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COMPETITION LAW

Setting a Milestone to Businesses in Malaysia

IN THIS ARTICLE, LILIEN WONG LIEN LIEN ANALYSES THE CASES DECIDED BY THE MALAYSIAN COMPETITION COMMISSION AND DISCUSSES HOW THE COMING INTO FORCE OF THE COMPETITION ACT 2010 AFFECTS THE WAY BUSINESSES ARE CONDUCTED IN MALAYSIA.

Introduction

The Malaysian Competition Commission or more commonly known as the MyCC was set up as an independent body to enforce the Malaysian Competition Act 2010 ("Act") that came into force on 1 January 2012. The Act has a wide coverage as most, if not all, enterprises (save where specific exemptions under the Act apply) that carry out any commercial activities which may have an impact on competition in the market fall under the scrutiny of the MyCC.

The MyCC is seeking to reform the way businesses are conducted in Malaysia. The first Malaysian Competition Law Conference held on 25 and 26 September 2013 carried the theme "Competition Act 2010 Compliance Guidelines" ("Compliance Guidelines") which set out how to implement a competition law compliance programme for enterprises.

Compliance Guidelines

The Compliance Guidelines provide insight for businesses on how to develop a competition law compliance culture which involves, essentially, the setting up of:

(i) a compliance policy statement emphasising the importance and the need of an enterprise to comply with the Act;

(ii) a competition law compliance manual setting out the guidelines for employees to abide by;

(iii) a competition law compliance committee or representative to address the employees' concerns on competition law compliance issues;

(iv) a training programme for all relevant staff such as the procurement personnel, sales and marketing personnel and the senior management; and

(v) a periodical reporting and audit process to monitor competition law compliance.

Notably, the MyCC indicated its concerns on small and medium enterprises ("SMEs") and recommended SMEs adopt the following measures to promote good corporate governance[1]:

(i) a document be made available to staff that sets out the key "do's" and "don'ts" to ensure compliance with the Act.

(ii) members of staff be given training on how the Act applies to the business. This training should include relevant examples and information on the consequences of breaching the

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Act.

(iii) a senior person be appointed as the competition law "point of contact" to whom staff can direct any questions or concerns about competition law.

(iv) competition law compliance processes be reviewed regularly to ensure they remain relevant.

Price fixing by members of association — the CHFA case and PMLOA case

The SMEs play a pivotal role in the industrial development of the country. For decades SMEs in various sectors have banded together in the form of organisations, associations or chambers in achieving common goals which may sometime involve anti-competitive practices such as price fixing or sharing of information. A classic example is the case of **Cameron Highlands Floriculturist Association**[2] ("**CHFA**"). The MyCC issued in December last year a 17-page decision concluding that the CHFA's decision to increase the price of flowers by 10% constituted a horizontal agreement between enterprises to fix prices that falls foul of the Act[3].

Horizontal arrangements between enterprises such as price-fixing agreements, bid rigging, market sharing and limiting production are hardcore cartel activities that are strictly prohibited, regardless of whether an enterprise has a significant market share in the relevant market.

In September of this year, another price fixing decision was reached amongst members of the Pan-Malaysia Lorry Owners Association ("**PMLOA**"). The PMLOA resolved that there would be a raise in transportation charges by 15%, shortly after the government announced a fuel price hike. The MyCC acted by issuing proposed interim measures to the PMLOA, including its 40 members and related lorry enterprises in respect of the agreement to increase the transportation charges by 15%[4]. The PMLOA, its members and the relevant lorry companies were, *inter alia*, restrained from acting in accordance with the decision to increase transportation charges. Subsequent to the interim measures, the PMLOA directed its members not to implement the 15% increase of transportation charges and advised the lorry owners to make their own independent decision regarding transportation charges[5].

The MAS-AirAsia case

Contrasting the measures taken against the PMLOA and CHFA, which comprise a group of SMEs (no financial penalties were imposed), the MyCC adopted a completely different approach in the case of two significant players in the airline industry.

On 6 September 2013, Malaysian Airlines ("MAS") and AirAsia Berhad ("AirAsia") were found to have infringed the Act and a financial penalty of RM10 million was imposed against the parties respectively. A proposed decision was issued against the two key players in relation to a comprehensive collaboration framework entered between the parties which the MyCC considered had, as its object, the sharing of markets in the air transport services sector in Malaysia[6].

The MyCC is expected to issue a final decision in January 2014 after hearing submissions from both parties.

Nestle's "Brand Equity Protection Policy"

Nestle Sdn Bhd ("Nestle"), a leading player in the Fast Moving Consumer Goods segment, was placed under scrutiny when it became the first applicant to seek an individual exemption for agreements with resellers as to the price at which the resellers should sell Nestle products. Essentially, Nestle was seeking to be excluded from the scrutiny of the MyCC. Early this year, the pricing policy was withdrawn after the MyCC declined to grant an individual exemption in favour of Nestle, on the ground that it constitutes resale price maintenance which essentially prevents the resellers from setting their prices independently and may lead to a price increase of the products to the detriment of the consumers[7].

Conclusion

The MyCC has delivered a clear message to businesses in Malaysia that it is time to change the way businesses are conducted and that the MyCC will take a strong stance against any price-fixing conduct, regardless of whether it is in the form of a horizontal arrangement (in the case of **PMLOA** and **CHFA**) or a vertical agreement as in the **Nestle** case.

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1 Page 16, Compliance Guidelines
2 Case Number MyCC/0003/2012(ACA)
3 MyCC decision on 6 December 2012, Case Number: MyCC/0003/2013(ACA)
4 MyCC News Release on 20 September 2013 — MyCC imposes proposed

interim measures to PMLOA

[5] MyCC News Release on 7 October 2013 — MyCC acknowledges PMLOA's positive move

[6] MyCC News Release on 6 September 2013 — MyCC issues proposed decision on MAS-AirAsia

[7] MyCC News Release on 25 February 2013 — Nestle withdraws exemption application

CORPORATE LAW

Payment Systems under the Financial Services Act 2013

IN THIS ARTICLE, ONG HANLEY GIVES AN OVERVIEW OF THE REGULATORY FRAMEWORK APPLICABLE TO PAYMENT SYSTEMS UNDER THE FINANCIAL SERVICES ACT 2013.

The Financial Services Act 2013 ("FSA") came into force on 30 June 2013 and provides for the regulation and supervision of financial institutions, payment systems and other relevant entities, and the oversight of the money market and foreign exchange market to promote financial stability, and for related matters. With the coming into force of the FSA, the Payment Systems Act 2003 ("PSA") was repealed and matters relating to payment systems are now dealt with in Part IV of the FSA.

The focus of this article is to provide a brief overview of the regulatory framework applicable to payment systems, payment instruments and the associated providers of such payment systems under the FSA.

Payment system

The oversight powers of Bank Negara Malaysia ("BNM") in respect of payment systems have been rationalised and consolidated under the FSA[1].

One important change in the FSA is the definition of a payment system. Under the FSA, payment systems are now defined as "*any system or arrangement for the transfer, clearing or settlement of funds or securities*."[2] The current definition is broader than that under the PSA as the following payment systems which were previously excluded under the PSA are now included under the FSA:

"(a) A payment system operated by BNM under the Central Bank of Malaysia Act 1958;

(b) A clearing house recognised under the Securities Industry Act 1983[3];

(c) A clearing house licensed under the Futures Industry Act 1993[4];

(d) An in-house payment system operated by a person solely for his own administrative purposes that does not transfer, clear or settle funds or securities for third parties;

(e) A system that solely facilitates the initiation of payment instructions; and

(f) Such other systems or arrangements as may be prescribed by BNM."

The removal of the exceptions above has the result of increasing the ambit of the term "payment system" and by implication, BNM's scope of regulatory oversight.

Operators of systems that enable the transfer of funds from one banking account to another, such as Interbank GIRO ("IBG"), Shared ATM Network and Financial Process Exchange ("FPS"), and payment instrument networks, such as VISA and MasterCard, require approval from BNM to operate such systems or networks[5] pursuant to section 11 of the FSA.

Where BNM is of the opinion that a disruption in the operations of a payment system could affect the public confidence in the overall payment systems in Malaysia, BNM is empowered to designate such payment system as a designated payment system[6]. Such systems are subject to greater scrutiny from BNM and must comply with additional operational arrangements[7], which include measures to ensure the prudent management of funds collected from users of the designated payment system. As of the date of writing, the two designated payment systems are the Real Time Electronic Transfer of Funds and Securities System ("RENTAS") and Sistem Penjelasan Informasi Cek Kebangsaaan Secara Elektronik ("eSPICK").

Both RENTAS and eSPICK are deemed to be certified designated payment systems under the FSA[8]. Therefore transfer orders (as defined in section 37 of the FSA) sent through RENTAS or eSPICK will be subject to the provisions of Division 3 Finality of payment and netting arrangement of Part IV Payment Systems of the FSA.

The FSA imposes a stricter framework as mentioned above than the previous position under the PSA which provided that persons intending to operate a payment system need only notify BNM and submit documents and information together with such fees as prescribed by BNM.[9]

Payment instruments

A payment instrument is defined as "a*ny instrument, whether tangible or intangible, that enables a person to obtain money, goods or services or to make any payment*" and examples of such instruments include credit cards, debit cards and cheques.

Payment instruments may also be gazetted as a designated payment instrument if the payment instrument may be of widespread use and may affect the payment systems in Malaysia, and BNM is of the opinion that such designation is necessary to maintain the integrity, efficiency and reliability of the payment instrument. Issuers of designated payment instruments must comply with standards issued by BNM in addition to operational arrangements as provided in the FSA.

The following types of payment instruments have been prescribed as designated payment instruments:

- Charge cards;
- Credit cards;
- Debit cards (which have been recently added to the list of designated payment instruments[10] reflecting its wider use among the public as a means of making payment and to subject its issuer to BNM's regulatory oversight);
- Electronic money (defined in the FSA as any payment instrument whether tangible or intangible, that (a) stores funds electronically in exchange of funds paid to the issuer, and (b) is able to be used as a means of making payment to any person other than the issuer); and
- Any combination of the payment instruments above.[11]

Designated payment instruments may only be issued by persons approved under section 11 of the FSA and in compliance with the provisions of the FSA applicable to an approved issuer of a designated payment instrument.

Merchant acquiring services

A new addition to the regulatory framework for payment systems is the inclusion of the term "merchant acquiring services", which is defined under section 2 of the FSA as "*a business of an operator of a payment system that enters into a contract with a merchant for the purpose of accepting payment instruments for payment of goods or services*".

An operator of a payment system for merchant acquiring services has to be a registered operator of a payment system, and first register with BNM before commencing such business. The provisions in the FSA applicable to registered businesses would, unless otherwise expressly provided, apply to a person providing merchant acquiring services.

Conclusion

The provisions relating to payment systems in the FSA have the objective of strengthening regulatory oversight over payment systems and payment instru-

ments. In particular, the broadening of the definition of payment systems combined with the requirement for approval to be obtained from BNM prior to the commencing of operations of a payment system will enable BNM to act in a proactive, rather than reactive manner. Greater regulatory oversight is also achieved by the inclusion of merchant acquiring services within the ambit of BNM's scope of governance and the requirement of registration prior to commencing the provision of such services. The regulatory measures imposed will improve the confidence of the public and potential investors in the payment systems in Malaysia and, in particular, retail payment systems.

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[1] Page 131 of BNM's Financial Stability and Payment Systems Report 2012
[2] Section 2 of the FSA
[3] Repealed and which should now be the Capital Markets and Services Act 2007
[4] Repealed and which should now be the Capital Markets and Services Act 2007
[5] Page 131 of BNM's Financial Stability and Payment Systems Report 2012
[6] Section 30 of the FSA
[7] Section 35(2) of the FSA
[8] Section 277 of the FSA
[9] Section 5(3) of the PSA
[10] Financial Services (Designated Payment Instruments) Order 2013; Islamic Financial Services (Designated Islamic Payment Instruments) Order 2013
[11] Financial Services (Designated Payment Instruments) Order 2013, P.U.(A) 202

FINANCIAL SERVICES

More Teeth and Bite to Laws Regulating the Financial Sector

IN THIS ARTICLE, VANESSA CHAM LOOKS AT SOME SIGNIFICANT FEATURES IN THE FINANCIAL SERVICES ACT 2013 AND THE ISLAMIC FINANCIAL SERVICES ACT 2013.

This article introduces and highlights certain significant features of the Financial Services Act 2013 ("FSA") and the Islamic Financial Services Act 2013 ("IFSA"), both of which came into force on 30 June 2013[1].

The FSA and the IFSA have consolidated the following six pre-existing statutes:

- Banking and Financial Institutions Act 1989
- Exchange Control Act 1953
- Insurance Act 1996
- Payment Systems Act 2003
- Takaful Act 1984
- Islamic Banking Act 1983.

The FSA and the IFSA were enacted with the primary aim to promote financial stability in the money market and Islamic money market, and the foreign exchange market and Islamic foreign exchange money market. Financial stability in these markets in turn support and strengthen the preconditions for Bank Negara Malaysia ("BNM") to promote sound conditions for the intermediation of funds to new growth areas and strengthening Malaysia's interlinkages with regional and international economies as outlined in the Financial Sector Blueprint 2011–2020.

Certain significant features of the new Acts include:

- *Removal of provisions on scheduled institutions*
  Companies that wish to carry on leasing business, factoring business, development finance business or building credit business (previously known as scheduled business under the repealed Banking and Financial

Institutions Act 1989) are no longer required to obtain written acknowledgement from BNM, although the Minister of Finance ("MOF") has the power to regulate them as a prescribed financial institution[2].

- *Formal recognition of financial holding companies*

The FSA empowers BNM to supervise companies within a financial group to ensure that activities of the financial group do not pose risks to the safety and soundness of licensed persons under the FSA. Any company within the group that has an interest in shares of more than 50% in a person licensed to carry on banking, insurance or investment banking business under the FSA is required to apply to BNM to be approved as a financial holding company of the relevant licensed person[3]. However, BNM may require other companies within the financial group to submit application to be approved as a financial holding company, where BNM considers it necessary for the purposes of maintaining effective regulation and supervision of a licensed person[4].

The prudential requirements under the FSA will apply to financial holding companies and its subsidiaries unless excluded by Ministerial order[5]. In addition, BNM may also issue directions to financial holding companies, its subsidiaries and officers to cease or refrain from committing an act or pursuing a course of conduct or to do any act and to remove director or chief executive officer of a financial holding company if BNM is of the view that such persons fail to comply with the fit and proper requirements or breach of any provisions under the FSA; a direction issued under section 116 of the FSA or an enforceable undertaking accepted by BNM[6].

- *Preservation of netting and collateral arrangements relating to netting*

New provisions have been incorporated in the FSA and the IFSA following the recent amendment of the Central Bank of Malaysia Act 2009 ("CBA") with the aim of preserving the ability of counterparties to enforce their contractual rights and obligations under close-out netting and collateral arrangements in situations where BNM may exercise its wide powers under the FSA and the IFSA. This is one of the measures to secure Malaysia's status as a netting-friendly jurisdiction. This is done through the concepts of "qualified financial agreement", "qualified financial transaction", "financial collateral" and "title transfer credit support agreement"[7].

- *Foreign exchange administration*

With the coming into force of the FSA and the IFSA, all Exchange Control Notices and all the related circular letters previously issued by BNM under the repealed Exchange Control Act 1953 have been revoked and replaced with a new set of foreign exchange administration ("FEA") notices ("Notices")[8]. However, approvals granted under the repealed Exchange Control Act 1953 remain valid[9].

The general approach is that persons may not undertake or engage in any transaction set out in Schedule 14 to the FSA[10] except with the written approval of BNM or general permission given by BNM in the Notices. The concepts of "resident" and "non-resident" still apply under the FEA rules.

The following indicates some of the liberalisation of the FEA rules after the coming into operation of the FSA and the IFSA:

- Residents are free to undertake anticipatory hedging on financial account transactions involving ringgit with licensed onshore banks (except international Islamic banks).

- Non-residents are free to undertake anticipatory hedging on current account transactions involving ringgit with licensed onshore banks (except international Islamic banks).

- Licensed *takaful* operators are free to undertake investments abroad of any amount on behalf of their resident clients.

- Non-residents are free to issue foreign currency securities in Malaysia.

- Registration of financial guarantee not later than seven business days after the giving/obtaining of financial guarantee by a resident on behalf/in favour of a non-resident is required if the amount of the financial guarantee exceeds RM50 million or its equivalent in aggregate provided such financial guarantee is not subject to prior approval of BNM.

- A non-financial guarantee (as defined in the Definition to the FEA Notices) of any amount in foreign currency or ringgit given by a resident on behalf/in favour of a non-resident does not require registration.

- All Labuan entities (other than a Labuan entity which carries on Labuan banking business, Labuan insurance or *takaful* business) are automatically declared non-residents for FEA purposes. Declaration of non-resident status for Labuan entities which carry on Labuan banking business, Labuan insurance or *takaful* business will take effect upon licensing of such businesses under the relevant Acts.

Despite the liberalisation above, BNM's policy against internationalisation of ringgit remains and BNM approval is required for certain finan-

cial guarantees between a resident and a non-resident.

- *Conversion to single insurance/takaful business*

A licensed insurer (except a licensed professional reinsurer) under the FSA is not allowed to carry on both life insurance and general insurance business pursuant to subsection 16(1) of the FSA. A licensed insurer which carried on both life insurance business and general insurance business under the repealed Insurance Act 1996 is given five years (unless a longer period is specified by the MOF on the recommendation of BNM, by notice in writing to the insurer upon its written application before the expiry of the five years) to comply with subsection 16(1) of the FSA[11].

Similar provisions with regard to conversion to single *takaful* business which apply to a licensed *takaful* operator, other than a licensed professional *retakaful* operator, can be found in the IFSA[12]. In addition, a licensed *takaful* operator under the repealed Takaful Act 1984 (deemed to be licensed under the IFSA) which is a private company must be converted into a public company within 12 months (or such longer period as may be specified by the MOF, on the recommendation of BNM upon its written application before the expiry of 12 months)[13].

- *Strengthening the regulatory framework for Islamic Finance*

The IFSA contains a clearer and more comprehensive set of provisions for *Shariah* governance for licensed institutions. Section 28 of the IFSA requires licensed institutions to ensure that its aims, operations, business, affairs and activities are in compliance with *Shariah* at all times. Compliance with any ruling of the *Shariah* Advisory Council is deemed compliance with *Shariah*.

BNM is empowered to issue guidance and specify standards on *Shariah* governance matters (in accordance with the advice of the *Shariah* Advisory Council) such as functions and duties of key functionaries, fit and proper requirements or disqualification of a member of a *Shariah* committee, and on any other matters for purposes of compliance with *Shariah* by the licensed institutions[14].

- *BNM's powers*

BNM has wide powers under both the FSA and the IFSA to specify standards and issue directions of compliance[15]. The FSA and the IFSA contain less prescriptive provisions than the statutes they repealed, but more flexibility is given to BNM and, in certain cases, the MOF, to determine what and how to regulate. The respective roles of BNM and MOF are also clarified in the FSA and the IFSA.

Summary

The enactment of the FSA and the IFSA has removed inconsistencies in the regulation of financial institutions under the repealed statutes and given the regulators more flexibility to set standards and implement regulatory policies. The FSA and the IFSA are the key statutes which form part of the legal framework of the financial sector placing Malaysia's regulatory and supervisory framework of the financial sector on a stronger footing.

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1 Certain provisions and Schedules of the FSA come into force later
2 Section 212 of the FSA; section 223 of the IFSA
3 Subsection 110(1) of the FSA; subsection 122(1) of the IFSA
4 Section 111 of the FSA; section 123 of the IFSA
5 Subsection 115(1) of the FSA; subsection 127(1) of the IFSA
6 Sections 116 and 120 of the FSA; sections 128 and 132 of the IFSA
7 All are defined terms under subsection 2(5) of the FSA and IFSA respectively
8 Available at http://www.bnm.gov.my/index.php?lang=en&ch=en_newfea&pg=en_newfea_circulars&ac=1&eId=box1
9 Subsection 214(6) of the FSA read together with section 272(a) of the FSA
10 Subsection 212(4) of the FSA; subsection 225(2) of the IFSA
11 Sections 276 of the FSA
12 Subsection 16(1) of the IFSA
13 Section 286 of the IFSA
14 Section 29 of the IFSA
15 The sections are sections 156, 165, 216 of the FSA; sections 168, 177, 227 of the IFSA

INTELLECTUAL PROPERTY

Right of Publicity Protection in Malaysia

IN THIS ARTICLE, ESTHER HOR CONSIDERS A CELEBRITY'S RIGHT OF PUBLICITY PROTECTION IN MALAYSIA.

Let's imagine this:

Mr. A, an acknowledged celebrity, discovered a photo image of himself which he posted on his private Facebook account had been used by a third party company in its website www.Abc.com. That company offers online sales of various branded merchandise. His photographic image was used as an adjunct to and for an auxiliary purpose to the individual brands of the merchandise.

Is there any legal recourse for Mr. A?

Mr. A's publicity value is an intrinsic feeling of goodness and pride earned from the respect of the public at large and his contemporaries. Unless there is an identifiable economic value that is attached to the given aspects of his identity, there is no consumption demand for it as a business commodity item and hence, there is no need to protect his right of publicity for his likeness, image and persona. Advancements in advertising and communication channels and technology have enhanced the fame of a celebrity. It is communicated faster and with greater efficiency and frequency to the world at large. This has led to the likeness, persona and image of celebrities being in demand for use in advertising and promotional materials in business for products and services. The result is that there might well be a valuable proprietary asset and interest in the economic value of his identity, personality, image and name as commercial property for which he is entitled to monetary compensation from its exploitation including in the case of any misappropriated use.

Is the misappropriation of the publicity actionable?

If there is a natural proprietary right per se vested in the likeness, personality, image and persona does that mean the celebrity is entitled to restrain any exploitation of his fame for any economic advantage without compensation? For there to be any proprietary entitlement, the right of publicity per se must be a legally recognisable property interest and be assignable absolutely and without any distinctive unique reputational attributes, commercial advantage and commercial goodwill attached to it, transmissible in law and be enforceable by heirs. If that were the law, any aspect of the identity or persona of the celebrity if obvious or suggestive of the celebrity in the manner of its unauthorised use is sufficient for a cause of action. Irrespective of what its legal standing is, the fame and personality of a celebrity is accepted and used for the promotion and endorsement of commercial products and the public offering of services. It is doubtful whether Malaysian law will accept such a broad concept of unlawful exploitation of a right of publicity per se. At least, there is as yet no statutory protection.

The prevailing view is that the right of publicity is protected if the facts fall within the common law and statutory regimes of trademark, design, copyright, consumer protection laws and common law passing off.

In the context of passing off, there must be reputational attributes, commercial advantage and goodwill in the given aspect of the celebrity's personality and public association of the name, likeness, personality and persona of the celebrity with a commercial source of goods or services. There must be a misrepresentation in that there must be deception or likelihood of confusion in the manner of the alleged deceptive marketing. Only then can there be certainty in the measurement of damages; which is, the commercial loss that can be evaluated in monetary terms suffered by the celebrity or the unjust pecuniary gain acquired by unjust enrichment. If such attributes, whether recognised as goodwill, trademarks, designs or copyright are present, the rights to the given aspects of the personality of the celebrity are proprietary that may be assigned, licensed and inherited. In the Canadian case of **Gould Estate v Stoddard Publishing**[1], a famous pianist was interviewed by Jock Carroll for an article in Weekend Magazine. Nearly 40 years later (in 1995), Carroll published through Stoddart Publishing Co. a book called "*Glenn Gould*" with some portraits of the pianist as a young man. It also included some of the photographs and conversations that Carroll recorded during the interview with Gould. Gould died in 1982 and the Gould Estate did not authorise the publication or receive royalties from the book. As a result, Gould Estate sued Stoddart Publishing Co. on three grounds, one of which was the tort of appropriation of personality. The trial judge concluded that the Gould Estate had standing to sue because personality rights survive the death of the right-holder (in this case Gould) and are transmitted to the right-holder's heirs (in this case Gould Estate).

Misrepresentative commercial and impressionistic association

There is no longer any necessity for a common trading field of activity for a passing off action. In the Malaysian case of **Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor**[2] the Court referred to the English case of **Irvine v Talksport Ltd**[3] where it was held that there was no requirement for Irvine and Talksport Ltd to be engaged in a common field of activity. The Court acknowledged that those with fame are entitled to exploit their names and images by way of endorsement if they have reputation and goodwill in the given aspects of their personality. On the need to show misrepresentation the Court ruled that in order to succeed, the burden on Irvine includes a need to prove at least two interrelated facts — first, that at the time of the acts complained of he

had a significant reputation or goodwill; second, that the actions of Talksport Ltd gave rise to a false message which would be understood by a significant section of Talksport Ltd's market that its goods are endorsed, recommended or are approved by Irvine. This ruling points to the emergence of the tort of wrongful appropriation of personality. This, in essence, is not different from misappropriation of a right of publicity. Similar principles will apply in the case of a celebrity's personality being used to promote any services without authorisation.

That there must be misrepresentation of a commercial association between the celebrity and the products or business of the other party is also adopted in the Canadian case of **Krouse v Chrysler Canada Ltd**[4]. This case involved the use of a professional footballer's photograph in an advertisement for the defendant automobile manufacturer. Chrysler Canada Ltd was not found liable as the Court held that it was not reasonable for the footballer to have an expectation of privacy of a football game and the advertisement that was meant to illustrate the climactic nature of the game to promote the product was such that no inference could be made that the footballer was personally endorsing the product. However, Justice Estey held that "*there may well be circumstances in which the Courts would be justified in holding a defendant liable in damages for appropriation of a plaintiff's personality, amounting to an invasion of his right to exploit his personality by the use of his image, voice or otherwise with damage to the plaintiff*". Whilst whether there is present or absent any misrepresentation must remain a question of fact and law, this case readily accepted and acknowledged the common law tortious right of action for the unauthorised appropriation of personality which is a distinct cause of action from that of trademark, design or copyright infringement.

The matter of false association may be a matter of degree in an assessment and evaluation of the facts. Impressionistic association has been held to be sufficient misrepresentation. This test has a wider scope than the false association test. In the case of **Pacific Dunlop Ltd v Hogan & Other** (known as the "Crocodile Dundee case")[5], the judge pointed to a distinction to be drawn between a "mere" caricature on the one hand and a caricature "embedded" in an advertisement on the other. The former is innocent because viewers would receive the impression that the person caricatured would not have agreed. The latter carries with it a different impression, favourable to the subject of the caricature, in which he or she is perceived as endorsing the object of the advertising.

The cases cited above and the legal principles applied lend support to there being no cause of action if the claim is the misappropriation or stealing of the proprietary rights and assets vested in the likeness, image, personality and persona of the celebrity per se without there being proved the added requirements of distinctiveness of the claimed aspect of the personality, public deception and misrepresentation measured against a commercial and business context and damages resulting therefrom.

It is likely that Malaysia will follow the legal position in the UK. Unlike in the US, there is no personality right per se in the UK which prevents unfair exploitation even if someone evoked the celebrity's image by an act of misrepresentation. The absence of any "image right" or "personality right" under English law was reaffirmed in the case of **Robyn Rihanna Fenty and others v Arcadia Group Brands Ltd (t/a Topshop) and another**[6], by Justice Birss who noted:

> *"Whatever may be the position elsewhere in the world, and how ever much various celebrities may wish there were, there is today in England no such thing as a free standing general right by a famous person (or anyone else) to control the reproduction of their image."*

However, under English law, the law of passing off is one way by which celebrities have protected their image, provided that they can show that they have goodwill in their image and that there has been a misrepresentation leading to public deception. There may also be claims for copyright and/or trade mark infringement, and possibly claims for breach of privacy, an area of evolving law.

Must unlawful appropriation of a right of publicity or unauthorised appropriation of personality be intentional?

If the unlawful appropriation is actionable only by way of a passing off action of the extended kind, then neither motive nor intent is requisite. The state of mind of the party who is sued is not relevant. Proof of any ill or fraudulent intent is not necessary. Whether the party who is sued has acted negligently or fraudulently in misleading his customers is not a relevant consideration either. However, if there is a flagrant and blatant attempt to pass off on the part of the party who is sued, then such intent is not immaterial and will assist the case of the claimant.

Copyright

Copyright in the context of a right of publicity is more relevant in the case of a photograph captured of the celebrity whether as a person or him in one or more of his expressive moods or behavioral traits. The photographer as the person who took the photograph is the author and copyright owner of the photograph. He is entitled to exploit and license the photograph for the commercial exploitation by others, either by way of distribution or importation of those photographs for commercial rental or reproduction. Unless the celebrity has an understanding with the photographer that the photographer may license the photograph of the celebrity's image or other aspects of his personality for commercial exploitation, the celebrity can refuse to permit the use of his image or photograph. It is therefore advisable for the photographer to seek a publicity release agreement from the celebrity to allow the photographer to use the celebrity's image and photograph in any manner the photographer sees fit. This is because the celebrity continues to retain his rights to and control the use of

his image and likeness in the context of commercial use given his right to sue for passing off.

The Digital World — Downloading of images for unauthorised use from sharing websites

There are two scenarios. If it were the celebrity himself or the photographer who posted the image onto a sharing website, much will depend on what the terms and conditions of use of the sharing website are. For example in the Facebook Statement of Rights and Responsibilities, the users are deemed to agree with the terms set out in that Statement by using or accessing the Facebook content material. The intention of having this is to help users understand how social network collects and uses people's data; for example, how Facebook may use the users' name, profile photos and other data to deliver advertisements on its site. The key operative term is, "*users permit a business or other entity to pay Facebook to display users' name and/or profile picture with users' content or information, without any compensation to Facebook users*". In such an instance, the celebrity would have given up his rights of publicity by having agreed to license the right to copy or reproduction of his uploaded photograph of his image to the site owner.

Where it is the photographer who did the uploading, he similarly would have agreed to license out the right to copy to the site owner who in turn licenses other users to similar copy the uploaded material. Unless the photographer has an executed publicity release agreement from the celebrity, the celebrity has every right to control his image and photograph in terms of any commercial use. Even though the site owner has a license from the photographer, it has not been granted any right or license by the celebrity to use his image, photograph or likeness in any way for any commercial purpose. Therefore, by allowing the site owner to use the photograph uploaded by the photographer without the consent of the celebrity to have his personality, image and likeness for product and services promotional purposes, both the site owner and photographer may have liability exposure to the celebrity depending on the circumstances. They may, however, be exempted if such use of the photograph falls under the scope of "fair dealing" laid down in section 13 of Copyright Act 1987.

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[1] [1996], 30 O.R. (3d) 520 (Ont. Gen. Div.)
[2] [2011] MLJU 777
[3] [2003] EWCA Civ 423
[4] [1974] 1 OR (2d) 225
[5] [1989] 25 FCR 553
[6] [2013] EWHC 2310 (Ch)

EMPLOYMENT LAW

Code of Conduct for Industrial Harmony — A Guideline on Retrenchment?

IN THIS ARTICLE, PARVATHY DEVI RAJA MOORTHY DISCUSSES THE CODE OF CONDUCT FOR INDUSTRIAL HARMONY

The Code of Conduct for Industrial Harmony ("the Code") was agreed upon between the then Ministry of Labour and Manpower[1], the Malaysian Council of Employers' Organisation[2] and the Malaysian Trades Union Congress to lay down principles and guidelines to employers and workers on the practice of industrial relations for achieving greater industrial harmony.

The Code provides that prior to a retrenchment exercise, the employer should, in consultation with employees' representative, trade union and in consultation with the Ministry of Labour, take positive steps to avert or minimise reductions of work force by the adoption of appropriate measures, such as limitation on recruitment, restriction of overtime work, restriction of work on weekly day of rest, reduction in the number of shifts or days worked in a week, reduction in the number of hours of work or retraining or transfer to other department. The Code also provides that if retrenchment becomes necessary, the employer should take the following measures:

(i) giving as early a warning as practicable to the workers concerned;

(ii) introducing schemes for voluntary retrenchment and retirement and for payment of redundancy and retirement benefits;

(iii) retiring workers who are beyond their normal retirement age;

(iv) assisting, in cooperation with the Ministry of Human Resources, the workers to find work outside the undertaking;

(v) spreading termination of employment over a longer period;

(vi) ensuring that no such announcement is made before the employees and their representatives or trade union have been informed.

The perennial issue that has been litigated in court for many years is whether compliance with the Code is mandatory and whether a failure to comply with the Code would result in an otherwise fair retrenchment being considered as unfair.

In 1989, the High Court ruled in **Penang & S Prai Textile & Garment Industry Employees' Union v Dragon & Phoenix Bhd Penang & Anor**[3] ("**S Prai Textile**") that the Code had no legal force or sanction[4].

However, despite the aforesaid decision, the Industrial Courts in several decisions that were decided after **S Prai Textile** have ruled that a blatant failure to comply with the Code would result in the retrenchment of an employee being viewed as unfair[5]. The Industrial Courts have reasoned that even though the Code has no legal force, it would still be within the purview of the courts to examine an employer's compliance with the Code in considering whether the retrenchment of an employee was carried out in a fair manner. The basis to do so is premised on section 30(5A) of the Industrial Relations Act 1967, which stipulates as follows:

> *"In making its award, the [Industrial] 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."*

The recent decision of the Court of Appeal in **Equant Integration Services Sdn Bhd v Wong Wai Hung**[6] ("**Equant**") provides more clarity on the degree of compliance that is expected from an employer in a retrenchment exercise.

Equant's case — The brief background

Wong Wai Hung ("Wong") in **Equant** claimed that his retrenchment had not been carried out in a *bona fide* manner. Conversely, Equant Integration Services Sdn Bhd ("EIS" or "the employer") contended that the retrenchment had been carried out fairly and in accordance with good industrial practice.

The decision of the Industrial Court

Although the Industrial Court found that the restructuring exercise undertaken by EIS was genuine and that the selection of Wong for retrenchment was made upon a fair and proper selection, the Industrial Court held that Wong's retrenchment cannot be considered fair since the company had failed to consult or inform Wong prior to the retrenchment, as required by clause 21 and 22(a)(I) of the Code.

In reaching its decision, the Industrial Court found that EIS's contention that there was no legal obligation for it to comply with the Code was not quite correct. It held that the obligation is imposed by section 30(5) of the Industrial Relations Act 1967 which provided that the Industrial Court has the discretion to take into consideration the Code.

In the circumstances, the Industrial Court also found the dismissal to be unfair on the basis that the severance payment was not made in accordance with

clause 22(a)(ii) of the Code of Conduct and inadequate.

The decision of the High Court

The High Court upheld the decision of the Industrial Court on the basis that there was a plethora of cases[7] in Malaysia that have taken the position that even after the employer has established that a genuine redundancy situation has arisen at the time of the retrenchment exercise, the Court will still inquire whether the employer had engaged in prior consultation with the affected employees.

The decision of the Court of Appeal

The Court of Appeal set aside the decisions of the Industrial Court and High Court, and agreed with the employer that the Code is a mere guideline and held that the failure to comply with the Code per se cannot be fatal in a proper retrenchment exercise. The Code cannot be enforced as if it is a binding statute. It does not have the force of law.

Accordingly, the Court of Appeal held that although the Code is to be given due consideration by the Industrial Court when exercising its discretionary power under section 30(5A) of the Industrial Relations Act 1967, the Code cannot be applied technically and mechanically. Instead it should be taken as mere guidance in a proper retrenchment and the proper question for the Industrial Court to ask is, "how would the breach of the Code affect a redundant position in the company?".

On the facts, the Court of Appeal considered that the employee was given circulars and notification by the parent company about the restructuring (merger) a month before his retrenchment. He also attended an interview for a position in the reorganised company, post-merger and that a payment of three months' salary in lieu of notice was given to him. The Court of Appeal therefore held that the retrenchment was carried out in a proper manner and with sufficient justification.

Conclusion

In the light of the decision in **Equant**, it is clear now that a mere non-compliance with the Code will not result in an otherwise fair and *bona fide* retrenchment being considered unfair. Be that as it may, as a precaution, employers should still, where practicable, adhere to the Code as it not only reflects good industry practice but will put employers in a better position to defend an unfair dismissal suit.

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[1] Ministry of Human Resources
[2] Malaysian Employers' Federation
[3] [1989] 1 MLJ 481
[4] This decision has been upheld by the Supreme Court
[5] *Mamut Copper Mining Sdn Bhd v Chau Fook Kong @ Leonard & Ors* [1997] 2 ILR 625; Agilent Technologies Malaysia Sdn Bhd v Tan Wee Khoon (Award No 1606 of 2008)
[6] [2012] 1 LNS 1296; Decided on 10th October 2012
[7] *Trident Malaysia Sdn Bhd, Penang v National Union of Commercial Workers* [1987] 2 ILR 190; *Lily Industries (M) Sdn Bhd v Billy Wayne Selsor* [2006] 3 ILR 1507; *Said Dharmalingam Abdullah v Malayan Breweries (Malaysia) Sdn Bhd* [1997] 1 CLJ 646; *Looi Tuck Keong v New-Ell Stationary Product (Malaysia) Sdn Bhd*, Award No: 1527 of 2010; *Credit Corporation (M) Bhd v Choo Kam Sing & Anor* [1999] 8 CLJ 86, *Mamut Copper Mining Sdn Bhd v Chan Fook Kong @ Leonard & Ors* [1997] 2 ILR 625

Budget 2014 Highlights

IN THIS ARTICLE, CHRISTOPHER TAY HANMIN HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2014 BUDGET.

On 25 October 2013, the Prime Minister in his capacity as Finance Minister tabled the 2014 Budget which carried the theme "Strengthening Economic Resilience, Accelerating Transformation and Fulfilling Promises" at the Dewan Rakyat.

The most significant highlight of the Budget was the much anticipated announcement of the introduction of the Goods and Services Tax ("GST"). At the same time, the Government has also proposed some tax reductions and other forms of assistance to the people.

Some of the 2014 Budget highlights are discussed below. Unless otherwise stated, the budgetary proposals discussed below when passed by Parliament will take effect from Year of Assessment ("YA") 2014.

GST

The GST proposed will cover all goods and services, whether domestic or imported into the country, at all levels from production, manufacturing, wholesaling to retailing, subject to some exceptions. This broad-based consumption tax would be set at a rate of 6% effective from 1 April 2015 and would replace the current sales tax and service tax which would be abolished.

In the 2014 Budget speech, the Prime Minister said the GST will not be imposed on:

- basic food items such as rice, sugar, salt, flour, cooking oil, lentils, herbs and spices, salted fish, *cencalok*, *budu* and *belacan*;
- piped water supply, and the first 200 units of electricity per month for domestic consumers;
- services provided by the Government such as issuance of passports, licences, health services and school education;
- transportation services such as bus, train, LRT, taxi, ferry, boat, highway toll, and health and education services;
- sale, purchase and rental of residential properties and selected financial services.

In tandem with the introduction of the GST, the Government has proposed a one-off cash assistance of RM300 to households who are BR1M[1] recipients and the reduction of income tax rates as follows:

- *Individuals*

  Personal income tax rates would be reduced by 1% to 3% and the individual income tax structure would be reviewed. The chargeable income subject to the maximum rate will be increased from exceeding RM100,000 to exceeding RM400,000 and the maximum tax rate would be reduced from 26% to 24%. These proposed measures would only be effective from YA 2015.

- *Companies*

  Corporate tax rate would be cut by 1% from 25% to 24% while companies with paid up share capital of up to RM2.5 million are taxed at a reduced rate of 19% to chargeable income up to RM500,000 and the remaining chargeable income would be taxed at a reduced rate of 24%. These tax reductions would be effective only from YA 2016.

- *Cooperatives*

  Cooperative income tax rate is to be reduced by 1% to 2% from YA 2015.

- *Other packages, deductions and incentives*

  - Tax deductions for secretarial fee and tax filing fee are allowed from YA 2015;
  - Cost of purchasing ICT equipment and software is given Accelerated Capital Allowance until YA 2016;
  - Expenses incurred for the training in accounting and ICT relating to the GST are to be given further tax deductions for YA 2014 and YA 2015;
  - A training grant of RM100 million to be provided for businesses that send their employees for GST training in 2013 and 2014;
  - Financial assistance amounting to RM150 million to be provided to small and medium enterprises ("SMEs") for the purchase of accounting software in 2014 and 2015.

The Government has also sent out a clear warning that no party should take the opportunity to increase the prices of goods and services unscrupulously. The price of goods will be monitored and the Ministry of Domestic Trade, Cooperatives and Consumerism will be intensifying enforcement efforts through the Price Control and Anti-Profiteering Act 2011. Furthermore, a GST Monitoring Committee will be established for the smooth implementation of GST under the purview of the Second Finance Minister.

Direct taxes

- *Individuals*

  Under the current regime, taxpayers with employment income and subject to Monthly Tax Deduction ("MTD") are required to submit their tax returns before or on 30 April each year. The Government is proposing that these taxpayers who are serving under the same employer for a period of 12 months in a calendar year need not submit tax returns if the MTD is the final tax.

  For middle-income taxpayers, a special tax relief of RM2,000 will be given for those whose monthly income is not more than RM8,000 in YA 2013.

- *Corporations*

  Companies that apply for the Flexible Working Arrangement ("FWA") status between 1 January 2014 to 31 December 2016 and are approved by Talent Corporation Malaysia Berhad will be given a double deduction on expenses incurred in the training of employees, supervisors and managers, and the payment of consultancy fees to design the appropriate FWA to be implemented.

  Anchor companies that have signed a memorandum of understanding with the Ministry of International Trade and Industry under the Vendor Development Programme, which was introduced for the development of vendors, will be given double deduction on approved expenses, capped at RM300,000 yearly from 1 January 2014 until 31 December 2016.

Tax deductions and incentives

- *Minimum wage*

  Under the National Wages Consultative Council Act 2011, the Government, together with the National Wages Consultative Council, decided[2] that there should be a minimum monthly wage of RM900 in Peninsular Malaysia and RM800 in Sabah and Sarawak. To encourage compliance with the Government's Minimum Wages Policy, a further tax deduction is to be allowed for the difference in the wages paid by employers for the period between 1 January 2014 to 31 December 2014.

- *Visit Malaysia Year 2014 and 2015: Year of Festivals*

  Year 2014 has been declared "Visit Malaysia Year" while 2015 is designated as the "Year of Festivals". To promote Malaysia as a preferred tourist destination and to encourage investments in the tourism industry, the Government has proposed the application period of Pioneer Status and Investment Tax Allowance incentives for investments in four- and five-stars hotels be extended for another three years until 31 December 2016.

- *Green technology*

  The Government wishes to strengthen the development of green technology and has made proposals that investment tax allowance for the purchase of green technology equipment and income tax exemption on the use of green technology services and system to be given.

- *Strengthening the SMEs*

  SMEs will receive assistance and incentives under the Green Lane Policy[3] programme for financing, tax incentives and procurement. This includes stamp duty exemption for loan agreements under the soft loan incentive scheme and tax deduction on expenses incurred for obtaining 1-InnoCERT certification.

- *Bioeconomy*

  To encourage research and development of Bioeconomy[4], tax deductions will be allowed for companies who invest to acquire technology platform in bio-based industry. Besides that, there will be an exemption of import duty on R&D equipment for companies that invest in pilot plants for purpose of pre-commercialisation in Malaysia. A special incentive for companies to partially cover operational cost for human capital development is also proposed.

Real property gains tax ("RPGT")

The RPGT rate for gains on properties disposed within the holding period of up to three years is increased to 30%. For disposals within the holding period of up to four and five years, the rates are increased to 20% and 15% respectively. There is no RPGT on citizens for disposals made in the sixth or subsequent

years but companies are taxed at 5%.

For non-citizens, the minimum price of property that can be purchased is to be raised from RM500,000 to RM1 million. RPGT would be imposed at 30% on the gains from properties disposed within the holding period of up to five years and for disposal in the sixth or subsequent years, RPGT is imposed at 5%.

Finance Bill (No 2) 2013

It has been the norm for the Finance Bill to be tabled before the Dewan Rakyat in the same session as the proposed Budget. This year, however, the Finance Bill was only tabled on 30 October 2013, which is an unprecedented five days after the Budget announcement was made. There has been much speculation on the reasons for the delay.

Some of the more controversial proposals in this year's Finance Bill are:

- *Proposed new section 4C*

  Over the years, there have been disputes between taxpayers, particularly property developers, and the Inland Revenue Board ("Revenue") over the status of gains from a compulsory acquisition of land. Following a long line of case law, such gains were held to be not taxable as the compulsory nature of the acquisition vitiates the intention to trade.

  This proposed section seeks to make all gains from compulsory acquisition taxable.

- *Proposed section 39(1A)*

  Currently under section 81 of the Income Tax Act 1967 ("ITA"), the Director General of Inland Revenue ("DGIR") can request for any information or particulars from any person in possession or control of it to be provided within a specified period.

  This proposed subsection provides that if that person fails to provide such information relating to claims for tax deduction when requested by the DGIR within the specified time or such extended time allowed by the DGIR, no deduction from the gross income would be allowed in respect of such claims.

- *Proposed section 99(4)*

  Under the current provisions in section 99, all taxpayers have an unqualified right to appeal to the Special Commissioners of Income Tax ("SCIT") against a deemed assessment made under section 90(1) or section 91A so long as it is made within 30 days.

  The proposed subsection seeks to fundamentally restrict the right of appeal against a deemed assessment by any taxpayer whereby a taxpayer can only appeal against a deemed assessment if he is aggrieved by a public ruling made under section 138A of the ITA.

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[1] http://www.br1m3.com/about/

[2] The Minimum Wages Order 2012 was gazetted on 16 July 2012 and came into force on 1 January 2013

[3] The Government introduced Green Lane Policy to acknowledge the contribution of competitive and innovative local SMEs under the 10th Malaysia Plan

[4] http://www.biotechcorp.com.my/bioeconomy/

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