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NEWSLETTER

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EMPLOYMENT LAW

Impact of the Personal Data Protection Act 2010 on Employers

IN THIS ARTICLE, WONG KIAN JUN HIGHLIGHTS THE APPLICATION OF THE SEVEN PERSONAL DATA PROTECTION PRINCIPLES IN THE PERSONAL DATA PROTECTION ACT 2010 TO EMPLOYEE DATA.

The Personal Data Protection Act 2010 ("the Act") was passed by the Parliament to remedy the mischief of rampant and unregulated misuse of personal data in Malaysia. This Act is accepted to forever change the collection and processing of personal data in the private sector and bring Malaysia to keep abreast with the other countries with mature privacy laws. Although the Act was passed as early as 2010, it has not come into force yet, despite various press announcements by the relevant Ministry that the Act was to come into force soon. However, when the Act comes into force, employers would need to rethink their approach and revisit their contracts of employment when dealing with and managing their employees' information.

There has been some uncertainty as to whether the Act would apply to an employee–employer relationship in light of section 2 of the Act which provides that the Act only applies to any person who processes and has control over the processing of personal data in respect of commercial transactions. A "commercial transaction" has been defined in the Act as "*any transaction of a commercial nature, whether contractual or not, which includes any matters relating to the supply or exchange of good or services, agency, investments, financing, banking and insurance, but does not include a credit reporting business carried out by a credit reporting agency under the Credit Reporting Agencies Act 2010*". In essence, an employee–employer relationship is commercial in nature and arises from a contract of services in exchange for remuneration. Based on the above definitions, the Act will apply to such a relationship.

An employer would need to put in place mechanisms and processes to comply with the provisions of the Act. In doing so, an employer would need to comply with the seven Personal Data Protection Principles as follows:

(i) the General Principle;

(ii) the Notice and Choice Principle;

(iii) the Disclosure Principle;

(iv) the Security Principle;

(v) the Retention Principle;

(vi) the Data Integrity Principle; and

(vii) the Access Principle.

The above principles will affect the way an employer manages information relating to its employees.

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Pursuant to the General Principle, employers in the course of collecting information from their employees must first obtain consent from the employees in the case of personal data, and it must be explicit consent when it involves sensitive personal data. However, an employer is exempted from seeking consent in relation to collecting/processing personal data if it is necessary for the performance of a contract to which the employee is a party. This means that in order to be exempted from the requirement of consent in relation to personal data, an employer must now evaluate and determine what information is absolutely necessary for the discharge of both the employer and employees' duties and obligations. With the Act, the employer must determine whether such information is required and avoid the situation of excessive data collection.

Pursuant to the Notice and Choice Principle, an employer must also provide a notice to its employees informing them, amongst others, the nature of the information collected, the purpose for which the information is collected, whether the information would be shared with a third party and that the employees have the right to access the information collected. By requiring employers to provide such a notice to employees, it would promote better transparency on the collection and processing of personal data. It would be pertinent to note that this requirement is separate from the consent requirement under the General Principle.

Pursuant to the Disclosure Principle, employers need to be careful on the sharing of data with third parties, including sister companies that are within the same group employer. The Disclosure Principle provides that a data user is not allowed to share data with third parties unless the consent of the individual is obtained. This would impact employers who outsource certain HR functions such as payroll and training to external outsourcing companies.

Pursuant to the Retention Principle, employers would not be permitted to retain personal data of its employees indefinitely. The Retention principle mandates a data user to securely destroy the personal data where such data is no longer required for the purpose for which it was to be processed. However, employers should be mindful that certain obligations imposed by other law on the requirement of retaining data of its employees even after the cessation of employment. For example, section 61 of the Employment Act 1955 mandates employers to keep information registers of its employees for a period not less than six years.

The Security Principle requires an employer to ensure that there are adequate security measures in place to protect the employees' information in its control/possession, either in soft copy or hard copy. In doing so, amongst the factors that must be taken into consideration are the place and location where the personal data is stored, security measures incorporated into any equipment in which personal data is stored and whether the personnel having access to the personal data is competent. Personnel files should no longer be kept in unlocked file cabinets or in a haphazard manner. Furthermore, in the event the information of the employees are processed by a third party, for example payroll agencies, there is an obligation on the employer to ensure that they have taken reasonable steps to put in place security measures to protect the personal data.

The Data Integrity Principle provides that an employer must ensure that all personal data is accurate, complete, not misleading and kept up to date. As such, employers are now not only required to ensure the accuracy of the data but must obtain updates from their employees on a regular basis.

The Access Principle provides that an employee be given access to his information and that he must be able to correct his personal data in the event there are any inaccuracies, incomplete information, misleading information or that the information is not up to date. The right to access is not unrestricted. The Act provides for certain exceptions where a data user may refuse the right to access in certain circumstances, such as where there is an element of confidentiality involved.

With the coming into force of the Act, employers must have in place proper procedures and revise its documentation such as employment contracts and handbooks to comply with the requirements of the Act.

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CASE NOTE

Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors

IN THIS ARTICLE, PHUAH LEE ZHIN REVIEWS THE CASE OF **PRIMUS (MALAYSIA) SDN BHD V RIN KEI MEI & ORS** ON WHETHER A COMPANY CAN REDUCE ITS CAPITAL TO NIL.

Introduction

The question of whether a company can undertake a reduction of its capital to nil was considered in the Federal Court in **Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors**[1]. In that case, the arrangement was for the entire issued and paid-up share capital of EON Capital Berhad ("EONCAP") to be cancelled and for two new ordinary shares in EONCAP to be issued.

Section 64(1) of the Companies Act 1965 ("Act") provides that subject to confirmation by the court, a company may if so authorised by its articles of association (the "articles") by special resolution reduce its capital in any way. Whilst the manner in which a reduction can be undertaken does not seem to be limited, section 64(1) of the Act specifies three ways in which the capital reduction can be carried out, namely:

(a) to extinguish or reduce the liability on any of its shares in respect of share capital that has not been paid-up;

(b) to cancel any paid-up capital which is:

(i) lost; or

(ii) unrepresented by available assets; or

(c) to pay off paid-up share capital which is in excess of the needs of the company.

The background of Primus (Malaysia) Sdn Bhd v Rin Kei Mei & Ors

The dispute arose from the disposal of all the assets and liabilities of EONCAP to Hong Leong Berhad ("HLB") for a cash consideration and, in consequence, a distribution of the monies to its shareholders.

The distribution comprised, amongst others, a capital reduction exercise cancelling the entire issued and paid-up share capital of EONCAP pursuant to section 64 of the Act. Two new ordinary shares of RM1 each in EONCAP at par were also issued to ensure that EONCAP would, after the capital reduction exercise, have an issued and paid-up capital of RM2 comprising two ordinary shares of RM1 each.

An extraordinary general meeting was held for the shareholders to consider HLB's offer[2] and the resolutions relating to the disposal of assets and distribution of the proceeds formulated by the board of directors were passed at the said meeting. It was also EONCAP's intention to initiate a voluntary winding-up thereafter.

At the material time, Primus (Malaysia) Sdn Bhd ("Primus Malaysia") was a registered shareholder of EONCAP. On 21 June 2010, Primus Malaysia presented a petition under section 181 of the Act in the High Court of Kuala Lumpur to set aside the sale of all the assets and liabilities of EONCAP to HLB for cash and, thereafter, the distribution of the monies to its shareholders.

At the High Court, Primus Malaysia's objections relating to the capital reduction exercise were, amongst others, as follows:

(a) under section 64 of the Act, there cannot be a 100% reduction and 100% return of capital to sever completely the relationship between EONCAP and its existing members; and

(b) the wide scope of section 64 of the Act ("*...by special resolution reduce its share capital in any way...*") cannot be resorted to terminate the mutual relations between members as enshrined in section 33(1) of the Act[3].

In relation to the interpretation of section 64 of the Act, the High Court rejected Primus Malaysia's argument and accepted the submission of the counsel for some of the respondents[4] that a capital reduction cancelling all the shares and returning all the capital to the shareholders combined with the issue of two shares is permissible under section 64 of the Act. The relevant excerpts of the submission are reproduced as follows[5]:

> *"41.1 Section 64 allows cancellation 'in any way' and includes a reduction to nil. The Petitioner accepts that there may be a reduction to nil. In **Northern Engineering Industries plc [1994] 2 BCLC 704**, Millet LJ said:-*
>
> > *To speak of 'reducing' an amount to nothing rather than merely to 'vanishing point' may not be an etymologically correct use of word, but it is a permissible one.*
>
> *41.2 But the reduction to nil can only be temporarily. As Millet LJ said in **Northern Engineering Industries plc**:-*

> *It is not disputed before us that this allows a company, which the section applies to reduce its capital to nil, even though by reason of other requirements of the Companies Act, it must immediately increase its share capital to a positive amount. Such confirmations are frequently confirmed by the court…*
>
> *41.3 The position therefore is that the capital may be reduced to nil, but it must be recapitalised to a positive amount because of 'other requirements of the Companies Act'. These include section 14(1) of the Companies Act, which provides a minimum of 2 subscribers (with a corresponding minimum of 1 share each). The minimum 'positive amount' is therefore 2 shares…"*

The High Court also accepted the argument of the counsel for some of the respondents[6] that section 64 of the Act does not prevent capital reduction by cancelling all the shares and thus severing the statutory contract with all existing members.

Accordingly, the High Court dismissed Primus Malaysia's petition with costs and Primus Malaysia appealed against the High Court's decision.

Affirming the decision of the High Court, the Court of Appeal dismissed the appeal and held that section 64 of the Act does not prohibit the reduction of capital to nil, provided that simultaneously a minimum of two shares are issued and that "*it matters not whether the two shares are issued to parties who are not members prior to such reduction*".

Primus Malaysia appealed against the Court of Appeal decision.

The application for leave before the Federal Court

The questions for leave to appeal before the Federal Court were, amongst others, related to the interpretation of section 64 of the Act. The questions included whether section 64 of the Act is one of the statutory ways of enabling or empowering a company to sever, end and settle its mutual relations with its existing members.

Dismissing Primus Malaysia's application with costs, the Federal Court held that there was nothing wrong or illegal for a company to undergo a capital reduction exercise under section 64 of the Act after disposing of its entire business for cash and consequently distributing the monies to its shareholders. That distribution of monies to the shareholders is a distribution of capital and hence there has to be a reduction of share capital exercise as the issued shares will then be unrepresented by assets[7]. In any event, section 64(1)(b) of the Act clearly provides that subject to confirmation by the court and if the articles so direct, a company may cancel any paid-up capital which is unrepresented by available assets[8].

Conclusion

This case reaffirms the position that pursuant to section 64 of the Act where permitted by the articles and subject to the confirmation by the court, a company may reduce its capital by a special resolution in any way, including reducing its capital to nil, provided that a minimum of two shares are issued simultaneously.

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1 [2012] 1 CLJ 176.

2 Please refer to EONCAP's circular dated 1 September 2010 in relation to the (a) proposed disposal of the entire assets and liabilities of EONCAP to HLB for a cash consideration of RM5,060,423,743.60; and (b) proposed distribution of the cash proceeds arising from the proposed disposal to all entitled shareholders of EONCAP via the proposed special dividend and proposed capital repayment, and the proposed issuance of two new ordinary shares of RM1 each in EONCAP at par, for further information on the said transaction and offers.

3 Section 33(1) of the Act states that a company's memorandum and articles bind the company and its members to the same extent as if they had been signed and sealed by each member and contained covenants on the part of each member to observe all their provisions.

4 Grounds of Judgment at [64] where extracts from paragraphs 21 to 74 of the Reply Submission of Counsel for respondents No 1, 10 and 11 were reproduced and the submissions and contentions set out therein were accepted by the judicial commissioner.

5 Grounds of Judgment at [64] at [sub-paragraphs 41.1, 41.2 and 41.3].

6 Counsel for respondents No 1, 10 and 11.

7 [2012] 1 CLJ 176 at [37].

8 [2012] 1 CLJ 176 at [48].

DISPUTE RESOLUTION

The Transmile Decision: The *Pari Passu* Principle in Relation to Subordination Agreements

IN THIS ARTICLE, LUKAS LIM XIA WEI LOOKS AT THE **TRANSMILE** CASE ON THE *PARI PASSU* PRINCIPLE IN RELATION TO SUBORDINATION AGREEMENTS.

The *pari passu* principle

Pro rata distribution between unsecured creditors

One of the fundamental principles of insolvency law is that of *pari passu* distribution, where subject to the claims of secured creditors and statutory provisions of preferential payment, all unsecured creditors of an insolvent company participate in a common pool of the company's assets, in proportion to the amount of their admitted claims.[1]

Prior to the commencement of winding-up proceedings, each creditor is free to pursue any available means of satisfying its debt, from self-help (for example repossession, realisation of security, set-off) to legal recourse. The creditor that moves the fastest has the first bite of the cherry and the creditor who acts too slowly may find that he no longer has any assets to claim against.

Once winding-up proceedings arise however, the statutory provisions of insolvency take effect, which include the operation of the *pari passu* principle by virtue of section 292(2) of the Companies Act 1965 ("CA"), and all losses caused by liquidation are borne by unsecured creditors equally.

In practice, this effectively puts an end to the contest between unsecured creditors for priority of claims, and all agreements, payments and transfers that result in an unfair preference of a particular creditor are struck down. Further, it is generally the case that no one creditor can lawfully contract-out of *pari passu* distribution in insolvency.[2]

The rationale for the mandatory nature of the *pari passu* principle is that insolvency proceedings are of a collective nature, and no individual creditor should be allowed to obtain an unfair advantage over the others.[3] It would thus run contrary to public policy for a creditor to contract with the debtor, in order to defeat the interests of other creditors that are not parties to such a contract.[4]

Subordination agreements

In a typical subordination agreement, two creditors of a same class, X and Y, may agree between themselves that Y, who ranks higher than or equal to X in terms of a claim against a mutual debtor, would rank below X. The end result is that Y cannot collect its debt from the debtor until X is paid in full.

Whether such arrangements offend the *pari passu* principle has been the subject of much debate in various parts of the Commonwealth. Some courts have held that such agreements contravene the *pari passu* principle[5], while others have concluded that they have no detrimental effect on other creditors and are thus acceptable[6].

Similar questions were recently considered for the first time by the Malaysian courts in **Malaysian Trustees Bhd v Transmile Group Bhd & Ors**[7].

The Transmile case

The hearing at the High Court: brief facts and issues

The substantive action in the High Court, and subsequently in the Court of Appeal, arose out of an application under section 176 of the CA by the insolvent company ("TAS") to stay winding-up proceedings against it, and to effect a scheme of arrangement ("SOA") between itself and three groups of creditors (X, Y and Z).

It was proposed by TAS, and agreed to by Y and Z, that the three groups of creditors be treated as a single class for the purpose of voting for the SOA at the creditors' meeting. X, however rejected such a classification, and attempted to invoke a purported subordination clause in a trust deed between itself and TAS, to rank in priority to the other unsecured creditors.

The gist of the subordination clause was that advances by any of TAS' shareholders, directors, subsidiaries, or inter-company loans[8] made after the date of the trust deed would be subordinated to TAS' liabilities to X. Neither Y nor Z were parties to the trust deed.

X's argument was rejected by the High Court, amongst others, on the finding that the purported subordination clause did not fall within any of the recognised categories of subordination arrangements, namely[9]:

(a) A "true subordinated debt", where the terms on which the debt is incurred by an agreement between the debtor and creditor provide for repayment to the creditor to be subordinated to other payments by the debtor;

(b) A "priorities agreement" between two or more creditors of the same

debtor, where they agree to alter the priority in which they receive payment among themselves; or

(c) A "trust arrangement", where one creditor agrees to hold proceeds received from a common debtor for the benefit of another creditor.

It was stressed by the High Court that both Y and Z had to agree to the subordination of their debts in favour of X. There was, however, no evidence of any such agreement. The purported subordination clause was therefore no more than a mere contractual undertaking, given by TAS to X, and any recourse for breach thereof lay only against TAS.

Could a valid subordination clause displace the *pari passu* rule?

X's claim could have been dismissed solely on the basis of the High Court findings above. The High Court, however, went further to examine in *obiter* whether a valid subordination clause could in fact displace the operation of the *pari passu* principle in the context of a corporate insolvency.

The High Court started by emphasising the fundamental nature of the *pari passu* principle in relation to insolvency, and that allowing X to have a better right than Y and Z would "*violate statutory and established principles of equal satisfaction of claims upon a liquidation*"[10].

However, upon an examination of the Commonwealth jurisprudence on this matter, the High Court concluded that there had been some relaxation of the "absolute nature" of the *pari passu* principle in recent years. Applying the judgment in **Re Maxwell Communications Corp plc (No 2)**[11], the High Court stated that the *pari passu* principle would not be affected if[12]:

(a) there was an express agreement between all affected creditors to subordinate, as between them, their respective debts;

(b) there was an express waiver by a creditor of his right in favour of another creditor; or

(c) estoppel operated against one creditor in favour of another.

As already noted above, the underlying basis of the mandatory nature of the *pari passu* principle is that no individual creditor should be allowed to obtain an unfair advantage over the others. In this regard, categories (a) to (c) above do not offend against the underlying basis, and thus do not compromise the *pari passu* principle.

In **Horne v Chester & Fein Property Developments Pty Ltd**[13], Southwell J observed that the courts would normally strike down any attempts by creditors to "contract-out" of the mandatory insolvency provisions, as these would adversely affect the other parties who were not parties to the contract, which was contrary to public policy. His Lordship then stated:

> *"That policy, as it appears to me, was never intended to alter the rights and obligations of parties freely entering into a contract, unless the performance of a contract would, upon insolvency, adversely affect the right of strangers to the contract."*

It was clear that X's attempt to contract-out of the *pari passu* principle would be at the expense of Y and Z. Without the express consent of Y and Z, such an arrangement would be unlawful. The High Court thus held that X ranked *pari passu* with Y and Z under the SOA.

The Court of Appeal decision

X subsequently appealed against the High Court decision. Speaking for the Court of Appeal, Ramly Ali JCA reiterated that the *pari passu* rule "*is one of the most fundamental principles of the law of liquidation and at the very heart of the whole statutory scheme of winding-up*"[14]. Such a rule was mandatory and could not be excluded by contract, so as to give one creditor more than its proper share.

At the same time, and in line with the High Court's decision, Ramly Ali JCA agreed that a creditor may voluntarily subordinate its debt by agreement or by waiver. In this regard, His Lordship warned:

> *"There must be evidence to show that the creditor personally agrees to such a choice. An agreement of another creditor to that effect will not bind it... A creditor and the debtor cannot agree to subordinate the debts of another creditor not party to the agreement"*[15].

As the purported subordination clause would have detrimentally affected the rights of Y and Z as creditors over TAS, it was essential that X showed express evidence that Y and Z were willing to put themselves in such a position. It was clear that Y and Z had not agreed to any subordination of their debts. The appeal was thus dismissed.

It should be noted that X applied for leave to appeal to the Federal Court against the Court of Appeal's decision, but was unsuccessful. The Court of Appeal's decision is therefore final.

Conclusion

The High Court decision, as affirmed by the Court of Appeal in **Transmile**, helps to clarify the Malaysian position on understanding the *pari passu* principle, specifically in relation to subordination clauses.

In this regard, any unsecured creditor who contemplates entering into a subordination agreement should first ensure that the agreement is one that falls into a recognised category of subordination agreements, and second, should ensure that in addition to the debtor company, the other affected creditors agree to the subordination.

Failing to adhere to the above may lead the court to strike-down the subordination agreement. As observed in **Transmile**, such an outcome may be disastrous, especially where creditors may have given a company credit on the basis and assumption that the agreement would be binding[16].

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[1] Roy Goode, Principles of Corporate Insolvency Law, (2011), (4th Ed), Sweet & Maxwell, paragraph 8-01.

[2] *See British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 780 to 781.

[3] I.F. Fletcher, The Law of Insolvency, (2009), (4th Ed),Sweet & Maxwell, paragraph 26-020.

[4] *See British Eagle International Air Lines Ltd v Compagnie Nationale Air France* [1975] 1 WLR 758 at 780.

[5] *See Re Orion Sound Ltd* [1979] 2 NZLR 574.

[6] *See Horne v Chester & Fein Property Developments Pty Ltd* (1986) 11 ACLR 485. See also Roy Goode, Principles of Corporate Insolvency Law, (2011), (4th Ed), Sweet & Maxwell, paragraph 8-08.

[7] [2012] 3 MLJ 679.

[8] X argued that the loans made by Y and Z to TAS were in fact "inter-company loans". This was based on the fact that C was a special purpose vehicle wholly-owned by TAS' parent company, while Y had made its loans to TAS via a special purpose vehicle that was also wholly-owned by TAS' parent company. This argument was rejected by the High Court for reasons not relevant to the present discussion.

[9] *See Re SSSL Realisations (2002) Ltd (in liquidation)* [2005] 1 BCLC 1. See also paragraphs 11.1 to 11.3 of the High Court's judgment.

[10] *Ibid*. Paragraph 15.2 of the High Court's judgment.

[11] [1994] 1 All ER 737.

[12] *Ibid.*

[13] [1986] 11 ACLR 485.

[14] [2012] 3 MLJ 679 at 690, paragraph 26 and 27.

[15] [2012] 3 MLJ 679 at 690, paragraph 26 and 27.

[16] *In re Maxwell Communications Corp plc (No 2)* [1994] 1 All ER 737 at 746.

REAL ESTATE

A Growing Trend in Malaysia — The Green Culture

IN THIS ARTICLE, CHEAH WAI LEONG DISCUSSES THE "GREEN BUILDING INDEX" RATING AS WELL AS GOVERNMENT EFFORTS TO ENCOURAGE THE CONSTRUCTION OF "GREEN BUILDINGS" BY ITS INTRODUCTION OF INCOME TAX AND STAMP DUTY RELIEF.

What "green" signifies, in modern times

In this day and age, the term "green" has been so frequently and widely associated with the "conservation of resources" that when a person is asked what "green" signifies, the first thing that comes to mind, more often than not, is unsurprisingly not the colour.

Many "green" initiatives have, in recent times, been introduced, promoted and undertaken by the public at large — in a rushed, desperate attempt to save our ailing Mother Earth. The importance of going "green" is outlined by, among others, the use of brown napkins in Starbucks cafés and the advent of electric cars. "Green" is also the official colour used in anti-Lynas campaigns. Another interesting fact to note is that the Ministry of Energy, Water and Communication has been renamed the Ministry of Energy, Green Technology and Water since 9 April 2009.[1]

The "green building index" rating defined

Perhaps less commonly known to the general population outside the field of developers, architects, engineers and contractors, but certainly not any less significant, is the introduction of the "green building index" ("GBI") rating on 21 May 2009 in the 2010 Budget Speech.[2] The GBI rating is a green rating index on environmentally friendly buildings — buildings which save utility costs and preserve the quality of the environment.[3]

A more comprehensive definition can be found on the website www.green-

buildingindex.org, where a "green building" is defined as a building that *"focuses on increasing the efficiency of resource use — energy, water and materials — while reducing building impact on human health and the environment during the building's lifecycle, through better siting, design, construction, operation, maintenance, and removal"*.[4] Since the GBI rating's inception, buildings such as Bangunan Suruhanjaya Tenaga, Setia City Mall, Setia City Convention Centre, Menara Binjai and GTower have received GBI certificates.[5]

The Government's efforts to encourage the usage of green technology — income tax and stamp duty relief

To implement its policy to encourage the usage of green technology and the promotion of the construction of "green buildings", the Government has introduced various incentives. Among others, building owners who obtain the GBI certificates for buildings constructed from 24 October 2009 until 31 December 2014 are given an income tax exemption equivalent to the additional capital expenditure to obtain the GBI certificates.[6]

Apart from this, the Stamp Duty (Exemption) Order 2009 (which is deemed to have come into operation on 24 October 2009) provides that property purchasers are eligible for the exemption of payment of stamp duty on the instrument of transfer up to an amount equivalent to one hundred percent (100%)[7] of the additional cost incurred for the purpose of the procurement of the GBI certificates and other costs as certified by the Board of Architects Malaysia[8].[9] These costs include the costs incurred to design, construct, alter and renovate properties to obtain GBI certification. It is understood that purchasers of such property can claim the stamp duty exemption in their annual income tax return forms.[10]

However, it is imperative to note that this exemption applies only to direct purchasers who execute sale and purchase agreements between 24 October 2009 to 31 December 2014 (both dates inclusive) for the purchase from property developers of buildings or residential properties with GBI certificates.[11]

Besides enjoying the various incentives, a company or corporation that develops and/or occupies "green buildings" sends a positive message to the general public — that it is managed by a responsible group that is dedicated to the future. With these attractive incentives offered, it is little wonder that more companies and corporations are jumping on the bandwagon.

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1 http://www.kettha.gov.my/en/node?quicktabs_1=1
2 The 2010 Budget Speech — a copy of which material can be located at www.treasury.gov.my/pdf/budget/bs10.pdf
3 The 2010 Budget Speech — a copy of which material can be located at www.treasury.gov.my/pdf/budget/bs10.pdf
4 http://www.greenbuildingindex.org/why-green-buildings.html
5 http://www.greenbuildingindex.org/organisation-certified-buildings-NRNC.html
6 Income Tax (Exemption) (No 5) Order 2011.
7 "Garis Panduan dan Prosedur bagi Tuntutan Pengecualian Cukai dan Duti Setem ke atas Perbelanjaan bagi Memperolehi Perakuan Indeks Bangunan Hijau" — LHDN.01/35/42/51/84.
8 Established under section 3 of the Architects Act 1967.
9 Section 2(2) of the Stamp Duty (Exemption) Order 2009.
10 "Incentives for Renewable Energy, Energy Efficiency & Green Buildings in Malaysia" by Kementerian Tenaga Teknologi Hijau dan Air — a copy of which material can be located at http://www.mbipv.net.my
11 Stamp Duty (Exemption) Order 2009.

INTELLECTUAL PROPERTY

Is there any likelihood that goods of different classes may cause confusion and deception to the public and are goods of a similar purpose and nature goods of the same description for trademark purposes?

IN THIS ARTICLE, RAGHURAM SUPRAMANIUM ANALYSES THE FEDERAL COURT'S JUDGMENT OF **YONG TENG HING B/S HONG KONG TRADING CO & ANOR V WALTON INTERNATIONAL LTD**[1] ON THE ISSUE OF LIKELIHOOD OF CONFUSION AND CONFUSION RESULTING FROM THE PRIOR USE OF AN IDENTI-

CAL MARK IN RELATION TO A DIFFERENT CLASS OF GOODS FROM THAT FOR WHICH A SUBSEQUENT APPLICATION FOR REGISTRATION OF A TRADEMARK IS FILED.

The Federal Court judgment in **Yong Teng Hing B/S Hong Kong Trading Co & Anor v Walton International Ltd** interprets section 14(1)(a) of the Trade Marks Act 1976 which disallows an application for a mark to proceed if the use of the mark applied for is likely to deceive or cause confusion to the public. It provides the necessary guidance as to the factors that must be considered in arriving at the true intent, meaning and purpose of section 14(1)(a).

Facts

Walton International Ltd ("WI") is the registered proprietor, by way of an assignment from its predecessors in title, of various "Giordano" trademarks and other related trademarks in Classes 13, 18 and 25 for products including garments, wearing apparel, articles of clothing, jeans, T-shirts, pouch, accessories, footwear and headgear, soaps, deodorants, leather and imitations of leather. The "Giordano" registered trademarks have been used in relation to the goods of Classes 13, 18 and 25 from a point in time prior to Yong Teng Hing ("YTH")'s application for registration of the "Giordano" trademark in Class 9 on 25 July 1992. WI's predecessor in title had also exported to and sold in Malaysia eyewear and sunglasses.

YTH is a sole proprietor involved in the trade of selling genuine and imitation leather goods including cases, watchstraps and sunglasses. YTH applied for registration of the "Giordano" mark in Class 9 (a mark that is identical to WI's "Giordano" registered trademarks in Classes 13, 18 and 25) for optical goods and sunglasses on 25 July 1992. YTH's Class 9 application was then opposed by WI. The Senior Assistant Registrar ("Registrar") dismissed the opposition and WI appealed to the High Court.

The High Court affirmed the Registrar's decision. It ruled that YTH was the first user of the "Giordano" trademark in relation to optical goods and sunglasses which are goods of Class 9 in Malaysia, as WI did not adduce any evidence to show that it has sold goods under Class 9 bearing its "Giordano" trademark prior to or post YTH's application date of 25 July 1992 for its Class 9 application. The Court also held that WI's reputation and goodwill extended only to goods in Class 25 for garments, wearing apparel, articles of clothing, jeans, T-shirts, pouch, accessories, footwear and other fashion accessories. As the goods of both parties did not compete in the same market in the course of trade, the Court found YTH's "Giordano" trademark applied for in Class 9 not likely to deceive or cause confusion to the public.

The Court of Appeal reversed the High Court's decision and found in favour of WI. As a matter of fact and evidence, the Court of Appeal found that YTH had failed to adduce sufficient evidence that it was the first user of the "Giordano" trademark in relation to optical goods and sunglasses at any time before YTH applied for its registration in Class 9 on 25 July 1992. It also found that, instead, WI had been using the "Giordano" trademark in Malaysia at least as early as 1990 (a date preceding YTH's application date of 25 July 1992 for its "Giordano" trademark in Class 9) in relation to articles of clothing, leather belts, bags, wallets and umbrellas.

YTH appealed to the apex court, the Federal Court, which upheld the decision of the Court of Appeal. The decision of the Federal Court provides guidance as to the factors that must be considered in arriving at the true intent, meaning and purpose of section 14(1)(a) of the Trade Marks Act 1976.

Decision and analysis

The Federal Court acknowledged that the relevant date for determining whether YTH is entitled to apply for and register its "Giordano" trademark in Class 9 is its application date of 25 July 1992. The onus was on YTH to prove its entitlement but it failed to do so on the evidence. Even if YTH had filed its Class 9 application first, its claim to being entitled to the "Giordano" trademark for Class 9 goods as of the application priority date of 25 July 1992 is not the position in law.

The Federal Court accepted the finding of the Court of Appeal that there was no dispute that WI and its predecessor had prior use of the "Giordano" trademark on garments, wearing apparel, articles of clothing, jeans, T-shirts, pouch, accessories, footwear and others in Malaysia and elsewhere before YTH's application date of 25 July 1992 for its own "Giordano" trademark in Class 9. Although these goods are within Classes 13, 18 and 25, and not Class 9, such prior use by WI had nevertheless resulted in cognisable goodwill and reputation accruing to WI's trade and business both in Malaysia and internationally. The Court was of the view that the goods of these classes are of a similar nature and purpose. The Court gave the following reason:

> *"It is our judgment that the respondent has established that it has goodwill and reputation not only in relation to Class 25 goods but by the application date, it has already established goodwill and reputation in relation to its "GIORDANO" trade mark arising from the use not limited to clothing and apparel being goods falling in Class 25 but also in respect of leather goods, belts, bags and fashion accessories. Thus, the business interest of the respondent extends beyond just apparel and clothing in Class 25 goods. Further, the goodwill and reputation of the respondent transcends the goods in which it had actually traded as the respondent is in the fashion retail business that encompasses products such as optical and sunglasses."*

The Federal Court therefore came to the view that the deception and confusion envisaged by section 14(1)(a) is a question of fact and degree to be culled

from the evidence taking cognisance of the goodwill and reputation WI had earned on account of its and its predecessor's trade and business on goods of the same nature and purpose. Apart from statements that the "*Respondent is in the fashion retail business that encompasses products such as optical and sun glasses*" and that "*Optical and sunglasses in Class 9 are fashion products … (and) … likewise articles of clothing and leather goods such as belts and bags in class 25 are also fashion products*", it seems that the Court's preference for the description "*goods of the same nature and purpose*" is just another way of asking the time-honoured question of whether the Class 25 and Class 9 goods are of the same description. The Court went on to hold that "*… both the Appellant's and the Respondent's goods are targeted at the same customers and made available through similar retail channels and are commonly found to be sold together or next to each other in departmental stores, retail stores and fashion boutiques*".

On the basis that Class 9 goods are of the same nature and purpose as the Class 25 goods and *vice versa*, the Court found that members of the public are very likely to associate WI's "Giordano" trademark to YTH's, as both the trademarks are identical and substantially similar. In fact, the Court confidently pronounced that "*it is inevitable that the consumers will assume that both products of the Appellant and Respondent are of the same origin originating ultimately from or authorized by the Respondent. That will result in the misappropriation of the local and international goodwill and reputation of the Respondent*".

The Federal Court was also critical of the fact that YTH had not independently devised the mark himself, or had any plausible explanation to the choice of the mark, but instead tried to obtain the benefit of WI's worldwide reputation. As for the need to protect the international goodwill and reputation of WI and its "Giordano" trademark, the Court said that the more well-known or unusual a trademark is, the more likely it is that consumers might be confused into believing that there is a trade connection between goods or services bearing the same or similar mark. In this case, WI was the first in time to use and register the invented mark, and the fact that YTH had used and attempted to register a visually and phonetically identical mark will only lead members of the public to wonder whether it might be the case that the two products came from the same source by reason of the use of the identical marks.

Although the Federal Court accepted that there is international goodwill and reputation that has come to attach to WI's trade and business and goods in Classes 13, 18 and 15 for its "Giordano" trademarks, there is little comment on the extent of the evidence adduced that led to the Court being so satisfied. Again, whilst it is accepted that well-known trademarks are recognised and are to be protected, the Federal Court's decision did not turn on that.

The Federal Court also took a realistic and pragmatic approach by recognising the way trade and business change with the passing of time. It acknowledged that the owner of a trademark and the goodwill and reputation of his business in the goods in connection and in relation to which his trademark is used in a distinctive manner is entitled in law to extend his product line under the same renowned trademark of his. Accordingly, the Court accepted that the business interest of WI goes beyond just apparels and clothing. It is not realistic to segregate market segments by the different types of goods sold.

Conclusion

This case is a reminder to those who seek to register a trade mark, which is identical or similar to a previously used distinctive mark that has earned its owner goodwill and reputation, that they may not be able to resist opposition by said owner if the subsequently applied for trade mark is for goods which are of such a similar nature and purpose as those for which the previously used distinctive mark has been used, so as to cause deception and confusion to the public despite the goods being in different classes. It seems that the philosophy behind section 14(1)(a) is the prevention of confusion and deception amongst consumers and is further dictated by business considerations and practices.

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[1] [2012] 6 CLJ 337.

CASE NOTE

Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri

IN THIS ARTICLE, CYNTHIA LIAN CONSIDERS THE CASE OF **KYROS INTERNATIONAL SDN BHD V KETUA PENGARAH HASIL DALAM NEGERI** ON THE ISSUE OF APPELLATE INTERFERENCE.

The recent judgment of the Court of Appeal in **Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri**[1] dealt with the issue of appellate interference on the facts found by trial courts or tribunals.

In this case, Kyros International ("KI") appealed against the decision of the High Court on the basis that the High Court judge had interfered with the finding of facts by the Special Commissioners of Income Tax ("SCIT").

Facts

KI is in the business of operating kebab fast food chains and is the registered owner of the trademark "Kyros". KI had granted sole and exclusive rights to its franchisee to establish and operate in a designated area and KI supported its franchisee in the operations by providing certain services such as auditing the operating system to ensure compliance with the standard operating procedures and giving advice to the franchisee on ways to improve operations and business development.

Decisions of the SCIT and High Court

The SCIT held that franchise fees received by KI from Pakistan, China, Indonesia, Singapore and Brunei are exempt under paragraph 28(1) of Schedule 6 to the Income Tax Act 1967 ("ITA") which states:

> *"Schedule 6: Exemption from tax*
>
> *28. (1) Income of any person, other than a resident company carrying on the business of banking, insurance or sea or air transport, for the basis year for a year of assessment derived from sources outside Malaysia and received in Malaysia."*

In this regard, the SCIT found as a fact that the foreign franchise took place outside Malaysia and held:

> *"We find as a fact the execution or operations of business by the foreign franchisees took place outside Malaysia, through the evidence of the Respondent's witness (RW1). The foreign franchisees are independent i.e. not related to the Appellant. We therefore hold that all activities in respect of the agreements entered into with the foreign entities took place outside Malaysia."*

The SCIT applied the principle enunciated in the case of **CIR v Hang Seng Ltd**[2] and held that the income is derived where the franchise was exercised.

Further, on the issue of whether the penalty imposed under section 113(2) of the ITA was correct in law, the SCIT held that the incorrect return was made in good faith and waived the penalty.

On appeal to the High Court, Ketua Pengarah Hasil Dalam Negeri ("KPHDN") succeeded on the first issue that franchise fees received by KI were not exempt under paragraph 28(1) of Schedule 6 to the ITA. KPHDN's appeal on the issue of penalty was dismissed by the High Court.

Decision of the Court of Appeal

The Court of Appeal, in allowing KI's appeal (on the franchise fee) and dismissing KPHDN's cross-appeal (on penalty under section 113(2) of the ITA), relied on the Privy Council case of **Chua Lip Kong v Director-General of Inland Revenue**[3] which succinctly held:

> *"Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; occasionally they may be insufficient to enable the High Court to decide the question of law sought to be raised by the Case Stated, but in that event it will be necessary for the Case to be remitted to the Commissioners themselves for further findings."* (emphasis added)

It is a trite principle of law that the finding of facts by a trial judge or tribunal must be given utmost respect and interference with findings of facts is only allowed in limited circumstances.

The Court of Appeal stressed the importance of appreciating the distinction between two types of facts under the Evidence Act 1950, namely physical fact which refers to "*anything, state of thing, or relations of thing capable of being perceived by the senses*" and psychological fact which refers to "*any mental condition of which any person is conscious of*".

As a general rule, the Court of Appeal held that the finding of facts by a trier of facts is rarely disturbed by appellate courts, especially findings of physical facts. Findings of physical facts will not be ordinarily disturbed if the trier of facts "*has directed his mind to the relevant issues, and had acted in accordance with the law and the decision passes the test of reasonableness.*"[4]

However, a stricter test applies when the finding of facts relates to psychological facts. In this regard, the trier of facts is required to provide further cogent reasons to ensure that every aspect of the relevant evidence has been considered in the right perspective to pass the test of reasonableness[5] and failure to give sufficient reasons in the grounds of judgment may result in appellate interference.

Where a court sits in its appellate jurisdiction interferes in the finding of facts by a trier of facts, the Court of Appeal held that there is a duty and obligation by the appellate courts to meticulously go through the relevant documents such as pleadings, witnesses' evidence, memorandum of appeal and notes of proceedings. Further, grounds of judgment must provide three things namely:

(i) the court has applied its mind to the reasons provided by the trier of facts;

(ii) the court's cognisance that the trier of facts has had the benefit of seeing and hearing the witnesses, which is a benefit not available to the appellate court; and

(iii) cogent reasons must be given for disagreeing with the trier of facts.

The Court of Appeal held that a stricter test is applied for appellate interference where the decision of the SCIT is appealed to the High Court by way of case stated. The Court of Appeal further held that the burden lies with the appellant to satisfy the court that the SCIT's decision was based on a misconception of the law or unsupported by the primary facts, and that such a conclusion on the facts and law was such that no other reasonable SCIT could have reached if they had correctly directed themselves.

It is settled law that the special position of the SCIT is generally recognised by the appellate court. In holding that the High Court can only disturb the finding of facts by the SCIT in limited circumstances, the Court of Appeal applied the principles enunciated in **Edward v Bairstow & Harrison**[6] and **Chua Lip Kong**.

It is recognised that courts exercising appellate jurisdiction have placed upon themselves various levels of self-imposed restrictions against appellate interference on the finding of facts by trial courts or tribunals, or statutory appeals by case stated and any such interference would only be exercised in limited circumstances. The Court further observed that the *"scope of appellate interference may be further restricted depending on the nature of the appeal as the jurisdiction relating to appeal, revision, review, reference etc and the jurisprudence relating to such 'heads' are not one and the same."*[7]

Applying the principles above, the Court held that the finding of facts by the SCIT did not warrant appellate interference by the High Court.

Conclusion

The decision of the Court of Appeal reiterates an important principle of law: finding of facts by a trial judge or tribunal must be given utmost respect and interference by the appellate courts may only be exercised in limited circumstances.

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[1] Civil Appeal No: B-01-16-2010.
[2] [1990] STC 733.
[3] [1982] 1 MLJ 235.
[4] Civil Appeal No: B-01-16-2010 at p 3.
[5] *Lee Ing Chin @ Lee Teck Seng & Ors v Gan Yook Chin & Anor* [2003] 2 MLJ 97.
[6] 36 TC 207.
[7] Civil Appeal No B-01-16-2010 at p 3.

CASE NOTE

Saratogoa Sdn Bhd v Pentadbir Tanah Johor Bahru

IN THIS ARTICLE, CHAI YEE HOONG LOOKS AT THE RECENT COURT OF APPEAL DECISION OF **SARATOGOA SDN BHD V PENTADBIR TANAH JOHOR BAHRU**[1] ON HOW FORFEITURE OF SARATOGOA'S LAND FOR NON-PAYMENT OF RENT ASSESSMENT SHOULD BE EFFECTED AFTER A WINDING-UP ORDER HAD BEEN MADE AGAINST SARATOGOA.

Introduction

The issue in this case was whether the Pentadbir Tanah Johor Bahru ("PTJB") could by an order of forfeiture forfeit land owned by Saratogoa Sdn Bhd ("Saratogoa") for non-payment of rent assessment after a winding-up order has been made against Saratogoa under the Companies Act 1965 ("CA").

Saratogoa's case was that relying on section 226(3) of the CA, once a winding-up order has been made against a company, its property cannot be forfeited without obtaining leave of court.

Section 226(3) of the CA states that:

> *"**226 Actions stayed on winding up order.***
>
> *xxx*
>
> *(3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except—*
>
> *(a) by leave of Court; and*
>
> *(b) in accordance with such terms as the Court imposes."*

Facts

An order for winding-up of Saratogoa was made on 12 April 2007. A private liquidator was appointed to manage the affairs of Saratogoa, but the liquidator failed to settle the amount due on the agreed terms to PTJB. PTJB gazetted Form 8A concerning notice of the forfeiture on 23 June 2010. Saratogoa filed an appeal to the High Court under section 418 of the National Land Code ("NLC") against the decision of PTJB to forfeit Saratogoa's land.

Section 418 of the NLC reads as follows:

> *"(1) Any person or body aggrieved by any decision under this Act of the State Director, the Registrar or any Land Administrator may, at any time within the period of three months beginning with the date on which it was communicated to him, appeal therefrom to the Court.*
>
> *(2) Any such appeal shall be made in accordance with the provisions of any written law for the time being in force relating to civil procedure; and the Court shall make such order thereon as it considers just.*
>
> *(3) In this section "decision" includes any act, omission, refusal, direction or order."*

In the High Court, PTJB argued that the liquidator had failed to comply with section 233(3) of the CA so when it exercised its statutory powers under the NLC, it had not intentionally breached section 226(3) of the CA.

Section 233(3) of the CA provides as follows:

> *"(3) Where an order is made under this section every liquidator of a company in relation to which the order is made shall lodge within seven days of the making of the order—*
>
> *(a) an office copy of the order with the Registrar; and*
>
> *(b) where the order relates to land, an office copy of the order with the appropriate authority concerned with the registration or recording of dealings in that land,*
>
> *and every liquidator who makes default in complying with this section shall be guilty of an offence against this Act."*

Decision of the High Court

The High Court held that Saratogoa could not invoke the purported non-compliance by PTJB of section 226(3) of the CA as a valid ground of appeal under section 418 of the NLC as the order made by PTJB was in the exercise of powers conferred by the NLC. The High Court also took into account the fact that Saratogoa itself breached its legal obligations under the CA and was therefore not in a position to ask that the order of PTJB be set aside as PTJB had proceeded to make the order without being officially notified that a liquidator had been appointed in respect of Saratogoa. The High Court therefore dismissed Saratogoa's appeal.

Decision of the Court of Appeal

Saratogoa appealed. The Court of Appeal held that forfeiture is quasi criminal in nature and the decision to forfeit will be frowned upon by the court if procedural safeguards and compliance are not adhered to in the strict sense. When forfeiture relates to landed property, constitutional safeguards must be strictly complied with.[2]

In this case, although it is not disputed that PTJB had complied with sections 97, 100 and 130 of the NLC, such compliance was not sufficient where a winding-up order had been made against Saratogoa. In such a situation, compliance with section 226(3) of the CA is necessary and failing to do so will offend the fundamental guarantee afforded in the Federal Constitution in particular Article 13(1) which provides that *"no person shall be deprived of property save in accordance with law"*.

The Court of Appeal further held that every exercise of statutory power must not only be in conformity with the express words of the statute (in this case, sections 97, 100, 130 of the NLC), but above all must comply with express and/or implied legal requirements (in the instant case, section 226(3) of the CA), and must further pass the acid test of reasonableness.[3]

The Court of Appeal revoked the order of forfeiture and allowed the appeal.

Conclusion

The Court of Appeal in this case made it clear that every exercise of statutory power must not only be in conformity with the words of the statute in which it arises, but has to comply with any other law applicable in the circumstances. So, although the PTJB had complied with the requirements of the NLC in relation to the forfeiture, the status of Saratogoa had changed by reason of the winding-up order, so in addition, section 226(3) of the CA applied and such forfeiture was ineffective without leave of court.

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2 Article 13 of the Federal Constitution; Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd [2003] 3 MLJ 1.

3 Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223; Pemungut Hasil Tanah Daerah Barat Daya, Pulau Pinang v Ong Gaik Kee [1983] 2 MLJ 35.

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