to be employed by the Malaysian Government because their salaries were borne by the Malaysian Government.

The Industrial Court also ruled that there is no basis to Ng Boon Leh's argument that a binational commission cannot constitute a government entity or perform a government service. In fact, the Industrial Court ruled MACEE as an extension of services provided by the Higher Education Ministry of Malaysia.

Conclusion

The decision above reaffirms the ambit of the Act, which only extends to employees in the private sector. In other words, the Industrial Court only provides redresses to workmen in the private sector. Any claims to the Industrial Court by the Federal Government or the State Government's servant, or any individual working with the statutory and/or government authority, including any local authority, would be struck off by the Industrial Court. As illustrated by this decision, the Industrial Court takes a purposive approach in determining whether an organisation is a governmental or private organisation.

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Real Estate

What to do with a Deceased's Estate upon his/her Death?

In this article, Ng Lyn Ee outlines the steps to deal with a deceased's estate.

How does an executor or administrator obtain the power to deal with a deceased's estate?

After a person passes, the first step is to find out whether the deceased left a will. Depending on the existence of a will and the size of the estate, there are several different ways to obtain power to deal with the estate of the deceased:

With will

i. When there is a valid will and an executor has been named in the will, the executor should apply for the Grant of Probate of the will (section 3 of the **Probate and Administration Act 1959** ("PAA 1959")).
ii. If there is a valid will, but either the executor named in the will had predeceased the testator or no executor had been appointed in the will, the person intending to be the administrator may apply for grant of Letters of Administration with the will annexed at a High Court (section 16 of the PAA 1959).
iii. The Court grants Letters of Administration to such person as the Court deems fit to administer, in the following order:

a. a universal or residuary legatee;
b. a personal representative of a deceased universal or residuary legatee;
c. such person or persons, being beneficiaries under the will, as would have been entitled to a grant of Letters of Administration if the deceased had died intestate;
d. a legatee having a beneficial interest; and
e. a creditor of the deceased.

Without will

iv. If a person dies intestate, the person intending to be the administrator may apply for grant of Letters of Administration (section 30 of the PAA 1959). Depending on the size of the estate, there are different ways to obtain the Letters of Administration:
    a. If the gross estate consists of wholly or partly immovable property, for example, land, a house, which exceeds RM2 million, the person intending to be the administrator will have to obtain Letters of Administration at the High Court (section 30, PAA 1959). The Court shall grant administration to one or more of the persons interested in the residuary estate of the deceased, unless by reason of the insolvency of the estate or other special circumstances the Court thinks it expedient to grant administration to some other person (s. 30, PAA 1959);
    b. If the estate is a small estate, the person interested in the estate shall go to the Estate Distribution Unit of the Department of the Director-General of Lands and Mines ("JKPTG") or the Land Office to get Letters of Administration (section 4, **Small Estates (Distribution) Act 1955** ("SEDA 1955")). The Letters of Administration will be in the form of a Distribution Order.

    small estate refers to the estate of a deceased person consisting (section 3(2), SEDA 1955):
        A. wholly or partly of immovable property; and
        B. not exceeding RM2,000,000 in total value at the time of application for summary administration; or

v. If the gross value of the estate is for only movable property and is less than RM600,000, and no person is entitled to apply for Grant of Probate or Letters of Administration, one may apply for summary administration via Amanah Raya Berhad (section 17, **Public Trust Corporation Act 1995**). Letters of Administration in the form of a Declaration or Order will be issued.

What is the next step after the Court has granted the Probate or Letters of Administration?

After the Court has granted the Probate or Letters of Administration, the personal representative (that is, the executor or the administrator) will have to do the following:

i. collect all the deceased's assets;
ii. pay off the deceased's debts and liabilities (if any); and
iii. distribute the estate in accordance with the deceased's will if there is one, otherwise to distribute the estate in accordance with the **Distribution Act 1958**.

How does the personal representative transfer the immovable property from the estate of the deceased to the beneficiary or a third-party purchaser?

The first step is for the personal representative to register the vesting of the property forming part of the estate of the deceased to himself as representative at the land office (section 346, **National Land Code**

1965). The land office will endorse on the respective title deed that the property is vested in the personal representative "*as representative*".

The second step depends on whether the deceased died leaving a will or intestate. If there is a valid will, the personal representative can transfer the property to the beneficiaries through presentation of the memorandum of transfer at the land office.

By contrast, if the deceased has died intestate, the personal representative will need to obtain the requisite order under section 60 of the PAA 1959 from the High Court sanctioning the transfer before the presentation of the transfer can take place at the land office.

If, instead of being transferred to a beneficiary, the property is to be sold to a third party purchaser, an order of the High Court under section 60 of the PAA 1959 sanctioning the sale has to be obtained before the presentation of the transfer can take place at the land office.

How much is the stamp duty for the transfer of the property from the estate of the deceased to the beneficiary and the third-party purchaser?

The stamp duty for the transfer of the property to the beneficiary, regardless of whether the deceased has left a will, is RM10 (Item 32(i), First Schedule, **Stamp Act 1949**).

By contrast, the stamp duty for the transfer of the property to the third party purchaser is the full *ad valorem* stamp duty *ad valorem* [Item 32(a), First Schedule, SA 1949 (as amended by the **Finance Act 2018** ("FA 2018") which came into effect on 1 January 2019)].

How much is the real property gains tax ("RPGT") for the transfer of the property from the estate of the deceased to the beneficiary and the third-party purchaser?

When a property forming part of the estate is vested in the personal representative, there is no RPGT payable as the disposal price of the property is deemed equal to acquisition price of the property (paragraph 3(1)(a), Schedule 2, **Real Property Gains Tax Act 1976** ("RPGT Act 1976")).

When the personal representative transfers the property to a beneficiary, there is also no RPGT payable too (paragraph 3(1)(a), Schedule 2, RPGT Act 1976). Nevertheless, if the beneficiary subsequently disposes of the property, the beneficiary will be deemed to have acquired the property on the date of transfer of ownership of the property to the beneficiary and the acquisition price of the property will accordingly be the market value of the property on such date (paragraphs 15(2), 15A(c) and 19(3A), Schedule 2, RPGT Act 1976).

If the personal representative transfers the property to a third-party purchaser, the personal representative will need to pay RPGT in accordance with the rate of tax specified in Schedule 5 of the RPGT Act 1976 (as amended by the FA 2018 which came into effect from 1 January 2019). The personal representative will be deemed to have acquired the property on the date of death of the deceased and the acquisition price of the property will accordingly be the market value of the property on such date (paragraphs 15B(1) and 19(3), Schedule 2, RPGT Act 1976).

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Corporate/M&A

Removal of Directors under the Companies Act 2016

In this article, Janice Ho Xiao En discusses the recent High Court decision of Low Thiam Hoe v Sri Serdang Sdn Bhd[1] which provides guidance on issues relating to the removal of directors under the Companies Act 2016.

Introduction

Under section 206(1) of the **Companies Act 2016** ("CA 2016"), a director may be removed before the expiration of the director's period of office, subject to the company's constitution, by ordinary resolution.

The removal of a director of a private company cannot be made by written resolution; a general meeting needs to be convened for the purpose of removing a director before the expiration of his term of office[2].

Members may convene a general meeting using either the method prescribed in section 310 or section 311 of the CA 2016. Section 311 of the CA 2016 allows any member holding at least 10% of the issued share capital of the company to require the directors to convene a meeting. In contrast, section 310 of the CA 2016 allows the board or any member holding at least 10% of the issued share capital of the company to convene a meeting.

The recent High Court decision of **Low Thiam Hoe v Sri Serdang Sdn Bhd** considered issues relating to the removal of directors under the CA 2016, that is, whether special notice is required, and on the holding of board meetings to consider resolutions to remove directors.

Salient Facts

On 16 July 2019, the board of directors of Golden Plus Holdings Berhad ("Golden Plus") passed a directors' resolution to remove certain directors of four of its wholly owned private subsidiaries and to appoint other directors.

The directors' resolution also authorised the corporate representative for Golden Plus, Mr. Tan Say Han ("Mr. Tan"), who was to take all such steps to give effect to the removal and appointment of those directors. Mr. Tan was appointed as corporate representative of Golden Plus in March 2015.

Mr Tan signed four requisitions, one for each of the subsidiaries, to request that the board of directors of each subsidiary convene an extraordinary general meeting ("EGM") to consider the resolutions to remove the specified directors. These requisition notices appeared to have been made pursuant to section 311 of the CA 2016.

Also, the company secretary of each of the four subsidiaries emailed all the directors of the subsidiaries informing them that a director in each of the subsidiaries had convened a board meeting of each of those subsidiaries with the agenda to call an EGM. Some of the directors stated that they were unable to attend the board meeting on that date. Nonetheless, only one of the subsidiaries successfully held a board meeting as two directors attended, and the quorum was met.

However, for some of the subsidiaries, the EGM was not called within the 21 days required under the requisition notices. Golden Plus then exercised its right as sole member of the subsidiaries pursuant to section 310 of the CA 2016 to convene and hold an EGM.

Eventually, the EGMs of all the subsidiary companies were held and the specified directors were removed. The removed directors then filed a court action seeking to invalidate certain board meetings and the various resolutions at the EGMs removing them as directors.

Issues and findings of the Court

1. Corporate representatives have power to requisition an EGM.

The removed directors first challenged the ability of Mr. Tan (as corporate representative) to issue the four requisition notices for the EGM. The removed directors argued that as a corporate representative, Mr. Tan did not have the capacity to requisition an EGM. The argument was that the corporate representative's power under section 147(3) of the Companies Act 1965 ("CA 1965") (now reintroduced in section 333 of the CA 2016) was to merely attend and vote on behalf of the corporate shareholder.

The Judge disagreed. The Judge decided that Mr. Tan derived his authority to sign the requisition notices from Golden Plus' board resolution and not section 147(3) of the CA 1965.

Section 147(3) of the CA 1965 merely sets out what a company, which is a member of another company or a creditor, may do to appoint someone to represent it at meetings. Nothing in the section seeks to regulate how a company, which is a member of another, is to requisition an EGM. Also, section 147 does not proscribe a corporate representative from doing any other act which the company may authorise him to perform.

2. ***Board meetings need not be convened based on the availability of all board directors.***

The removed directors argued that the board meetings of the subsidiaries were not valid as they were convened without having first checked the directors' availability to attend.

The Judge held that there was nothing to suggest that board meetings may only be convened on a date when all directors were available. The articles of association or constitution of the company generally provides for a minimum quorum for a board meeting. If that minimum quorum is met, the board will have the required numbers to make decisions and to pass resolution as are required that will bind the company.

3. Reliance on section 310 of the CA 2016 permitted following reliance on section 311 of the CA 2016.

The Judge also dismissed the argument that once a member had invoked the procedure under section 311 of the CA 2016, there could not be reliance on section 310 of the CA 2016.

Section 311 of the CA 2016 essentially provides for a member to requisition the directors to convene and hold the general meeting. On the other hand, section 310 of the CA 2016 allows a member to directly convene and hold the general meeting (thus bypassing the need to go to the directors).

The Judge held that should the invocation of section 311 fail to result in the EGM requisitioned, a member may still be able to invoke section 310 to secure the desired EGM. Both provisions are independent provisions and reliance on either should be mutually exclusive.

4. ***No blanket requirement of special notice for removal of directors.***

The removed directors also contended that the subsidiary companies failed to provide valid special notice of the removal of the directors, as less than 28 days' special notice of the EGM was given.

However, it was held that the requirement for a special notice of a resolution to remove a director would only be required if the removal of directors was made pursuant to section 206 of the CA 2016. In this

case, the procedure for the removal of directors was made pursuant to the constitutions of the subsidiary companies and therefore did not require special notice.

Section 206(3) of the CA 2016 provides that special notice is required to remove a director "*under this section*", whereby a director may be removed by an ordinary resolution under section 206(1)(a). However, such removal is expressly provided under section 206(1)(a) to be "*subject to its constitution*".

Therefore, if the removal of a director is effected pursuant to a private company's constitution, the requirement for a special notice of the resolution removing the director does not apply.

Conclusion

Low Thiam Hoe has provided clarity and guidance on the procedures for the removal of directors, and the convening of meetings to give effect to the removal.

It is now clear that a corporate representative's role is not solely limited to act at any meeting of members of the company but includes exercise of further powers conferred to him by the board of directors of the company.

In addition, the judgment held that in the event a member fails to require a director to requisition a meeting under section 311 of the CA 2016, the member may rely on section 310 of the CA 2016, by way of self-help, to convene the desired meeting.

Lastly, it is authority for the view that special notice for the removal of directors will only be required in the event procedures for the removal of directors were made pursuant to section 206 of the CA 2016.

JANICE HO XIAO EN
CORPORATE/M&A

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1 Originating Summons No. WA-24NCC-459-08/2019.
2 Section 297(2)(a) of the CA 2016.

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