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FRONT PAGE FOCUS

COMPETITION LAW

Abuse of Dominant Position Under the Competition Act 2010

IN THIS ARTICLE, CYNTHIA LIAN ANALYSES THE COMPETITION ACT 2010 IN RELATION TO THE ABUSE OF A DOMINANT POSITION.

Dominant Position

The Competition Act 2010 ("CA") prohibits the abuse of the position of dominance by an enterprise, but it is important to note that it is not an offence for an enterprise to have a dominant position.

Section 2 of the CA defines "dominant position" to mean "a situation in which one or more enterprises possess such significant power in a market to adjust prices or outputs or trading terms, without effective constraint from competitors or potential competitors".

The meaning of dominant position has been further explained by the European Court of Justice ("ECJ") in the case of **United Brands Co. v Commission case**[1] as "*a position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers.*"

Market Definition

The Chapter 2 prohibition only applies where an enterprise is in a "dominant position". It is crucial to determine the relevant market that an enterprise is in for the purposes of establishing dominance. The importance of defining the relevant "market" in establishing the market position of an enterprise has been recognised by courts in various jurisdictions. In this regard, the ECJ in the case of **Continental Can Co Inc.**[2] held that "a market must be defined before a dominant position can be found".

For purposes of the CA, "market" has been defined in section 2 of the CA as "a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are suitable for, or otherwise competitive with, the first mentioned goods or services."

Whilst market share is an important factor in accessing market power, it is not conclusive as to whether an enterprise occupies, or does not occupy a dominant position in that market.[3] Various other factors are to be taken into account in determining market power, such as barriers to expansion of and entry into the market by potential competitors and power of the buyers where the market position of buyers may constrain the behaviour of the suppliers.

What Constitutes Abusive Conducts Under the CA

Once the position of dominance has been established, it is necessary to consider what constitutes an abuse of that dominant position under the CA. Below are some examples of conduct which may be caught under the CA as being abusive:

- Exclusive agreement

Exclusive agreement is a form of "vertical agreement"[4] where a customer is required to purchase a particular brand of goods or service exclusively from a dominant enterprise.

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Pursuant to these agreements, customers are prevented from purchasing competing brands of goods from competitors. An exclusive agreement is said to be abusive as customers are prevented from purchasing goods from competitors of the dominant enterprise which may then lead to horizontal foreclosure of the relevant market.

Various factors taken into account by courts in determining whether an exclusive agreement is abusive, include the extent and duration of the agreement. A requirement by a dominant enterprise for the customer to purchase all its requirements from that dominant enterprise would be viewed less favourably compared to requirements that the customer purchase a certain percentage of its requirements from the dominant enterprise. The duration of the exclusive obligation would be also taken into account as the longer the exclusivity, the more likely that the finding of abuse would be upheld.

- Tying/Bundling

Tying/bundling is a practice whereby a supplier of a product ("tying product") requires its customers to purchase another distinct product ("tied product") which could have been purchased individually. The courts had in some instances found that such practices may lead to horizontal foreclosure of the market when a dominant enterprise leveraged its market position in respect of the market for tying product to increase its sales for the tied product.

An example of tying is the case of **Microsoft Corp v Commission**[5] where Microsoft was found to have abused its dominant position by requiring its customers to purchase its product known as Media Player together with another distinct product, which was the personal computer operating system.

- Pricing practices

a) Unfair or discriminatory pricing and selling conditions – Supply of goods of the same description at different pricing/conditions where the differences could not be objectively justified or sale of different units of goods at prices not directly corresponding to differences in the cost of supplying them.

b) Grant of rebates and discounts – This practice is regarded as one of the most controversial areas of competition law. Some instances where these types of practices have been held to be abusive are where a dominant enterprise grants rebates to customers in return for a full or partial exclusive dealing arrangement and the grant of rebate is dependent on whether its customers have reached the estimated target set by the dominant enterprise. The courts in other jurisdictions have held that some of these rebates/discounts have loyalty inducing effect which would lead to horizontal foreclosure of the relevant market.

c) Predatory Pricing – Selling at a loss by a dominant enterprise may amount to an offence under the CA where it could be demonstrated that a dominant undertaking reduced its prices to a loss-making level to eliminate competition and thereafter raised its prices again when competitors have been eliminated.

d) Selective price cutting – Price cutting to a level not below cost but only applied to selected customers, for instance the practice of offering certain customers favourable conditions or giving away products free of charge to prevent its customers from purchasing goods from its competitors may be regarded as abusive in some instances.

e) Resale price maintenance – The practice of fixing prices, such as imposing on customers a minimum resale price may amount to abusive conduct.

Defences and Justification

The conduct of a dominant enterprise will not be regarded as abusive where its conduct could be objectively justified. This is because a dominant company has the right to compete on the merits for more business.

Conclusion

The CA was passed by Parliament in May 2010, gazetted in June 2010 and will be enforced on 1January 2012. In light of the above and the significant impact that the CA will have on business practices, it is crucial that Malaysian enterprises review and where appropriate, change their current business practices to ensure compliance with the provisions of the CA.

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[1] 27/76 [1978] 1 CMLR 429
[2] (Case 6/72 (1973) ECR 215)
[3] Section 10(4) of CA
[4] 'Vertical agreement' is defined in Section 2 of CA as 'an agreement between enterprises each of which operates at a different level in the production or distribution chain
[5] [2007] ECR II-000, [2007] CMLR 846

"As Is Where Is" in the Context of a Sale and Purchase Agreement

IN THIS ARTICLE, CHEAH WAI LEONG EXAMINES THE HIGH COURT DECISION OF **HADLAND ARTHUR JOHN & ANOR V. AUDRA ELAINE GOMEZI**[1] AND THE HIGH COURT'S INTEPRETATION OF "AS IS WHERE IS" ("**PHRASE**") IN THE CONTEXT OF A SALE AND PURCHASE AGREEMENT ("**SPA**") AND THE EFFECT IT HAS ON THE PARTIES TO THE SPA.

What Does "As Is Where Is" Mean?

The Phrase is usually found not only in SPAs but also in tenancy agreements. In particular, the Phrase is prevalent in SPAs in respect of properties sold at auctions.

Where the Phrase is present in an SPA, the property or land is disposed of in its present state and condition regardless of whether the property or land is sold in a deplorable state or has a badly damaged roof.

Put simply, the purchaser takes the property or land as the purchaser sees it. Any repair which may need to be carried out on the property subsequent to the entry of a sale and purchase transaction of this nature will be at the sole cost and expense of the purchaser. The purchaser is not entitled to claim any repair cost from the vendor.

Facts

In **Hadland**, the purchasers agreed to purchase a completed property from the vendor. Clause 11.2(b) of the SPA states that "the Purchaser is purchasing the Property on an "as is where is" basis". Pending the completion of the SPA, the vendor agreed to let the property to the purchasers. A few months after the purchasers moved into the property, part of the plaster ceiling of the property collapsed. One of the issues was whether Clause 11.2(b) of the SPA prevented the purchasers from rescinding the SPA on the ground that the property was unfit for habitation.

Decision

Harmindar Singh Dhaliwal JC., the presiding judge in **Hadland**, explained that the general principle in respect of a completed property is that such a Clause excludes any warranty or condition as to the state and condition of the property and also in consequence its fitness for any particular purpose. This includes the fitness of the property for human habitation or readiness for immediate occupation unless it is the very nature and effect of the sale and purchase transaction or where there exists an express warranty or condition to that effect.[2] The Clause is seen to propound the theory of *caveat emptor* or "buyer beware".

Relying on Clause 11.2(b) of the SPA the court held that there was no express warranty or condition that the property was fit for occupation. The court gave effect to the intention of the parties in the SPA and after considering other issues at hand, dismissed the purchasers' action. The courts are generally unwilling to read any implied warranty or condition into an agreement, especially if the sale and purchase was transacted at arms' length.

Vendors owe no duty to purchasers to disclose any physical defects which are visible to the eye, conspicuous or otherwise. Purchasers ought or are deemed to have conducted an inspection on the properties in order to satisfy themselves on such matters prior to the entry of a sale and purchase transaction of this nature.[3] Nevertheless, where the vendors deliberately or fraudulently withhold certain information from the purchasers' knowledge, the purchasers may then have a cause of action against the vendors.

Conclusion

Purchasers are not accorded much protection if the Phrase is present in their SPA. Purchasers are advised to conduct inspections and due diligence on any property intended to be purchased before signing an SPA that contains the Phrase so as not to be caught in a similar situation as in **Hadland**.

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[1] Hadland Arthur John & Anor v. Audra Elaine Gomez [2010] 2 CLJ 78.

[2] Chua Moh Huat, Dennis v. Harvester Baptist Church Ltd. [1992] 4 CLJ 258 (Rep); Miller v. Cannon Hill Estates [1931] 2 KB 113 at p. 120, Swift J.

[3] Storey I.R., Conveyancing, (1983), Butterworth, p. 69.

DISPUTE RESOLUTION

"Kicking and Screaming" – Enhanced Delivery in the Court Process

IN THIS ARTICLE, ROBERT LAZAR LOOKS AT THE INTRODUCED REFORMS IN THE MALAYSIAN JUSTICE SYSTEM TO BRING ABOUT A MORE EFFICIENT AND EXPEDITIOUS MANNER OF DISPUTE RESOLUTION.

Most litigation lawyers will readily testify that 2010 was indeed a hectic year not just for themselves but for their clients, the litigants. It will be a foretaste of, and may come to represent on a permanent basis, a more efficient and expeditious manner of dispute resolution.

It has been said that a sea change is taking place within Malaysia's justice system and at the heart of it lies the initiatives introduced which are set on removing inefficiencies in courts, even if it means "dragging the judiciary and the Bar kicking and screaming." This was what was said by our Chief Justice in a speech in November 2009 at the appointment of new judges, quoting a past Chief Justice of Singapore, who had embarked on similar changes with the Singapore judiciary in the late 1990s.

These measures crystallized in September 2009 with the setting up in Kuala Lumpur of the New Commercial Court ("NCC"), the brainchild of a new spirit in the judicial administration in Malaysia brought about by the appointment of Tun Zaki Azmi as the Chief Justice of the Federal Court of Malaysia in October 2008. Soon after his Lordship's elevation to the nation's highest judicial office, a series of unprecedented measures were taken to virtually overhaul the Malaysian justice system which, up to then, had seen disputes languishing amid a backlog that seemed to be getting worse by the year despite the best efforts undertaken previously.

There was an increase in the appointment of judges. What was most encouraging was the appointment of judicial commissioners from among active, experienced and knowledgeable practitioners from the Bar. To some extent some measure of confidence was restored to a judiciary whose image and reputation had taken a battering for about 20 years. Measures were also introduced to make the registries more responsive and efficient. Writs and summonses were being extracted and returned at a much quicker pace. Orders could be extracted within a matter of days unlike in the past. In September 2009 the NCC was set up to hear all commercial cases filed in the Kuala Lumpur High Court as from that date. The processes for hearing all cases were tightened with frequent case managements, the fixing of trials was done on a more ordered basis and adjournments were rarely granted. Lawyers soon realised that once a hearing date was fixed, they were expected to carry on until conclusion of the matter. Judges' performance was also put under closer scrutiny, hence the reference to 'kicking and screaming'.

The objective of the NCC is to dispose of cases within a time frame of nine months. Statistics issued show that in the first year, of 389 cases filed in the NCC only four had not been disposed of within a year. With a greater increase of the use of written witness statements and court recorded transcripts, trials are heard more quickly and decisions being rendered sooner. In September 2010, the New Civil Court ("NCvC") was introduced to deal with cases filed in the civil division of the Kuala Lumpur High Court, and the NCvC has a target similar to the NCC.

What this means to litigants, who are really the end consumer in the justice system and the people who matter most, is that they will have a result within nine months in the High Court, and a further three months if there is an appeal. Litigants would need to be better prepared, to ensure that their documents are in good order and to devote their energies in a more organised manner as they no longer have the luxury of time for their day in court. Overall, on balance, the NCC and NCvC have been well received by lawyers and even more by their clients, once they know of the enormous benefits and advantages of these reforms in the Malaysian justice system.

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EMPLOYMENT LAW

An Employee's Fiduciary Duty in the Context of the Whistleblower's Protection Act 2010

IN THIS ARTICLE, REENA ENBASEGARAM CONSIDERS THE EFFECT OF THE WHISTLEBLOWER PROTECTION ACT 2010 ON AN EMPLOYEE'S FIDUCIARY OBLIGATION TOWARDS HIS EMPLOYER.

Introduction

Most companies today would require their employees to sign a confidentiality agreement where the terms would often bind the employees beyond the employment period. Even in the absence of such an agreement, there exists an implicit and paramount duty on the part of an employee to safeguard his employer's interest at all material times which would extend to maintaining confidentiality.

When the Whistleblower Protection Act 2010 ("the Act"), a key legislative initiative under the Government Transformation Programme's National Key Results Area, was passed by Parliament in the middle of 2010 and came into force with effect from 15 December 2010, it was hoped that the Act which was formulated to promote the reporting of proper conduct[1] as defined in the Act; would encourage, amongst others, employees to report or reveal incidences of improper conduct on the part of the employers.

Under the Act, a person may, provided that such disclosure is not specifically prohibited by any written law, make a disclosure of improper conduct to any enforcement agency based on his reasonable belief that any person has engaged, is engaging or is preparing to engage in improper conduct[2].

Such disclosure would invariably include the revelation of otherwise confidential company information and consequently amount to a breach of the employee's contractual obligation.

The Act, in acknowledging the aforesaid obligation, expressly provides that any provision in any contract of employment shall be void in so far as it purports to preclude the making of a disclosure of improper conduct[3].

However, it has to be noted that the Act cannot be used as a tool by a disgruntled employee to raise inflammatory and defamatory allegations against his employer as the Act provides several safeguards to prevent such abuse.

The Current Situation

The Industrial Court in a recent decision[4], upheld the dismissal of an employee who made various inflammatory allegations against his employer in a letter which was copied to various external sources. The dismissal was made on the basis that such dissemination amounted to an act of sabotage against the company's interest and further, constituted an act of insubordination contrary to the directions expressed in a general circular and a subsequent direct order. The employee's defence was that the contents of his letter which criticized the news editor and his running of the newsroom which purportedly had a negative effect on the image of the country did not fall within the scope of information consisting of the company's finances, positioning, marketing, strategies and trade secret. The external sources copied on the employee's letter included the Prime Minister, the Minister for Information and Minister of Human Resources. The Industrial Court deemed that the employee had breached his express undertaking to maintain confidentiality of company information.

Currently, another employee in the media industry is also facing action for openly criticizing his employer's management policies. It has been widely reported that the National Union of Journalists (NUJ) president, Hata Wahari, is facing disciplinary action by his employer, Utusan Melayu (M) Bhd, for purportedly insulting the company's management and tarnishing its image. Hata has been reported as raising a defence that his criticisms were levelled at the editorial policies and not at the company[5].

Several groups have also jumped to Hata's defence contending that he was fulfilling his duty as a union official and should not be penalized by his employer as the latter was entitled to make a public rebuttal in the event it disagreed with his views[6].

Would the Act provide protection in the above circumstances?

The Protection Accorded by the Act

On the surface, it would appear that the Act would provide protection to an employee from retaliation by the employer. Section 10 of the Act[7,8] states that no person shall take detrimental action against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct.

Detrimental action (protection against which is extended to related and associated persons), has been defined[9] to include threatening to or actual interference with the lawful employment or livelihood of any person, including discrimination, discharge, demotion, suspension, disadvantage, termination or adverse treatment in relation to a person's employment, career, profession, trade or business or the taking of disciplinary action. The Act also provides for a wide range of remedial action in the event detrimental action is taken against a whistleblower[10].

However, a closer reading of the Act reveals its limitations. It has to be noted that the protection is only limited to informants who provide information to a government agency[11,12]. Further, improper conduct is limited to any conduct which if proved, constitutes a disciplinary or criminal offence[13]. Disciplinary action includes a breach of discipline as provided by a code of conduct, a code of ethics or circulars or a contract of employment[14].

What then happens when an employee chooses to expose practices which do not fall within the Act's definition of improper conduct, for example in the above Hata Wahari/Utusan Melayu case? It has been repeatedly held by the courts that the obligation as an employee is paramount and shall supersede any duty as a union official.[15]

Consequences from an Employment Aspect

An analogy would be a situation where an employee is given an instruction which he deems to be unlawful or unreasonable. Can he disobey?

Industrial jurisprudence has formulated the principle that an employee bears the risk in failing to comply with what he deems to be an unlawful or unreasonable order but which the law holds valid. Whether an order by the employer is lawful or reasonable or was unreasonable, illegal or dangerous, among others, would depend very much on the terms and conditions of the contract and the character of the employment and is to be determined with reference to the circumstances of each individual case. In the event it is found that the order is indeed illegal, then any dismissal of the employee for non-compliance of the order in question would be deemed to be without just cause or excuse. However, if it is found that the order was in fact lawful, then the dismissal for willful insubordination would be accordingly upheld. The Federal Court[16] has held that the proper course of action would be for the employee to comply with the order and challenge it in a separate proceeding. This was because an employee could not simply disobey any order he perceives not to be legal, as it would result in it being impossible for the management to maintain discipline and industrial order.

Similarly, an employee, who is uncomfortable with the management's policies, is not in a position to openly criticize the same in the event he wishes to remain in employment. The employee is at all times subject to his fiduciary duty to the employer and is subservient to the overriding principle that he must act in the best interests of the employer. In the event he acts contrary to the foregoing obligation, then he bears the risk of being subject to disciplinary action including dismissal. An employer cannot retain the services of an employee when it no longer reposes the necessary trust and confidence in that employee.

However, the provisions of the Act notwithstanding, the courts would not hesitate to hold a dismissal unjust in the event it can be shown that the dismissal was purely in retaliation for whistle blowing activities.

In a 2008 decision[17], the Industrial Court in finding that the charges against the employee could not be established, further held that it could not rule out the possibility that the charges were actuated by malice on the part of the employee's immediate superior, holding, *"as evidence had been led earlier on, the Claimant had played the role of a whistleblower and COW 2 did not take too kindly to it because it involved him. The handwritten note taken from the Bible which COW 2 claimed to have misplaced on the table of the Claimant reflects the venom."*

Consequences under the Act

With the passing of the Act, it is arguable that in the event the employer is guilty of engaging in corruption, the Act would accord protection to an employee who exposes the same. However, in the event the allegation cannot be later substantiated, the employee then runs the risk of disciplinary action taken against him.

The Act provides that protection to the whistleblower can be revoked if the disclosure is, amongst others, deemed frivolous or vexatious or is made solely or substantially with the motive of avoiding dismissal or other disciplinary action[18].

A would-be whistleblower should also note that in the event he is found to have willfully made a material statement knowing/believing that it was false or not believing that it was true, he is deemed to have committed an offence wherein the statement is not only limited to the disclosure itself, but also extends to a complaint of detrimental action[19]. An offence is also deemed committed when he amongst others, falsifies or alters a document[20], wherein the penalty for committing an offence under the Act is a fine not exceeding RM20,000 or imprisonment for a term not exceeding five years or both[21].

Conclusion

The protections and remedies under the Act while far-reaching, are only applicable in limited circumstances. An employee who seeks to rely on the provisions of the Act to accord him protection when exposing alleged misdeeds on the part of his employer should tread carefully as the following case illustrates.

In this recent case[22], the sacked employee had deemed that she had the duty to ascertain whether the Chief Operating Officer ("COO") was abusing company benefits and acting contrary to company policy and she did so by way of accessing his confidential emails.

She then sent an anonymous package to the Group Managing Director consisting of a cover letter and the said confidential emails of the COO. The Court in upholding the dismissal, held that the employee's conduct had seriously compromised the security and confidentiality of information and documents of the company. The employee had been with the company for almost 25 years.

The Industrial Court further found that, *"she had also, by assuming that she had the right to do whatever she liked in the best interests of the respondent, conferred upon herself authority that she never possessed and she had undermined the discipline that must subsist in any organization. On the sending of the anonymous package to the Group Managing Director, respondent submitted that the claimant's involvement was a clear act of disloyalty and the contents of the covering letter as contained in COB p. 13 were extremely insolent and insubordinate of the COO; it also defamed the COO and the Customer Service Manager. Such act of insubordination attracts dismissal. Respondent therefore submitted that claimant had committed an extremely serious misconduct which warranted nothing less than the punishment of dismissal"*.

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[1] Malaysia Today 6 December 2010
[2] Section 6 of the Act
[3] Section 6(5) of the Act
[4] Dzulkarnain Mohd Taib v Natseven TV Sdn Bhd [2010] 2 LNS 130
[5] Star Online 15 January 2011
[6] Joint media statement dated 5 January 2011 issued by Centre for Independent Journalism (CIJ)
Charter 2000-Aliran, Writers' Alliance for Media Independence (WAMI), 1 Muted Malaysia
[7] Section 10 read with Section 7 of the Act
[8] Section 10 of the Act provides,
"(1) No person shall take detrimental action against a whistleblower or any person related to or associated with the whistleblower in reprisal for a disclosure of improper conduct.
(2) A whistleblower may make a complaint to any enforcement agency of any detrimental action committed by any person against the whistleblower or any person related to or associated with the whistleblower.
(3) A person is deemed to take detrimental action against a whistleblower or any person related to or associated with the whistleblower if:-
(a) the person takes or threatens to take the detrimental action because:-
(i) a whistleblower has made a disclosure of improper conduct; or
(ii) the person believes that a whistleblower has made or intends to make a disclosure of improper conduct; or
(b) the person incites or permits another person to take or threaten to take the detrimental action for any reason under subparagraph (a)(i) or (ii).
(4) Nothing in this section shall affect the whistleblower protection to an employee in the private body either at law or under a collective agreement or employment contract.
(5) No person acting or purporting to act on behalf of any public body or private body shall:-
(a) terminate a contract;
(b) withhold a payment that is due and payable under a contract; or
(c) refuse to enter into a subsequent contract, solely for the reason that a party to the contract or an employee or employer of a party to the contract has made a disclosure of improper conduct to any enforcement agency relating to the public body or private body.
(6) Any person who contravenes subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding one hundred thousand ringgit or to imprisonment for a term not exceeding fifteen years or to both.
(7) In any proceedings, it lies on the defendant to prove that the detrimental action shown to be taken against a whistleblower or any person related to or associated with the whistleblower is not in reprisal for a disclosure of improper conduct".
[9] Section 2 of the Act
[10] Sections 15 – 19 of the Act
[11] Section 6 read with Section 2 of the Act
[12] enforcement agency is defined as:-
(a) any ministry, department, agency or other body set up by the Federal Government, State Government or local government including a unit, section, division, department or agency of such ministry, department, agency or body, conferred with investigation and enforcement functions by any written law or having investigation and enforcement powers;
(b) a body established by a Federal law or State law which is conferred with investigation and enforcement functions by that Federal law or State law or any other written law; or
(c) a unit, section, division, department or agency of a body established by a Federal law or State law having investigation and enforcement functions;
[13] Scction 2 of the Act
[14] Section 2 of the Act
[15] Yodoshi Malleable (M) Sdn Bhd v Rajamohan S.P. Palanivel [1997] 2 ILR 449, Kesatuan Pekerja-Pekerja Perusahaan Alat-Alat Pengangkutan & Sekutu v Kilang Pembinaan Kereta-Kereta Sdn Bhd Johore Bharu [1980] 1 ILR 139, Hualon Corporation (M) Sdn Bhd v Rohani Ali [2006] 2 LNS 1640, Kandu Anak Sugang & Anor v Trienekens (Sarawak) Sdn Bhd [2010] 4 ILR 558
[16] Ngeow Voon Yean v Sungei Wang Plaza Sdn Bhd/Landmarks Holding Bhd [2006] 3 CLJ 837, Pan Global Textiles Bhd Pulau Pinang v Ang Beng Teik [2002] 1 CLJ 181
[17] Annie Lai v Tractors Malaysia (1982) Sdn Bhd [2008] 2 LNS 1555
[18] Section 11 of the Act. Subsection (1) provides,
(1) The enforcement agency shall revoke the whistleblower protection conferred under section 7 if it is of the opinion, based on its investigation or in the course of its investigation that:-
(a) the whistleblower himself has participated in the improper conduct disclosed;
(b) the whistleblower wilfully made in his disclosure of improper conduct a material statement which he knew or believed to be false or did not believe to be true;
(c) the disclosure of improper conduct is frivolous or vexatious;
(d) the disclosure of improper conduct principally involves questioning the merits of government policy, including policy of a public body;
(e) the disclosure of improper conduct is made solely or substantially with the motive of avoiding dismissal or other disciplinary action; or
(f) the whistleblower, in the course of making the disclosure or providing further information, commits an offence under this Act.

[19] Section 21 of the Act
[20] Section 23 of the Act
[21] Section 25 of the Act
[22] Dynacraft Industries Sdn Bhd v Lee Kooi Khoon [2008] 3 ILR 265

CASE NOTE

Fair Dealing for Non-Profit Research

IN THIS ARTICLE, TENG WEI REN DISCUSSES THE CASE OF MEDIACORP NEWS PTE LTD & ORS V MEDIABANC (JB) SDN BHD & ORS[1] A COPYRIGHT INFRINGEMENT CASE WHERE THE DEFENCE OF FAIR DEALING FOR NON-PROFIT RESEARCH WAS RAISED.

Introduction

In certain and limited circumstances, one may be lawfully permitted to use a copyrighted work without having to seek the consent of or a licence from the owner if such use may on the facts and circumstances be said to be regarded as fair use or fair dealing in the copyrighted work.

By 13(2)(a) of the Copyright Act 1987 ("the Act"), the exclusive right of control accorded to the copyright owner does not extend to acts *"by way of fair dealing for purposes of non-profit research, public study, criticism, review or the reporting of current events, subject to the condition that if such use is public, it is accompanied by an acknowledgement of the title of the work and its authorship, except where the work is in connection with the doing of any such acts for the purposes of non-profit research, private study and the reporting of current events by means of a sound recording, film or broadcast*".

Merely providing an acknowledgement to the authorship to and title of a work without there being any lawful authorization express or implied is not a defense to a copyright infringement claim.

The nature of the 'dealing' of the copyrighted work on the facts and circumstances is determinative of whether such "dealing" qualifies under the exemptions of Section 13(2)(a). If the dealing is for purposes of a) non-profit research, b) public study, c) criticism, d) review or e) reporting of current events, it may be exempted. However, the Act neither defines the term 'fair dealing' nor the factors to be considered in determining whether a 'dealing' is a 'fair dealing'. That must remain a matter of facts, circumstances and evidence. The application of Section 13(2)(a) of the Act was finally considered in **MediaCorp News Pte Ltd & Ors v. MediaBanc (JB) Sdn Bhd & Ors** .

Facts of the Case

The Plaintiffs were a group of leading Singaporean media and broadcast companies known collectively as the MediaCorp Group. They owned and operated various television channels and radio stations, delivering news and information via these mediums.

The Defendants were collectively a group of companies in Malaysia whose primary activity and operations concerned media monitoring. The Defendants monitored and compiled selected television news programmes, commercials, and radio news programmes from various media on a continuous basis. From the Defendants' compiled data bank, they were able to supply their customers with particular clippings according to their customers' requests.
The Plaintiffs alleged that the Defendants' recording, compiling and archiving of the Plaintiffs' broadcasts and provision of clippings of news segments from the Plaintiffs' broadcasts to the Defendants' customers constituted copyright infringement.

The Defence of Fair Use

The Court found that copyright subsists in the programmes of the Plaintiffs and the Defendants had infringed the said copyright by reproducing or substantially reproducing the said programmes.

The Defendants raised, among others, the defense of fair dealing and submitted that the Defendants' business was media monitoring as opposed to a broadcasting business and their recording and compilation of the Plaintiffs' copyrighted works amounted to fair dealing, particularly for the purposes of non-profit research, within the intent of the Act for the following reasons:

- their customers were provided with excerpts of the audio and video recordings in sufficient length to convey the information in the context in which their customers' companies or brands were mentioned
- the source of the excerpt was acknowledged by means of adding an extract of the beginning of the programme and another excerpt from the end of the programme
- the watermark and other identifiers of the television station's broadcasts were not obliterated or distorted
- their customers were provided with digitally compressed excerpts to ensure that the quality of the excerpt is reduced and rendered unsuitable for rebroadcasting and recording
- the Defendants' charged their customers only in respect of the costs of recording and delivery but not for the excerpt itself
- the Defendants did not sell copies of entire news programmes but only clips and extracts related to a particular item of interest to their customers

The High Court's Decision

The High Court noted fair dealing was to be considered as prescribed under the Act and cannot be considered based on a broad and unspecified category of acts of fair dealing. It was held

that the determination on whether an act constituted 'fair dealing', included the following factors:

- the purpose of the 'dealing' and whether it falls within the specified exceptions in section 13(2)(a)
- the nature of the work
- whether it can be said that a substantial part of the work had been copied or utilized when compared with the original work
- on an objective assessment what is the impression created by the reproduced/ copies ?
- the effect of such 'dealing' upon the potential market for, or value of the work
- what is the motive of the party in dealing with the work

The question to be answered was whether the Defendants' business activity is one of 'non-profit research'. The Court held that the qualification for "non-profit research" must be in relation to the research itself and not the person or entity conducting it. The words "non-profit" themselves, ought to be construed according to their normal and ordinary dictionary meaning in that the research undertaken should not be for profit.

The Defendants contended that any research done by a company's own employees in monitoring, recording and reviewing media qualified as non-profit research. It was argued that the Defendants were merely an agent hired to do the same work and hence the statutory exemption of fair dealing should apply to them as well.

The Court found it necessary to take into account the totality of the Defendants' operations and found it artificial to segregate the parts of their business that involved the recording and clipping of the Plaintiffs' copyrighted works, from the rest of the Defendants' business and found that the segments reproduced directly from the Plaintiffs' broadcasts comprised an integral and inextricable part of the Defendants' business operations. The Defendants derived a profit from its operations of which the Plaintiffs' broadcasts comprised an integral part. Even if the use of the Plaintiffs' copyright could be described as "research"; nevertheless, the Defendants were engaged in a commercial enterprise. Even if a wide or liberal interpretation is accorded to the term 'non-profit research' it must still fall squarely within the purview of those exceptions. The Court found that the Defendants' operations did not fall within any of the provisions prescribed under section 13(2)(a) of the Act.

Fair Dealing Under the Copyright (Amendment) Bill 2010

The limited scope for application of the fair dealing exemption under the Act is expected to be drastically expended as proposed under the Copyright (Amendment) Bill 2010. The Bill has yet, at the date of this article, to be passed by the Legislature.

The relevant proposed amendments are as follows:

- the research is no longer required to be "non-profit"
- the confines of the nature of the dealing which qualify for fair dealing exemption is removed, and would be applicable to acts "*including* for purposes of research, private study, criticism, review or the reporting of news or current events".
- no acknowledgement is required in connection with the reporting of news or current events by means of a sound recording, film or broadcast
- the consideration for determining whether a dealing is a fair dealing is now statutorily defined as "*including"* the following as the "*factors to be considered*":

  a) the purpose and character of the "dealing", including whether such a "dealing" is of a commercial nature or is for non-profit educational purposes;
  b) the nature of the copyright work;
  c) the amount and substantiality of the portion used in relation to the copyright work as a whole; and
  d) the effect of the "dealing" upon the potential market for or value of the copyright work.

Conclusion and Observations

The proposed amendments do address the current rigidity of the fair dealing exemption under the Act and seeks to strike a balance between the interests of the public at large and the interests of the copyright holders.

Would the Court have reached the same conclusion in **MediaCorp** were the amendments in place then? The defence failed because the Court found that the Defendants were conducting a commercial enterprise by the use of the Plaintiffs' broadcasts. Even with the removal of the "non-profit" qualification for research, the Court may still have taken into account the commercial nature of the Defendants' use of the Plaintiffs' broadcasts. The difference would have been that the commercial nature was only one of the factors to be considered. Under the proposed amendments, it would seem that one who uses copyright work in research for commercial purpose may be able to rely on fair dealing as a defence provided a host of other determining factors as set out above are also satisfied.

The best way for commercial entities to safeguard against an action for copyright infringement is still to seek the consent or licence from the copyright owners for the use of their works in any commercial operation.

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[1] [2010] MLJU 310

CASE NOTE

Alcatel-Lucent Malaysia Sdn Bhd (formerly known as Alcatel Network Systems (Malaysia) Sdn Bhd) ("Alcatel") and Alcanet International Asia Pacific Pte Ltd ("Alcanet") v Ketua Pengarah Hasil Dalam Negeri[1]

"In a recent landmark decision on withholding tax in Malaysia, the High Court considered the two main withholding tax sections under the Income Tax Act 1967 ("ITA") in a judicial review application filed by **Alcatel-Lucent Malaysia Sdn Bhd (formerly known as Alcatel Network Systems (Malaysia) Sdn Bhd) ("Alcatel") and Alcanet International Asia Pacific Pte Ltd ("Alcanet") against the Director General of Inland Revenue**."

IN THIS ARTICLE, IRENE YONG DISCUSSES THE RECENT DECISION OF THE HIGH COURT IN ALCATEL-LUCENT MALAYSIA SDN BHD AND ALCANET INTERNATIONAL ASIA PACIFIC PTE LTD V KETUA PENGARAH HASIL DALAM NEGERI IN RELATION TO WITHHOLDING TAX IN MALAYSIA.

Facts

Alcanet, which is not tax resident in Malaysia, provided certain services relating to the provision of a global network for voice, data and video communication ("Services") to Alcatel.

Subsequent to a withholding tax audit conducted by the Director General of Inland Revenue ("Revenue"), the Revenue purported to subject payments made by Alcatel to Alcanet for the Services ("Payments") to withholding tax and increased withholding tax under "section 109 and/or section 109B of the Income Tax Act 1967" ("ITA") for the relevant years ("Revenue's decision").

Alcatel and Alcanet (collectively "Applicants") disputed that the Payments were subject to withholding tax and filed an application for judicial review in the High Court of Malaya under Order 53 of the Rules of the High Court 1980 to quash the Revenue's decision ("JR Application").

Issues

The Court considered the following issues:

(a) whether the Revenue's failure to provide reasons for their decision was unreasonable ("First Issue"); and

(a) whether the Payments are "royalty" subject to withholding tax under section 109 read with section 2 of the ITA ("Second Issue").

The material provisions of the ITA are set out below.

Section 109:

(1) Where any person … is liable to pay interest or royalty derived from Malaysia to any other person not known to him to be resident in Malaysia … he shall upon paying or crediting the interest … or royalty deduct therefrom tax at the rate applicable to such interest or royalty, and … shall within one month after paying or crediting the interest or royalty render an account and pay the amount of that tax to the Director General: …

Section 109B:

(1) Where any person … is liable to make payments to a non-resident –

xxx

(b) for technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; or …

which is deemed to be derived from Malaysia, he shall, upon paying or crediting the payments, deduct therefrom tax at the rate applicable to such payments, and … shall within one month after paying or crediting such payment, render an account and pay the amount of that tax to the Director General: …

Section 15A:

Gross income in respect of –

xxx

(b) in consideration of technical advice, assistance or services rendered in connection with technical management or administration of any scientific, industrial or commercial undertaking, venture, project or scheme; …

shall be deemed to be derived from Malaysia –

xxx

(ii) if responsibility for the payment of the above or other payments lies with a person who is a resident for that basis year; or

(iii) if the payment of the above or other payments is charged as an outgoing or expense in the accounts of a business carried on in Malaysia:

Provided that in respect of paragraphs (a) and (b), this section shall apply to the amount attributable to services which are performed in Malaysia."

Section 2:

(1) In this Act, unless the context otherwise requires –

xxx

"royalty" includes –

(a) any sums paid as consideration for the use of, or the right to use –

(i) copyrights, artistic or scientific works, patents, designs or models, plans, secret processes or formulae, trademarks, or tapes for radio or television broadcasting, motion picture films, films or video tapes or other means of reproduction where such films or tapes have been or are to be used or reproduced in Malaysia or other like property or rights;

(ii) know-how or information concerning technical industrial, commercial or scientific knowledge, experience or skill;

(b) income derived from the alienation of any property, know-how or information mentioned in paragraph (a) of this definition.

Decision

The High Court found in favour of the Applicants on both issues.

On the First Issue, the Court held that:

"Public interest demands that a statutory power must be exercised reasonably and with due consideration. I agree with counsel for the Applicants that in the circumstances of this case it was unreasonable of the Respondent to apply both sections 109 and 109B. I find that applying both sections 109 and 109B renders the Respondent's decision unreasonable."[emphasis added]

On the Second Issue, the Court held that the Payments do not constitute "royalty" under section 109 read with section 2 of the ITA as the Revenue had failed to establish that the software was used to produce profits for Alcatel or that Alcatel was granted any rights to develop or exploit the software commercially. The Court also held that the Payments are not chargeable to withholding tax under section 109B read with section 15A of the ITA as the Services were wholly performed outside Malaysia at all material times.

It is noteworthy that the Court considered and applied the Commentary on the Model Tax Convention on Income and on Capital by the OECD Committee on Fiscal Affairs in determining the meaning of "royalty" under the ITA. The Court also referred to the judgment of the Federal Court of Appeal of Canada in **The Queen v St. John Shipbuilding & Dry Dock Co. Ltd.**[2] where it was held that:

(1) ""Royalties", though a broad term, when used in the sense of a payment for the use of property, connotes a payment calculated by reference to the use or to the production or revenue or profits from the use of the rights granted."[emphasis added]

Conclusion

This is a landmark decision on withholding tax in Malaysia dealing with the two main withholding tax sections in the ITA, sections 109 and 109B. This decision makes it clear that the Revenue must exercise its powers under the ITA reasonably or the courts would interfere to quash any unreasonable exercise of statutory powers.

The Revenue has lodged an appeal to the Court of Appeal against the decision of the High Court.

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[1] Unreported decision of the High Court.
[2] [1981] 1 F.C. 334