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INTELLECTUAL PROPERTY

MESUMA SPORTS SDN BHD v MAJLIS SUKAN NEGARA MALAYSIA (PENDAFTAR CAP DAGANGAN MALAYSIA, INTERESTED PARTY)

IN THIS ARTICLE, SIM SOOK ENG ANALYSES THE DECISION OF THE FEDERAL COURT ON THE COMMON LAW OWNERSHIP OF TRADE MARKS.

Introduction

In the recent Federal Court case of **Mesuma Sports Sdn Bhd v Majlis Sukan Negara Malaysia (Pendaftar Cap Dagangan Malaysia, interested party)**[1], important questions were posed for determination of the Court. The questions posed could be summarised as follows:

1. Whether common law ownership over a trade mark lies with the creator or designer of a trade mark or source identifier; and

2. Whether common law ownership over a trade mark is determined on the basis of first use.

To put the questions posed in perspective, we first consider the salient facts of the case.

Facts

Majlis Sukan Negara (the National Sports Council of Malaysia, "NSC"), commenced action against Mesuma Sports Sdn Bhd ("Mesuma"). The basis of the action was that Mesuma had wrongfully sought and obtained registration of trade marks which consisted of designs of tiger stripes in a distinctive manner ("the tiger stripes design"). NSC claimed that Mesuma's registrations were wrongfully entered and/or remaining on the register and hence should be cancelled. NSC further claimed that Mesuma's use of the tiger stripes design amounted to passing-off. The rationale of these claims was that the NSC, as first conceiver of the tiger stripes design, was the proper proprietor of the tiger stripes design.

Mesuma on the other hand contended that it had priority over the tiger stripes design as the first user of the same as a trade mark in the course of trade. In support of its claim, Mesuma contended that the goodwill associated to the business identified by the tiger stripes design could only be achieved through business activities such as "*manufacturing, supplying and selling*" the sports attire and garments it had produced. This, according to Mesuma, was not done by the NSC resulting in the NSC's claim as set out in the pleadings not presenting sufficient facts to support its case.

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Decision of the High Court and Court of Appeal

The High Court in finding for the NSC held that the relationship between NSC and Mesuma was that of a customer and a contract supplier. This cloaked the NSC with use of the tiger stripes design thus satisfying the threshold of trade mark use in the context of the claim.

Mesuma appealed against the decision to the Court of Appeal. The Court of Appeal found that the NSC was in fact and in law the first creator and first user of the tiger stripes design. The Court of Appeal held that the "*course of trade*" should not be interpreted too restrictively and the general activities of the NSC within its statutory role were sufficient to pass the requisite threshold of use. Mesuma appealed further to the Federal Court on the questions set out above.

Decision of the Federal Court

On the first question, the apex Court found that, while the creator or designer of an indicator as a trade mark or source identifier may well be the copyright owner or registered design owner, it did not automatically translate to trade mark ownership. Trade mark ownership or rights to a trade mark is determined by first user in Malaysia. As such, the Federal Court's answer to the first part of the question posed was in the negative.

As for the second part of the question, the Court held that the key issue to be determined was whether NSC had used the tiger stripes design as a trade mark in the trade mark sense and in the course of trade prior to Mesuma's application for registration of the tiger stripes design. The Federal Court disagreed with the proposition advanced by Mesuma that "*use in trade mark sense*" can only be achieved through business activities such as manufacturing and/or supplying of goods to others for benefit of profits. The Federal Court held that the NSC was authorised under the National Sports Council of Malaysia Act 1971 to engage in business activities including the commercialisation of the tiger stripes design as well as to deal with it by way of appointment and engaging of contract suppliers for the manufacture and supply of all such goods. Reviewing the relationship between the NSC and Mesuma, the Federal Court agreed with the factual findings of the High Court in that Mesuma was a contract supplier of the NSC. This relationship, in the view of the Federal Court, was sufficient to establish that the NSC was using the tiger stripes design in the course of trade.

Conclusion

The decision of the Federal Court signifies a more liberal approach in considering and determining the requisite threshold of use of a trade mark in the course of trade.

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[1] [2015] MLJU 556

DISPUTE RESOLUTION

Fraud — beyond reasonable doubt or balance of probabilities?

IN THIS ARTICLE, KHOR MEYVEN DISCUSSES THE FEDERAL COURT'S CLARIFICATION OF THE STANDARD OF PROOF FOR FRAUD IN CIVIL PROCEEDINGS.

Introduction

The standard of proof denotes the quantum or nature of evidence that a litigant has to adduce to convince a Judge that a fact exists.

In civil proceedings, the standard of proof is on a balance of probabilities, that is, whether an allegation is more probable than not. However, where there is an allegation of fraud in civil proceedings, the standard of proof in criminal cases, namely, beyond reasonable doubt, has been applied by our Courts. This standard is a high degree of probability although it need not reach certainty. However, in some cases our Courts have also applied the standard of balance of probabilities.

Recently, the Federal Court in **Sinnaiyah & Son Sdn Bhd v Damai Setia Sdn Bhd**[1] (**"Sinnaiyah"**) clarified the standard of proof for fraud in civil proceedings.

This article looks at the earlier inconsistencies, the recent development in **Sinnaiyah**, and the significance of the new standard.

Muddy legal waters

In the past, the Federal Court has adopted different principles in relation to the standard of proof for fraud in civil proceedings.

In 1974, the Federal Court in **Lau Kee Ko & Anor v Paw Ngi Siu**[2] held that fraud in civil proceedings needed only to be proved on a balance of probabilities, albeit a very high degree of probability would be required.

In 1981 the Privy Council[3] in **Saminathan v Pappa**[4] (without considering **Lau Kee Ko**) endorsed the Federal Court's decision which adopted the principle set out in **A L N Narayanan Chettyar v Official Assignee**, where High Court Rangoon[5] held that fraud, whether in civil or criminal cases, must be proved beyond reasonable doubt.

In 1982, the Federal Court held in **Lee You Sin v Chong Ngo Khoon**[6] that the standard of proof for fraud in civil proceedings is the principle laid down in **Bater v Bater**, that is, on a balance of probabilities which imposes a higher degree of probability, somehow reverting to its earlier position in **Lau Kee Ko** (without considering **Lau Kee Ko** or **Saminathan**).

In 1997, the Federal Court in **Ang Hiok Seng v Yim Yut Kiu**[7] seemingly attempted to reconcile the two conflicting principles by holding that the standard of proof in civil cases for criminal fraud is beyond reasonable doubt, whereas the standard of proof for purely civil fraud is on a balance of probabilities. This distinction was confusing as in most if not all cases on allegation of fraud will involve a criminal element.

Finally in 2005, the Federal Court in **Yong Tim v Hoo Kok Cheong**[8] (without considering **Lee You Sin** or **Ang Hiok Seng**) held that the standard of proof for fraud in civil proceedings is beyond reasonable doubt, endorsing **Saminathan**. This approach was followed by the Federal Court in **Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd**[9] in 2007.

The Sinnaiyah approach

In **Sinnaiyah**, the Federal Court comprehensively analysed the earlier Federal Court and Privy Council cases on standard of proof for fraud in civil proceedings.

The Federal Court also took the opportunity to consider the standard of proof for fraud in civil proceedings in England, Canada, Australia and Singapore, which can be summarised as follows:

- In England, the standard of fraud in civil proceedings was settled in **In re B** (**Children**) (Care Proceedings: Standard of Proof)[10], which held that it is on a balance of probabilities regardless of the seriousness of allegation.
- In Canada, the position is the same as in England, where the Canadian Supreme Court held in **F H v McDougall**[11] that the standard of proof for fraud in civil proceedings is on a balance of probabilities, and the Court will need to decide whether it is more probable or not after scrutinising the relevant evidence with care.
- In Australia, the High Court held in **Rejfek & Anor v McElroy & Anor**[12] that the standard of proof is on the balance of probabilities irrespective of the gravity of the fact, and only needs to be reasonably satisfied.
- In Singapore, the Courts also adopt the balance of probabilities standard, however, they require more evidence when the allegation is more serious, as held in **Tang Yoke Kheng v Lek Benedict**[13].

After conducting the analysis, the Federal Court recognised that the standard laid down by earlier cases was far from satisfactory.

The Federal Court then adopted the position in England in **In re B (Children)**, that is, fraud need only be proved on a balance of probabilities irrespective of the seriousness of the allegation. The Federal Court further overruled its earlier decisions in **Lee You Sin, Ang Hiok Seng** and **Yong Tim.**

The significance of Sinnaiyah

Sinnaiyah has once and for all settled the confusion over the standard of proof for fraud in civil proceedings, and brings Malaysian law in relation to the standard of proof for fraud in civil proceedings in line with developments in England, Canada and Australia.

Sinnaiyah makes it easier for Judges dealing with allegations of fraud, as they only need to decide which version is to be believed or disbelieved, that is, whether or not there is fraud.

Further, Judges are also relieved from having to ascertain whether the fraud involved is criminal or civil in nature, which the High Court in **Eric Chan Thiam Soon v Sarawak Securities Sdn Bhd**[14] has considered "*an attempt at distinguishing the indistinguishable*".

Sinnaiyah also makes it clearer to litigants and their lawyers as to the nature and extent of evidence that need to be adduced to satisfy the Court that fraud exists.

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1 [2015] 5 MLJ 1
2 [1974] 1 MLJ 21
3 Appeals to the Privy Council were abolished in Malaysia on 1 January 1985.
4 [1981] 1 MLJ 121
5 AIR 1941 PC 93
6 1982] 2 MLJ 15
7 [1997] 2 MLJ 45
8 [2005] 3 CLJ 229
9 [2007] 2 MLJ 301
10 [2008] UKHL 35
11 [2008] SCC 53
12 (1965) 39 ALJR 177
13 [2005] 3 SLR (R) 263
14 [2000] 4 MLJ 399

EMPLOYMENT LAW

A Re-look at the Laws on Retrenchment

IN THIS ARTICLE, WONG KIAN JUN CONSIDERS THE LAWS OF RETRENCEMENT IN MALAYSIA.

Introduction

During uncertain times and shrinking profits, organisations may decide to reorganise their business structure in order to create a leaner workforce thereby reducing their operating costs to weather the impact of a slowing economy. Inevitably, the reorganisation would result in the retrenchment of its employees who are considered surplus to the needs of the organisation. With news of retrenchment exercises carried out in the financial, manufacturing and airline industries, we think it useful to restate the current position of the law in relation to retrenchment.

The right to reorganise the business left unquestioned

In a claim of unfair dismissal at the Industrial Court, the first hurdle the employer would need to overcome would be to show the basis of the reorganisation which led to the retrenchment exercise. Many reasons have been put forward and accepted by the Industrial Court such as losses, reduced profits, mechanisation, partial or full closure of business, outsourcing and many more, as a reason for the reorganisation. The fundamental principle that remains is that the law recognises the employer's right to reorganise the business in the way that it considers best as long as it is done in a *bona fide* manner.

Redundancy

The next hurdle would be to show that there are surplus employees as a result of the reorgnisation. In **Stephen Bong v FCB Sdn Bhd**[1], the Industrial Court held that a redundancy does not only mean the work no longer exists but it can also occur when the business requires fewer employees. Therefore, this principle would naturally mean that redundancy can occur even if the work still exists and can be performed by fewer employees. If the work is performed by fewer employees, clearly the existing employees will have to perform the work of the employees that are retrenched. Surely if an employer can show that the work of the retrenched employee(s) was performed by other existing

employee(s) of the company, this would mean that the retrenched employee(s) was redundant. This is where there are conflicting views by the Industrial Court.

In the case of **Bayer (M) Sdn Bhd v Ng Hong Pau**[2], the Court held as follows:

> "*On redundancy, it cannot be gainsaid that the appellant must come to the court with concrete proof. The burden is on the appellant to prove actual redundancy on which the dismissal was grounded. (see Chapman & Others v Goonevan & Rostrowrack China Clay Co Ltd [1983] 2 ALL ER). It is our view that merely to show evidence of a reorganisation in the appellant is certainly not sufficient. There was evidence before the court that although sales were reduced, the workload was taken over by two of his former colleagues. Faced with these evidence, is it any wonder that the Court made a finding of fact that there was no convincing evidence produced by the appellant that the respondent's function were reduced to such an extent that he was considered redundant.*"
> (emphasis ours)

In the case of **Credit Corporation (M) Sdn Bhd v Choo Kam Sing & Anor**[3] the Court held as follows:

> "*The evidence before the Industrial Court showed that the first respondent's job functions were not abolished and in fact his duties [were] taken over by other employees. Thus, the order of reinstatement was justified...*"
> (emphasis ours)

Based on the above cases, it appears that there is no redundancy when the work has been taken over by other employees of the company which is in direct contradiction to the principle that a redundancy can occur when an employer requires fewer employees to perform the work, as held in the case of **Stephen Bong v FCB Sdn Bhd.**

Selection criteria

Once redundancy has been established, an employer would need to show that he has applied the correct method of selection. The recognised method would be the Last in First Out ("LIFO") principle which means the most junior employee in terms of length of service in a specific category would need to be selected first for retrenchment as opposed to a longer-serving employee. An employer would need to look at the length of service in a particular category only and not in other categories. Although the LIFO principle is not an immutable principle, it can only be departed from certain exceptional situations.

Other considerations

Apart from what is stated above, the employer must also take into consideration the following issues in a retrenchment exercise:

- Retrenchment benefits — whether contractual or imposed by law;
- Payment of contractual dues;
- Notification of retrenchment exercise to the Labour Office;
- Any requirements pursuant to Collective Agreement or Employee Handbook.

Apart from undertaking a retrenchment exercise, many organisations have also taken the route of introducing a Voluntary Separation Scheme ("VSS") or Mutual Separation Scheme ("MSS"). A VSS means that the employee would apply to terminate his employment with the company and the company would consider whether to approve the application or not. Whereas an MSS means both parties are to mutually agree on the cessation of employment.

Conclusion

Prior to embarking on a retrenchment exercise, an employer should first ascertain all the requirements of the law and the principles regarding retrenchment. This is because each organisation is unique and therefore the law and principles may apply differently depending on the organisation.

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1 [1999] 3 MLJ 411
2 [1999] 4 CLJ 155
3 [1999] 8 CLJ 86

Amendments to the main securities statutes in Malaysia

IN THIS ARTICLE, KRYSTLE LUI SHU LIN EXAMINES THE KEY CHANGES TO THE SECURITIES COMMISSION MALAYSIA ACT 1993 AND THE CAPITAL MARKETS AND SERVICES ACT 2007.

The Securities Commission Malaysia's ("SCM") is the regulator of the capital markets in Malaysia and its powers are largely derived from its constituent statute, the Securities Commission Malaysia Act 1993 ("SCMA") and the Capital Markets and Services Act 2007 ("CMSA").

The two main securities statutes in Malaysia, namely the SCMA and CMSA, were amended with effect from 15 September 2015.

An overview of the key changes that took place as follows:

A) SCMA

i. The name of the Securities Commission has been amended to Securities Commission Malaysia. Moving forward, all references to "Securities Commission" and the "Securities Commission Act 1993" in any written law or document shall be construed as references to the "Securities Commission Malaysia" and the "Securities Commission Malaysia Act 1993" respectively.

ii. The powers exercisable by the SCM in relation to the management of systemic risk previously under Part IXA of the CMSA have been moved to the SCMA, introduced as new Part IIIB of the SCMA. The purpose for such move is to provide for the consolidation of the SCM's powers into a single piece of legislation.

Under the new Part IIIB of the SCMA, where the SCM considers it necessary in the interest of monitoring, mitigating or managing systemic risk in the capital market, the SCM is empowered to issue a written directive requiring any person to take such measures as the SCM may consider necessary[1].

"***Systemic risk in the capital market***" means :

"*a situation when one or more of the following events occur or is likely to occur:*

(a) financial distress in a significant market participant[2] *or in a number of market participants;*

(b) an impairment in the orderly functioning of the capital market; or

(c) an erosion of public confidence in the integrity of the capital market."

B) CMSA

i. One amendment to the CMSA seeks to provide a new regulatory framework for recognized market. A "***recognized market***" is defined in the CMSA to mean "*a stock market or a derivatives market operated or maintained by an operator registered under section 34 of the CMSA*".

A "***stock market***" means "a market or other place at which, or a facility by means of which:

(a) offers to sell, purchases or exchanges of securities are regularly made or accepted;

(b) offers or invitations that are intended, or may reasonably be expected, to result, whether directly or indirectly, in the making or acceptance of offers to sell, purchase or exchange securities, are regularly made; or

(c) information concerning the prices at which or the consideration for which, particular persons, or particular classes of persons, propose, or may reasonably be expected to sell, purchase or exchange securities is regularly provided."

A "***derivatives market***" means "*a market or other place at which, or a facility by* means *of which, derivatives are regularly traded*".

The SCM has also expressed that socially beneficial financial innovation should be encouraged[3], and the new "*recognized market*[4]" regulatory framework now allows for the establishment of trading platforms to facilitate capital raising through equity crowdfunding ("ECF") for new companies and small and medium enterprises. Interested applicants will have to comply with the requirements set out in *Guidelines on Regulations of Markets* under section 34 of the CMSA issued by the SCM on 10 February 2015. Under this framework, private companies that are hosted on a registered ECF platform are provided a safe harbour from provisions in the *Companies Act 1965*, which prohibit private companies from offering shares to, or inviting deposits with it by, members of the public.

ii. Section 256 of the CMSA was substituted as follows:

"*[a]ny provision, clause or term contained in any agreement, contract, document or prospectus that is given or provided to an investor in relation to or concerning:*

> *(a) An offer for subscription or purchase of securities*
>
> *(b) An invitation to subscribe for or purchase securities; or*
>
> *(c) The making available of securities,*
>
> *that purports to exclude or restrict the liability of a person for contravention of section 92A, 246, 248 or 249 or for loss or damage under section 357 shall be void.*"

The new section 256 of the CMSA prohibits the exclusion or restriction of liability of a person under the specified provisions of the CMSA to any contract, documents or prospectus which is given to an investor for the purposes of offering for subscription or purchase of securities, as an invitation to subscribe for or purchase securities or to make available securities.

iii. A new Subdivision 7 under Division 2 of Part II of the CMSA has been introduced to provide for the enforceability of netting provisions under a qualified capital market agreement.

For the purposes of Subdivision 7:

- a "***qualified capital market agreement***" means:

> "*(a) an agreement with a netting provision, in respect of one or more securities borrowing and lending transactions; or*
>
> *(b) an agreement specified by the [SCM] to be a qualified capital market agreement for the purposes of [Part II].*"

- *a* "***netting provision***" means "*a contractual provision which provides that when the events specified by the parties under a qualified capital market agreement occur, two or more debts, claims or obligations can be set-off against each other or be converted into a net debt, claim or obligation and includes close-out netting arrangement*".

- "***securities borrowing and lending***" means "*an arrangement where any securities borrowing and lending transaction is entered into, other than:*

> *(a) transactions entered into between the approved clearing house and participants that is done in accordance with the rules of the approved clearing house; and*
>
> *(b) transactions in respect of unlisted debt securities effected under the Real Time Electronic Transfer of Funds and Securities (RENTAS) system.*"

Where the agreement is a qualified capital market agreement as defined in Part II of the CMSA, the rights of the parties under a netting provision shall not be stayed, avoided or otherwise limited by the commencement of any other proceeding which has the effect of assuming control or managing the business, affairs of properties to which a party may be subject[5]

iv. A new section 280A of the CMSA has been introduced to impose a statutory duty on a person who knows or becomes aware that the content in an information memorandum or disclosure document (which does not include prospectus) relating to debentures is false or misleading, to notify the person who is responsible for the distribution of the debentures of the false or misleading matter.

The person who is responsible for the distribution of the debentures is then required to inform the SCM and any person who has been provided with the information memorandum or disclosure document of the matter.

The amendments mark another milestone in the SCM's continuous endeavor to adhere with the International Organization of Securities Commission principles. The changes brought about are in line with the SCM's vision to facilitate innovative fundraising structures, enhance investor protection, clarify responsibilities of issuers and advisers, and expand the scope of its supervisory powers[6].

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1 Section 31ZG of the SCMA.
2 "Market participant" is defined in the SCMA to include "an investor, issuer, intermediary, capital market service provider, exchange holding company, stock exchange, derivatives exchange, central depository and clearing facility."
3 Page xii of Chairman's Message of SCM's 2014 Annual Report.
4 A stock market or a derivatives market operated or maintained by an operator registered under section 34 of the CMSA
5 Section 57B of the CMSA.
6 Available at http://www.sc.com.my/post_archive/amendments-to-securities-laws-come-into-force/.

CORPORATE LAW

Interest Schemes Bill 2015

IN THIS ARTICLE, DEBBIE WOO PUI HAAN LOOKS AT THE INTEREST SCHEMES BILL 2015 WHICH SEEKS TO REGULATE THE REGISTRATION, ADMINISTRATION AND DISSOLUTION OF SCHEMES IN MALAYSIA.

Introduction

The Interest Schemes Bill 2015 (the "Bill") was tabled in the House of Representatives ("Dewan Rakyat") for a first reading on 19 October 2015. The Bill which seeks to regulate the registration, administration and dissolution of schemes in Malaysia is an initiative to introduce a standalone, separate legislation governing the framework of interest schemes.

The provisions dealing with interest schemes which are presently contained in sections 84 to 87 of the Companies Act 1965 are not in the Companies Bill 2015 but are in fact set out in the Bill.

Definitions

"*Scheme*" is defined as:

> "*in relation to an interest, includes any contract, arrangement, undertaking, enterprise, programmes or plans of actions relating to an investment scheme, a time-sharing scheme or a recreational membership scheme.*"

"*Interest*" means:

> "*any interest or right to participate, whether enforceable or not and whether actual, prospective or contingent whether in Malaysia or elsewhere —*
>
> *(a) in any investment scheme;*
>
> *(b) in any time-sharing scheme; or*
>
> *(c) in any recreational membership scheme,*

whether or not the interest or right is evidenced by a formal document or relates to a physical asset, but does not include —

i. any shares in or debenture of a corporation;

ii. a capital market product as defined in section 2 of the Capital Markets and Services Act 2007 [Act 617];

iii. any interest in a partnership agreement unless the agreement —

(a) relates to a contract, arrangement, undertaking, or enterprise promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar contract, arrangement, undertaking or enterprise, whether or not that person is a party to the agreement; or

(b) is an agreement, or is within a class of agreements, prescribed by regulations for the purposes of this paragraph; or

iv. any participatory interest in any product offered by the licensees regulated under the Financial Services Act 2013 [Act 758] and the Islamic Financial Services Act 2013 [Act 759], approved issuers of a designated payment instruments regulated under the Financial Services Act 2013 and the Islamic Financial Services Act 2013 and development financial institutions prescribed under the Development Financial Institutions Act 2002 [Act 618]."

The terms "*investment scheme*", "*time-sharing scheme*" and "*recreational membership scheme*" are further explained in clause 4 of the Bill.

Registration of a scheme

All schemes under the Bill must be registered prior to any issue, offer or advertisement to invite any person to participate in the scheme. Failure to register the scheme is an offence and, upon conviction, the offender may be imprisoned for no more than 10 years or fined up to RM50,000,000 or both.

A scheme may be registered as a premium scheme, a small scheme or a foreign scheme. The differentiating factor between a premium scheme and a small scheme is that the latter must not raise funds in excess of the threshold determined by the Companies Commission of Malaysia ("CCM"). A small scheme may be converted to a premium scheme under clause 16 of the Bill.

The application for the registration of a scheme must include, among others, the following documents:

- for a premium scheme: a trust deed and prospectus;
- for a small scheme: a contractual agreement and product disclosure statement; and
- for a foreign scheme: the approval or registration by the relevant authority at its country of origin permitting it to offer interests under a scheme, trust deed and prospectus.

Trust deed or contractual agreement

The trust deed and contractual agreement must be approved by the CCM (see part III of the Bill). CCM's approval of the trust deed will only be granted if, among other things.

- the approval of the appointment of the trustee has been obtained;
- the approval for the appointment of the trustee has not been revoked;
- the trustee has not ceased office; and
- the trust deed or contractual agreement contains covenants set out in the First Schedule to the Bill.

Prospectus or product disclosure statement

A prospectus and product disclosure statement must not be issued, circulated or distributed by any person unless:

- it has been registered with the CCM;
- it complies with the provisions of the Bill; and
- it has been lodged with the CCM before the date of issue.

Appointment of trustee

Prior to the registration of a scheme, a trustee must be appointed to act for the interest holders in accordance with the provisions of the Bill.

A person or company is eligible to be appointed as a trustee if it is:

- a company registered under the Trust Companies Act 1949 or such other persons approved by the Minister;
- not directly or indirectly associated with persons who have control over the management company; and/or
- not a bankrupt.

Notably, the trust deed, contractual agreement or any contract relating thereto cannot exempt the trustee from, or indemnify the trustee, against any liability for breach of trust where the trustee fails to show the degree of care and diligence required of a trustee.

Dissolution

One of the distinguishing features of the Bill from the Companies Act 1965 is Part V of the Bill which sets out provisions relating to the winding up of schemes.

Generally, there are four ways to wind up a scheme under the Bill, which are as follows:

- at a specified time or upon the occurrence of specified circumstances as set out in the trust deed or the contractual agreement;
- with 75% approval of the interest holders of an investment scheme;
- if the management company considers that the purpose of the scheme has been accomplished or cannot be accomplished subject to the fulfilment of certain considerations under clause 64(2) of the Bill; or
- winding up ordered by the Court.

Conclusion

Arguably, interest schemes have not been popular in Malaysia due to the lack of regulation by the regulatory authorities to protect consumers. However, the market may see increased activity in the interest schemes industry with the enactment of the Bill.

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Budget 2016 Highlights

IN THIS ARTICLE, CHRISTOPHER TAY HANMIN HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2016 BUDGET.

The Budget 2016 tabled by the Prime Minister in his capacity as Finance Minister on 23 October 2015 was entitled *Budget 2016: Prospering the Rakyat*.

Budget 2016 is the first annual budget under the 11th Malaysian Plan[1] which is a five-year plan.

Some of the Budget 2016 highlights are discussed below. Unless otherwise stated, the budgetary proposals below when passed by Parliament will take effect from Year of Assessment ("Y/A") 2016.

Direct taxes — income tax

Individual income tax rate

The current income tax structure for resident individuals is based on progressive rates ranging from 0% to 25% on chargeable income. As for non-resident individuals, a fixed rate of 25% applies.
The Government has proposed changes to the income tax rate for resident individuals as follows:

- chargeable income from RM600,001 to RM1,000,000 to be increased by 1% to the rate of 26%; and

- chargeable income exceeding RM1,000,000 to be increased by 3% to the rate of 28% which is the top rate of income tax.

As for non-resident individuals, the fixed rate of income tax would be raised to 28%.

Review of tax reliefs

The Government has proposed the review of several tax reliefs, among others:

- spouse/former spouse: tax relief to be increased from RM3,000 to RM4,000 for individual taxpayer whose spouse has no income and/or if the said individual taxpayer pays an alimony to his/her former spouse;

- children below 18 years of age: individual tax relief to be increased from RM1,000 to RM2,000 for each child below 18 years of age;

- children studying at tertiary level: individual tax relief to be increased from RM6,000 to RM8,000 for each child above 18 years of age pursuing a full time education at diploma level and above; and

- fees for tertiary education: tax relief to be increased from RM5,000 to RM7,000 for individual taxpayer pursuing any course of study up to tertiary level in selected fields of study, or Master or Doctorate level in any field at any institution or professional body in Malaysia recognised by the Government or approved by the Minister of Finance.

Tax reliefs

The Government has proposed additional tax reliefs, among others:

- parental care: a new individual tax relief of RM1,500 for each parent subject to several conditions. This relief can be shared with other siblings provided the total relief claimed shall not exceed RM1,500 for each parent (up to two parent). This tax relief is effective from Y/A 2016 to Y/A 2020; and

- SOCSO: new individual tax relief of up to RM250 on contribution by employees to the Social Security Organisation ("SOCSO") pursuant to the Employees' Social Security Act 1969.

Goods and Services Tax ("GST")

Drugs/medicines

Currently, only pharmaceutical products listed under the National Essential Medicines are zero-rated. The Government has proposed to widen the list of zero-rated pharmaceutical products to include, among others, all types of controlled drugs in the Poison Groups A, B, C and D under the Poisons Act 1952 and a large number of over-the-counter medicines. This would come into effect on 1 January 2016.

Food products

The Government has proposed that the following food items be zero-rated effective from 1 January 2016:

- soybean-based milk and organic-based milk for infant and children;
- chickpeas, green and white beans;
- lotus root and water chestnut;
- mustard seeds;
- jaggery powder; and
- dried *mee kolok*.

Domestic air passenger transport services in East Malaysia

Currently, domestic air transportation services for passengers within and between Sabah, Sarawak and Labuan are subjected to GST. The Government has proposed to exempt this supply for economy class passengers under the Rural Air Services effective from 1 January 2016.

Approved Trader Scheme ("ATS")

The Government has proposed to extend the ATS to companies undertaking aerospace maintenance, repair and overhaul activities effective from 1 January 2016 to encourage growth in the aerospace industry.

Re-importation of goods temporarily exported

The Government has proposed to grant relief from payment of GST:

- on re-importation of goods temporarily exported for the purpose of promotion, research or exhibition effective from 1 January 2016; and
- on re-importation of eligible equipment (such as equipment used in the upstream oil and gas industry) that have been exported temporarily for the purpose of rental and lease outside Malaysia effective from 1 January 2016. The Government will provide a list of eligible equipment and conditions.

Tax deductions and incentives

- *Real Estate Investment Trusts ("REITs")*
  To further promote the development of REITs and boost the capital market and investment in real estate, the Government has proposed to extend the existing tax incentives given to investors in REITs for a further three years. This is effective from 1 January 2017 to 31 December 2019.

- *Sustainable and Responsible Investments Sukuk ("SRI Sukuk") Issuance*
  To promote the issuance of SRI Sukuk and to establish Malaysia as a regional issuance hub for SRI *Sukuk*, the Govern ment has proposed that tax deduction be given for five years on the issuance cost of SRI *Sukuk*. This is effective from Y/A 2016 to Y/A 2020.

- *Retail bond and retail sukuk*
  To boost the capital market, the Government has proposed that certain double deduction or further deduction for retail bonds and retail sukuk be extended for another three years. This is effective from Y/A 2016 to 2018.

- *Management of Shariah-compliant funds*
  Currently, companies that provide Shariah-compliant fund management services and certified by the Securities Commission Malaysia are exempted from income tax on the following:

  - statutory income derived from business of providing fund management services to foreign investors in Malaysia;
  - statutory income derived from business of providing fund management services to local investors in Malaysia; and
  - statutory income derived from business of providing fund management services to business trusts or REITs in Malaysia.

  To promote business management activities of Shariah-compliant funds, the Government has proposed the extension of the current tax exemption for a further four years. This is effective from Y/A 2017 to Y/A 2020.

- *Independent Conformity Assessment Bodies ("ICAB")*
  To promote the development of independent conformity assessment services in Malaysia, the Government has proposed to grant a new ICAB, either an income tax exemption of 100% on statutory income derived from qualifying activities for five years; or an investment tax allowance of 60% on qualifying capital expenditure incurred for a period of five years which is allowed to be set off against 100% of the statutory income. As for an existing ICAB, the Government has proposed to grant an investment tax allowance of 60% on qualifying capital expenditure incurred for a period of five years which is allowed to be set off against 100% of statutory income.

  These incentives are given to the ICABs which have obtained specified accreditation in the following sectors:

  - machinery and equipment;
  - electrical and electronics;
  - chemicals;
  - aerospace;
  - medical devices; and
  - fresh and processed food.

  The qualifying activities are testing laboratories, calibration laboratories, certifications, inspections or good laboratory practice.

  The proposal is effective for applications received by the Malaysian Investment Development Authority ("MIDA") from 1 January 2016 to 31 December 2018.

- *Automatic double deduction for research & development ("R&D") project*
  To promote R&D activities among small and medium enterprises ("SMEs"), the Government has proposed to provide an automatic double deduction for R&D project expenditures of up to RM50,000 for each Y/A. This is effective from Y/A 2016 to Y/A 2018 and these SMEs are required to submit a R&D project application to the Inland Revenue Board of Malaysia.

- *Export incentive for SMEs*
  To encourage SMEs to expand their export market to international markets, the Government has proposed that tax incentives on up to 70% of statutory income be given with the revised valued added criteria as follows:

  - an income tax exemption of 10% of the value of the increased exports to manufacturers provided that the goods exported attain at least 20% value added; and
  - an income tax exemption of 15% of the value of the increased exports to manufacturers provided that the goods exported attain at least 40% value added.

  This is effective from Y/A 2016 to Y/A 2018.

- *Special reinvestment allowance*
  To encourage reinvestments by companies which have exhausted their eligibility to qualify for reinvestment allowance, the Government has proposed a special reinvestment allowance be made available for reinvestments made in a period of three Y/As. This is effective for qualifying capital expenditure incurred from Y/A 2016 to Y/A 2018.

Finance Bill 2015 ("Finance Bill")

The Finance Bill was tabled before the Dewan Rakyat together with the proposed Budget 2016.
A host of amendments were proposed to various tax Acts, among others:

- to disallow the deduction of any amount paid in respect of GST in ascertaining adjusted income;
- to disregard any amount paid or borne by the disposer in respect of GST in computing the acquisition or disposal price of an asset for the purposes of the real property gains tax;
- to disallow any amount paid in respect of GST to be included in the capital expenditure incurred;

where a taxpayer is liable to be registered under the Goods and Services Tax Act 2014 ("GST Act") and has failed to do so or where a registered person would have been entitled to claim input tax relief under the GST Act (as the case may be).

Some of the proposals in this year's Finance Bill in relation to the Income Tax Act 1967 ("ITA") and the GST Act are:

Income Tax Act 1967

- *Proposed amendment to Section 33*
  This is an administrative amendment where, in relation to the deductibility of interest, this proposed new subsection 33(5) provides that any claim for deduction of any sum payable in a particular Y/A which is due to be paid in any following Y/A is to be made no later than 12 months from the end of that following Y/A. The taxpayer is required to notify the Director General of Inland Revenue ("Director General") in writing for this and upon receipt of the notice, the Director General may reduce the assessment that has been made in respect of such sum.

- *Proposed amendment to Section 112*
  This proposed new subsection 112(1A) provides that a failure to furnish returns for two Y/A or more without reasonable excuse is guilty of an offence and, on conviction, a fine between RM1,000 to RM20,000 or imprisonment for a maximum six months or both and a special penalty of three times the amount of tax charged on chargeable income as determined by the Director General shall be imposed on the taxpayer.

- *Proposed amendments to Section 120(1)*
  This proposed new subsection 120(1)(h) provides that a failure to furnish the correct particulars in regard to a return as required by the Director General shall be an offence.

- *Proposed amendment to Schedule 3*
  This proposed new paragraph 16B limits industrial building allowance on qualifying expenditure in regard to, among others, licensed private hospital, maternity home and nursing home, building used for hotel and building used for approved service project, whereby no allowance can be claimed by an owner of an industrial building if the owner seeks to let out the said building or part. This would also exclude owners who are in the business of letting out industrial building from claiming the said allowance.

Goods and Services Tax Act 2014

- *Proposed amendment to Section 41*
  This proposed new subsection 41(8) imposes a penalty on a taxable person, based on the number of days in which that taxable person fails to make payment for the tax due and payable. For the first 30 days in which the GST remains unpaid, the penalty is fixed at 5% of that amount and an additional penalty of 10% and 25% would be imposed for the second and third 30-day periods respectively.

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[1] The *Eleventh Malaysian Plan (2016–2020)* a comprehensive blueprint prepared and published by the Economic Planning Unit of the Prime Minister's Department. A copy of which can be found here http://rmk11.epu.gov.my/book/engElevent-Malaysia-Plan/RMKe-11%20Book.pdf.

The Partners of

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are pleased to announce the admission of

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Tax & Revenue Practice Group

as Partner with effect from **1 January 2016**

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