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TELECOMMUNICATIONS & TECHNOLOGY LAW

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Consumer Protection (Amendment) Bill 2010

IN THIS ARTICLE, GARY LIM HIGHLIGHTS SOME OF THE PERTINENT PROVISIONS OF THE CONSUMER PROTECTION (AMENDMENT) BILL 2010 AND THEIR POSSIBLE IMPLICATIONS ON STANDARD IT SERVICES AND TELECOMMUNICATION SERVICES CONTRACTS.

Consumer Protection (Amendment) Bill 2010

Malaysia does not have statutory provisions regulating unfair contract terms or exclusion clauses. The Malaysian Contracts Act 1950 does not contain provisions similar to the Unfair Contract Terms Act 1977 and Unfair Terms in Consumer Contracts Regulations 1999[1] of the United Kingdom.

It is not uncommon to find exclusion clauses in IT services or telecommunications services contracts in Malaysia. They are adopted by providers to exclude the burden of warranting that the goods or services supplied commensurate with the money's worth paid for it. For instance, a provision commonly found in standard IT services or telecommunication services contracts is: "*We cannot be held liable for any damages arising from the use of our product / services, howsoever caused….*". Consumers would not ordinarily consent to such a disclaimer, as they will be left with very little remedy. However, owing to their inferior bargaining positions, they are left with little choice but to accept the unfair contract terms presented to them by the providers.

To mitigate the consequences arising from the absence of adequate protection, at least insofar as consumers are concerned, the Malaysian Parliament has passed the Consumer Protection (Amendment) Bill 2010 ("the Bill"). Rather than enacting a new statute, the Malaysian Parliament had opted to amend the existing Consumer Protection Act 1999 ("the CPA"), by inserting a new Part IIIA entitled "Unfair Contract Terms". Section 1(3) of the Bill provides that the new Part IIIA applies to contracts entered into after the Bill comes into force. There is presently no indication as to when the Bill will come into force.

The Application of the Bill

Interpretation

Clause 24A provides the general interpretation in connection with the new Part IIIA. "Standard form contract" is defined to mean "a consumer contract that has been drawn up for general use in a particular industry, whether or not the contract differs from other contracts normally used in that industry". An "unfair term" on the other hand is defined to mean "a term in a consumer contract which, having regard to all the circumstances, causes a significant imbalance in the rights and obligations of the parties arising under the contract to the detriment of the consumer".

Application of the New Part IIIA

Clause 24B states that without prejudice to the provisions in the Contracts Act 1950, the Specific Relief Act 1950 and the Sale of Goods Act 1957 as well as other provisions of the law for the time being in force, the Part shall apply **to all contracts**. At this juncture, it is not apparent if the new Part IIIA really applies to all contracts, as there are some contracts or contract terms prescribed by law[2], which are not subject to negotiation.

General Procedural And Substantive Unfairness

The new Part IIIA deals with the question of unfair terms in two parts. Clause 24C deals with terms that are procedurally unfair, whereas, clause 24D deals with terms that are substantially unfair.

Clause 24C(1) provides that a contract term is procedurally unfair when:

- it results in an unjust advantage to the supplier;
- it results in an unjust disadvantage to the consumer;
- it is on account of the conduct of the supplier; or
- it is on account of the manner or circumstances that the contract is entered into between the supplier and the consumer.

Clause 24D(1) prescribes that a contract term is substantively unfair when the contract term:

(a) is in itself harsh;
(b) is oppressive;
(c) is unconscionable;
(d) excludes or restricts liability for negligence; or
(e) it excludes or restricts liability for breach of express or implied terms of the contract "without adequate justification".

Clauses 24C(2) and 24D(2) list the considerations to be taken into account by the court or a tribunal when determining when a contract term is procedurally or substantively unfair. These considerations are similar to Clause 14(4) of the Unfair Contract Terms Bill 2005 of the United Kingdom[3].

Burden of Proof

Clause 24E provides that it is for the supplier to prove that there is adequate justification for the contract term.

Power to Raise Issues of Unfairness

Clause 24F provides that a court or the Tribunal established by the CPA may deal with any issue of any unfair contract term even if none of the parties has raised the matter.

Effect of Unfair Terms

Clause 24G(1) prescribes that a court or the Tribunal may declare an unfair contract term under clauses 24C and 24D to be void and clause 24G(2) provides that other clauses of the contract affected are to continue in force without the offending term.

Offences

Clause 24I makes the contravention of any provisions of the new Part IIIA by "any person" an offence. This clause is silent however on how exactly the new Part IIIA is contravened. Does it mean the inclusion of any unfair contract term by a supplier is an offence? This is not clearly spelt out. It is to be noted that high penalties are involved. In the case of a body corporate, there will be a fine of up to RM250,000 for a first offence and a fine of up to RM500,000 for a subsequent offence, as well as RM2,000 for each day on which the offence continues.

In the case of a non body corporate, there will be a fine of up to RM100,000 or imprisonment for a term not exceeding three years or both, for a first offence and a fine of up to RM250,000 or imprisonment for a term not exceeding six years or both for a subsequent offence, as well as RM2,000 for each day on which the offence continues.

Implications

The proposed new Part IIIA fails to make clear what type of contracts are covered. Instead the intent seems to extend its application **to all contracts**. It also fails to address the issue of whether it applies to contracts concluded outside Malaysia or whether it applies to a contract that adopts foreign law but is concluded in Malaysia. The exact nature of the offence is not specified in the Bill.

Notwithstanding the above, in view of the very heavy penalties imposed on offenders the suppliers of products and services who are utilising standard terms contracts, which incorporates unfair terms or exclusion clauses, are well advised to review such contracts with care to ensure that they are at least procedurally and substantively fair so as to avoid possible liability under the Bill when it comes into force.

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[1] http://www.lawcom.gov.uk/unfair_terms.htm
[2] for instance those contained in the Schedules to the Housing Development (Control and Licensing) Regulations 1989 and financial or securities contracts.
[3] http://www.lawcom.gov.uk/docs/lc292bill.pdf

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EMPLOYMENT LAW

In-House Unions : A Single Union For Each Company Or For Each Group Of Companies

In this article, Reena Enbasegaram considers the impact of the High Court's decision on the meaning of "establishment" in the definition of trade union under the Trade Unions Act 1959 ("TUA").

Introduction

In a decision[1] widely reported[2] in both the print and on-line media, the Kuala Lumpur High Court on 15 July 2010 reaffirmed that the meaning of "establishment" in the definition of trade union under the TUA was limited to a single legal entity.

The issue before the Court was whether the in-house union of a holding company was empowered to represent the employees of its subsidiaries on the basis that there was single unity of purpose within a group of companies.

The Applicant in the matter was the British American Tobacco (Malaysia) Berhad Employees Union ("BATEU") and the four Respondents were the Director General of Trade Unions ("DGTU"), the British American Tobacco (Malaysia) Berhad ("BAT"), Tobacco Importers & Manufacturers Sdn Bhd ("TIM") and Commercial Marketing & Distributors Sdn Bhd ("CMD").

Background of the case

BATEU is a trade union of workmen registered in 1964 under the TUA and had acted as a collective bargaining body for BAT and its two wholly-owned subsidiaries, TIM (the manufacturing arm) and CMD (the marketing and distribution arm). BAT provides the administration and management services.

The DGTU in a decision dated 29 October 2007 ruled that BATEU's scope of representation was limited to BAT and could not extend to its subsidiaries. The decision stated that BATEU's scope of membership was inconsistent with the definition of a trade union under sections 2(1)[3] and 26(1A)[4] of TUA, wherein a trade union could only represent employees employed by a particular establishment.

Upon obtaining leave from the High Court, BATEU then filed an application to commence judicial review proceedings against the Respondents on the grounds that the DGTU had committed an error of law in handing down its impugned decision.

The definition[5] of trade union under the TUA refers to, amongst others, any combination of workmen within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries. It should be noted that "establishment" is the sole word that is expressly stated in the singular *vis-à-vis* the other words in that definition.

The paramount issue before the High Court was whether the DGTU had correctly interpreted the meaning of establishment within the definition of trade union under TUA in ruling that BATEU was limited to only representing the employees of BAT.

In order to resolve that issue, the High Court was urged to study the intention of Parliament in amending the TUA in 1989 to incorporate the word, "establishment" (the "1989 Amendment") in determining whether the DGTU's decision had the effect of weakening unionism in defiance of the intent of Parliament or otherwise.

The Intention of Parliament

The introduction of the 1989 Amendment had come about in order to rectify the situation at that material time wherein an in-house union could not be registered in the event there existed a national union.

Parliament in the debate leading to the 1989 Amendment made it clear that its intention for the introduction of the 1989 Amendment, was to encourage trade unionism. The 1989 Amendment paved the way for the legitimising of in-house unions in spite of the existence of national unions.

Both parties, in their respective arguments before the High Court, took the common stand that the intention of Parliament, in introducing the word "establishment", was not to limit the scope of employees entitled to become union members.

Parties' Argument

BATEU argued that the DGTU's decision had the effect of weakening it as an in-house union which went against the intention of Parliament in introducing the 1989 Amendment. By ruling that it could no longer represent the employees of TIM and CMD, the DGTU was in effect limiting the scope of the BATEU contrary to the intention of Parliament to protect and strengthen in-house unions. BATEU also highlighted the fact that BAT, TIM and CMD acted as a single business unit.

The DGTU's argument centred on the fact that the aforesaid companies are recognised in law as separate legal entities and unity of business notwithstanding, all the three companies were involved in different aspects of the business. At the end of the day, all three companies are separate establishments for purposes of the TUA.

Apart from reiterating the DGTU's stand above and clarifying that the circumstances did not justify the lifting of the corporate veil, BAT, TIM and CMD also took the position that as the DGTU's decision confirmed the entitlement of the employees of TIM and CMD to set up their respective in-house unions, BATEU's application in effect sought to rob them of the right accorded upon them by statute and reinforced by case-law[6] including a decision of the Court of Appeal[7].

BAT, TIM and CMD's collective argument was further premised on the point that BATEU's interpretation of the word "establishment" sought to shackle the prerogative of the employees to set up unions to represent their individual interests and in reality, it was BATEU's interpretation which went against the spirit behind the amendment to TUA.

Although they were barred from being represented by BATEU, the employees of TIM and CMD were not only entitled to set up their respective in-house unions, they were also at liberty to join the National Union of Tobacco Workers ("NUTW"). At no time did the DGTU's decision prevent union representation nor did it have the effect of crippling or incapacitating the activities of BATEU.

Notwithstanding the fact that BAT, TIM and CMD had previously accorded recognition to BATEU, and that collective agreements had been given cognizance in the past, the foregoing did not prevent BAT from subsequently applying to the DGTU to determine the competency of BATEU to represent employees of TIM and CMD. The DGTU was accordingly empowered[8] to determine the issue and consequently declare that the employees of TIM and CMD no longer came under BATEU's scope of representation.

The Court's Decision

The High Court opined that the intention of Parliament in relation to the 1989 Amendments was to legitimise the setting up of in-house unions despite the existence of a national union. The High Court held that the DGTU's decision conferred the entitlement on the employees of the TIM and CMD to set up their own respective in-house unions and accordingly did not amount to an error of law.

Conclusion

The High Court's ruling[9] confirms that in-house unions which currently act for a group of companies are not entitled to do so. It would be up to the relevant companies to make the necessary application to the DGTU to take the appropriate steps to set up their own in-house unions.

Although it would be inevitable that the affected in-house unions would argue that any such ruling by the DGTU would result in an attempt to fetter the formation of in-house unions and consequently trample on the rights of the employees concerned, the simple conclusion is that the relevant employees would then have the choice to either join the national union related to their specific industry or set up in-house unions for their respective employer companies.

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1 R2-25-337-2007

2 Print :
- In-house unions allowed rules court – The Star 16 July 2010
- Employees of subsidiaries allow to set Internal Trade Unions, British American Tobacco lost – Sin Chew Daily 16 July 2010
- Court dismisses judicial review – The Sun 16 July 2010

Online :
- Kesatuan Pekerja British American Tobacco tidak boleh wakili pekerja subsidiari – Sinar Harian – 16 July 2010
- Kesatuan Pekerja British American Tobacco tidak boleh wakili pekerja subsidiary – Bernama – 15 July 2010 – 6.00 p.m.
- British American Tobacco Union cannot represent subsidiary employees – Yahoo News – 16 July 2010

Radio :
BFM89.9 – 3.00 p.m. 15 July 2010, Length - 12secs

3 "In this Act, unless the context otherwise requires or it is otherwise expressly provided- "employer" means any person or body of persons, whether corporate or unincorporate, who employs a workman, and includes the Government and any statutory authority. "establishment" means any place of business or employment belonging to an employer and includes any division or branch thereof. "trade union" or "union" means any association or combination of workmen or employers, being workmen whose place of work is in West Malaysia, Sabah or Sarawak as the case may be, or employers employing workmen in West Malaysia, Sabah or Sarawak, as the case may be- (a) within any particular establishment, trade, occupation or industry or within any similar trades, occupations or industries:"

4 "No person shall join, or be a member of, or be accepted or retained as a member by, any trade union if he is not employed or engaged in any establishment, trade, occupation or industry in respect of which the trade union is registered".

5 s2(1)[i] of TUA

6 Perusahaan Otomobil Kedua Sdn. Bhd. v Ketua Pengarah Kesatuan Sekerja & Anor [2000] 5 CLJ 351, Harris Advanced Technology (M) Sdn Bhd v Ketua Pengarah Kesatuan Sekerja & Anor [1999] 7 CLJ 153, Kesatuan Pekerja-Pekerja Perbadanan Perkapalan Antarabangsa Malaysia Berhad (MISC) Semenanjung Malaysia v Perbadanan Perkapalan Antarabangsa Malaysia Berhad (MISC) [2007] 3 ILR 686

7 Harris Solid State (M) Sdn. Bhd. & Ors. v. Bruno Gentil Pereira & Ors. [1996] 4 CLJ 747

8 s4A TUA 1959

9 BATEU has since filed an appeal to the Court of Appeal.

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Revised Guidelines on Foreign Participation in Distributive Trade Services in Malaysia

In this article, Nicholas Tan looks at some of the key provisions in the "Guidelines on Foreign Participation in the Distributive Trade Services Malaysia" issued by the Ministry of Domestic Trade, Co-operatives and Consumerism on 15 May 2010.

Introduction

In 2004, the Ministry of Domestic Trade and Consumer Affairs ("MDTCA") which is now known as the Ministry of Domestic Trade, Co-operatives, and Consumerism ("MDTCC") had issued a set of guidelines known as the "Guidelines on Foreign Participation in the Distributive Trade Services Malaysia" ("2004 Guidelines") to regulate foreign participation in the distributive trade services in Malaysia.

In line with the Malaysian Government's proposal to promote domestic economic development and the implementation of various liberalization measures, the 2004 Guidelines were revised by the MDTCC and the revised guidelines were issued and made available to the public[1] on 15 May 2010 ("2010 Guidelines").

2010 Guidelines

The 2010 Guidelines took effect retrospectively from 1 January 2010. The 2010 Guidelines are intended to, amongst others, ensure an orderly and fair development of the distributive trade industry while ensuring growth of local businesses.

The 2010 Guidelines require all proposals for foreign participation in distributive trade to be approved by the MDTCC.

Under the 2010 Guidelines, "foreign participation" means

"any interest, associated group of interests or parties acting in concert which comprises:
i) individual who is not a Malaysian citizen including Permanent Resident; or
ii) foreign company or institutions; or
iii) local company or local institution whereby the parties as stated in item (i) and/or (ii) hold more than 50% of the voting rights in the company or institution."

The term "distributive trade" is defined as comprising all linkage activities that channel goods and services down the supply chain to intermediaries for resale or to final buyers. The linkages may be, amongst others, direct or indirect between two parties (or levels) or more than two parties (or levels) within the chain.

Generally, distributive trade covers wholesalers, retailers, franchise practitioners, direct sellers, suppliers who channel goods in the domestic market, and commission agents or other representatives including those of international trading companies.

Thus the term "distributive trade" as used under the 2010 Guidelines covers a wide range of activities relating to distribution of goods and services. Having said that, it is crucial to note that the 2010 Guidelines expressly exclude, and therefore are not applicable to:

(a) manufacturing companies; and
(b) companies which have been granted the status of regional establishments (including International Procurement Centres[2] and Operational Headquarters[3]) by the Malaysian Industrial Development Authority.

The 2010 Guidelines further provide that foreign involvement is not allowed in certain sectors and these include owning a:

(a) supermarket or mini market (less than 3,000 square meters sales floor area);
(b) provision shop;
(c) convenience store that open for business for 24 hours;
(d) news agent and miscellaneous goods store; and
(e) medical hall (inclined towards traditional or alternative medicine plus general dry foodstuff).

The categories excluded from foreign involvement are not meant to be exhaustive as new excluded categories may be introduced by the MDTCC.

Conditions

Under the 2004 Guidelines, the MDTCC imposed a general condition that a locally incorporated company involved in distributive trade must have at least 30% Bumiputera[4] shareholding ("Shareholding Requirement").

Under the 2010 Guidelines the Shareholding Requirement has been relaxed to a certain extent. Currently, only proposals for the setting up of hypermarkets in Malaysia that involve foreign participation are required to comply with the Shareholding Requirement. If this Shareholding Requirement is not met at the time of application, a grace period of three years for compliance may be given depending on the merits of each case and any extension thereafter is at the discretion of the MDTCC.

In addition to the Shareholding Requirement, it is expressly provided under the 2010 Guidelines that all distributive trade companies with foreign participation shall, amongst others,

appoint Bumiputera director(s);

hire personnel at all levels including management to reflect the racial composition of the Malaysian population;

hire at least 1% of the total hypermarket workforce from persons with disabilities; and

submit annual financial reports to the MDTCC.

All applicants must be companies incorporated under the Companies Act 1965. This would mean that an entity in any other form (such as a branch office) would not qualify to apply for MDTCC's approval.

There are also other requirements imposed by the 2010 Guidelines if the company is a hypermarket, departmental store, superstore or specialty store. For example, the respective minimum capital requirements for such companies are as set out below: -

Types of trade	*Minimum capital requirement*
Hypermarket[5]	RM50 million
Departmental store[6]	RM20 million
Superstore[7]	RM25 million
Specialty outlet[8]	RM1 million
Various other distribution formats[9]	RM1 million

Provision of Services

A residual question that arises is whether a company with foreign participation that is purely a service provider and does not distribute or supply goods ("Unregulated Services") is required to obtain the MDTCC's approval prior to commencement of any business. There is no express provision in the 2010 Guidelines stating that the scope of the 2010 Guidelines are equally applicable to companies with foreign participation that are carrying out Unregulated Services.

To date, no separate or revised guideline has been issued to regulate the Unregulated Services.

Conclusion

In conclusion, the relaxation of the Shareholding Requirement under the 2010 Guidelines will certainly be welcomed by industry players as it allows companies involved in the distributive trade, particularly those with foreign promoters, to increase their foreign equity participation.

In addition, the relaxation will certainly serve as an incentive to foreign companies (which may have thus far held back from investing in Malaysia due to the Shareholding Requirement) to enter the Malaysian market.

However, it is unclear whether companies that merely provide Unregulated Services are bound by the 2010 Guidelines.

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[1] The 2010 Guidelines can be downloaded from the official website of MDTCC at www.kpdnkk.gov.my.

[2] An international procurement centre (IPC) is a locally incorporated company, which carries on a business in Malaysia to undertake procurement and sale of raw materials, components and finished products for its group of related companies and unrelated companies in Malaysia and abroad.

[3] Operational Headquarters refers to a locally incorporated company which carries on a business in Malaysia, providing Qualifying Services to its offices or to its related companies outside Malaysia.

[4] Bumiputera is a Malay term widely used in Malaysia, embracing indigenous people of the Malay Archipelago. The term comes from the Sanskrit word *bhumiputra*, which can be translated literally as "son of land".

[5] A hypermarket means "a standalone self-service distribution store with sales floor area of 5,000 square meters or more, selling a very wide variety of mainly consumer goods, comprising a mix food and non-food products, in a range of transaction sizes or quantities and in different forms of packaging."

[6] A departmental store means "a distribution store with sales floor area of varying sizes, usually engaged in retailing an extensive assortment of consumer goods that are departmentalized by gender, age or lifestyle, through self-service or with sales assistance, generally under one common store management." It may include a supermarket of not more than 2,000 square meters

[7] A superstore means "a self-service distribution store with sales floor area of 3,000 square meters to less than 4,999 meters retailing a very wide variety of mainly consumer goods, comprising a mix of food and non-food products."

[8] A specialty outlet means "store dealing with one main brand name / product/ line of goods associated with one product." They may specialize in, amongst others, food catering and restaurant services outside hotel premises, household appliances, electrical appliances, healthcare products, footwear, books, jewellery and others.

[9] This includes other types of businesses not specified which will be considered on the merits of each case with particular reference to their contribution to the socio-economic development of Malaysia.

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REAL ESTATE

The Principle of Deferred Indefeasibility

IN THIS ARTICLE, AMELIA KOO DISCUSSES THE REINSTATEMENT OF THE PRINCIPLE OF DEFERRED INDEFEASIBILITY.

Background

Under Malaysian law, registration of ownership of land gives the registered owner indefeasible title. This is enshrined in section 340(1) of the National Land Code 1965 ("NLC") which states "*the title or interest of any person or body for the time being registered as proprietor of any land, or in whose name any lease charge or easement is for the time being registered, shall, subject to the provisions of this section, be indefeasible*".

The exceptions to section 340(1) of the NLC are set out in section 340(2) of the NLC. These cover situations where the title or interest is acquired by or through:

(a) fraud or misrepresentation;
(b) forgery or by means of an insufficient or void instrument; or
(c) unlawful means in the purported exercise of any power or authority by any written law.

If the title or interest is acquired in any of the situations set out in section 340(2), section 340(3) of the NLC provides that such transfer shall be liable to be set aside and any interest subsequently granted shall be similarly liable to be set aside provided that nothing shall affect any title or interest acquired by any purchaser in good faith and for valuable consideration, or by any person or body claiming through or under such a purchaser.

It is to be noted that a purchaser is defined in the NLC as a person or body who in good faith and for valuable consideration acquires title to, or any interest in land and includes a bank in its capacity as a chargee.

Principle of Deferred Indefeasibility

In the context of section 340 of the NLC, it is necessary to explain the principle of deferred indefeasibility. If the acquisition of the land by, say, purchaser A is through any of the means as set out in section 340(2) of NLC, the acquisition by purchaser A may be set aside at the instance of the original owner of the land who is the victim of fraud or forgery. However, if purchaser A after acquiring the land sells the land to a *bona fide* purchaser B and for valuable consideration, purchaser B retains good title or interest in the land. This is known as "deferred indefeasibility" and under this principle, purchaser A as the immediate purchaser does not acquire good title or interest in the land if he acquires through fraud, forgery or through an invalid instrument. However, if purchaser B has acquired title or interest in the land from purchaser A, then the original owner of the land cannot set aside the transfer.

The Federal Court in the cases of **Adorna Properties Sdn Bhd v Boonsom Boonyanit @ Sun Yok Eng**[1] ("Adorna Properties") and **Tan Ying Hong v Tan Sian San & 2 ors**[2] ("Tan Ying Hong") came to two very different decisions on the interpretation of section 340(3) of the NLC.

Adorna Properties

In **Adorna Properties** it was decided that the protection of a *bona fide* purchaser extends to instances where title or interest is acquired through any means excepted by section 340(2) of the NLC notwithstanding the principle of deferred indefeasibility.

In **Adorna Properties**, Boonsom Boonyanit was the registered proprietor of two parcels of land in Penang. She alleged that her signature had been forged on the instrument to transfer such lands in favour of Adorna Properties Sdn Bhd. Adorna Properties Sdn Bhd had no knowledge or reason to suspect that the transfer was forged. The Federal Court held that by virtue of the proviso of section 340(3) of the NLC, a purchaser in good faith and for valuable consideration is excluded from the application of the substantive provision of section 340(3) resulting in immediate indefeasible title as opposed to deferred indefeasibility. Thus, Adorna Properties Sdn Bhd obtained an indefeasible title to Boonsom Boonyanit's land.

The decision of **Adorna Properties** on the application of the proviso in section 340(3) of the NLC has recently been corrected by the decision in **Tan Ying Hong** after nine years and the principle of deferred indefeasibility reinstated. The decision in the latter case held that the title or interest acquired by an immediate purchaser through or by unlawful means could be set aside and the indefeasible title should remain with the original owner. The *bona fide* purchaser is only entitled to indefeasible title if he acquires the land from the immediate purchaser and not from the fraudster.

Tan Ying Hong

In **Tan Ying Hong**, Tan Ying Hong was the registered proprietor of a parcel of land situated in Pahang, which was charged to United Malayan Banking Corporation ("UMBC") to secure a loan granted to Cini Timber Industries Sdn Bhd ("Second Respondent"). Tan Sian San had, as attorney for Tan Ying Hong under a power of attorney, executed two charges in favour of UMBC as security for the loan granted to the Second Respondent. Tan Ying Hong was not aware of the charges until he received a notice of demand from UMBC. Tan Ying Hong claimed that he had not granted any power of attorney in favour of Tan Sian San and alleged that his signature had been forged and hence, the charge instruments executed in favour of the UMBC were void. The Federal Court held that it was not in dispute that the two charges registered in favour of UMBC were on void instruments as they were not executed by Tan Ying Hong. It therefore followed that the two charges in this case should be set aside under section 340(2) since they were void instruments. As UMBC was an immediate holder of these charges it could not take advantage of the proviso to section 340(3) of the NLC. The fact that UMBC acquired the interest in question in good faith for value was not in issue because the charges arose from void instruments. It automatically followed that such charges should be set aside at the instance of the registered proprietor.

It is also interesting to note Chief Justice Tun Zaki Azmi's comment in the case of **Tan Ying Hong** that *"Section 340(1) of the NLC confers an immediate indefeasible title or interest in land upon registration, subject to the exceptions set out in Section 340(2) and 340(3). According to the case of Adorna Properties, Adorna Properties Sdn Bhd had acquired its title to the land through or under a forged instrument and it therefore came under the category of Section 340(2)(b). The court then held that such a title was insulated from impeachment by the proviso in Section 340(3) of the NLC. The question which arose was whether the proviso immediately after Section 340(3) applied to other provisions of Section 340, in particular, to Section 340(2)(b). This could only be deduced from the proviso itself. From the authorities it was clear that a proviso to a subsection would not apply to another subsection and that a proviso carved out an exception to the provision immediately preceding the proviso and to no other. As such, the proviso immediately after Section 340(3) of the NLC directed towards Section 340(3) alone and not the earlier subsection. This is supported by the use of the words "in this subsection" in the proviso. Therefore its application could not be projected into the sphere or ambit of any other provisions of Section 340"*.

Conclusion
It is certainly a relief to landowners that the case of **Tan Ying Hong** has reinstated the principle of deferred indefeasibility and that registered owners who are victims of land transfer fraud may rely on the decision of **Tan Ying Hong** to commence an action to set aside the interest or title acquired by means of fraud, forgery or through an invalid instrument.

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[1] [2001] 1 MLJ 241
[2] [2010] 2 MLJ 1

CASE NOTE

Kerajaan Malaysia v Ekran Berhad[1]

IN THIS ARTICLE, IRENE YONG EXAMINES THE RECENT HIGH COURT DECISION IN KERAJAAN MALAYSIA V EKRAN BERHAD IN RELATION TO WHEN A STAY OF PROCEEDINGS SHOULD BE GRANTED FOR RECOVERY OF TAX ASSESSED.

Facts
The Inland Revenue Board had raised an assessment for the year of assessment 1997 ("disputed assessment") seeking to tax Ekran Berhad ("EB") in the amount of RM25,036,323.98 ("tax amount"). As EB did not pay the tax amount, the Government of Malaysia ("GOM") instituted a civil suit for the recovery of the tax amount.

Although EB opposed the suit on the grounds that the disputed assessment was erroneous, summary judgment was granted to the GOM to recover the tax amount.

EB then counterclaimed for a declaration that gains on capital account were not subject to income tax and also lodged an appeal ("tax appeal") to the Special Commissioners of Income Tax ("SCIT") on the grounds that the disputed assessment was erroneous.

The tax appeal was allowed by the SCIT. However, upon appeal to the High Court by the GOM, the decision of the SCIT was overturned and judgment was given by the High Court in favour of the GOM. Dissatisfied with the High Court's decision, EB further appealed to the Court of Appeal against the High Court's decision.

As the taxpayer had succeeded in the first instance before the SCIT, the GOM applied for and was granted a stay of proceedings pending disposal of its appeal by the High Court.

After the High Court's decision was delivered in favour of the GOM, it was the taxpayer who then sought a stay of the proceedings pending disposal of its further appeal to the Court of Appeal.

Issue
The issue for the High Court's determination was whether the stay of proceedings sought by the taxpayer should be granted in the instant case.

The Law
The relevant legislative provisions of the Income Tax Act 1967 ("ITA") at the material time provided as follows:

"Section 103. Payment of tax.

(1) Subject to this section, tax payable under an assessment or a composite assessment shall on

the service of the notice of assessment or composite assessment on the person assessed, other than a company to which section 103A applies, be due and payable at the place specified in the notice whether or not that person appeals against the assessment.

Section 106. Recovery by suit.

(1) Tax due and payable may be recovered by the Government by civil proceedings as a debt due to the Government. …
(3) In any proceedings under this section the court shall not entertain any plea that the amount of tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increased … "

Decision

The High Court held that it was trite law that *special circumstances* must be shown in order for an application for a stay of proceedings to succeed, in the same way that it applies to an application for a stay of execution. Accordingly, the High Court applied the same test as was applied by the High Court to grant a stay in the following cases.

In **Kerajaan Malaysia v Jasanusa Sdn Bhd**[2] and **The Government of Malaysia v Datuk Haji Kadir Mohamad Mastan and another case**[3], the Supreme Court and the High Court respectively granted the stay of execution sought by the respective taxpayers.

The Courts further held that sections 103(1) and 106(3) of the ITA do not bar a Court, in appropriate circumstances, from exercising its inherent powers in granting a stay, even in a tax case, as the ITA does not have any provision curtailing or restricting the inherent jurisdiction of the Court to stay an execution.

In the light of the legislative provisions set out above, in particular section 106(3), a taxpayer cannot rely on grounds that the amount of tax sought to be recovered by way of the disputed assessment was excessive, incorrectly assessed, under appeal and the like to defend against tax recovery suits instituted by the GOM.

Notwithstanding the foregoing, the High Court held that it was not precluded from granting a stay of proceedings under its inherent jurisdiction and power to grant a stay.

The High Court held that the facts of the instant case constituted special circumstances for the grant of a stay as, amongst other things:

(a) the GOM itself had applied and succeeded in obtaining a stay of proceedings; and
(b) it would be unfair and unjust for the taxpayer to pay the substantial amount of taxes as they had succeeded before the SCIT in the tax appeal.

The High Court also took cognizance of the fact that the findings of, and the inferences drawn by, the SCIT were binding on appellate courts and not subject to review by the appellate courts, as was held by the Court of Appeal in **Aspac Lubricants (M) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri**[4].

Conclusion

Ekran confirms that the strict provisions of section 103 and 106 are not cast in stone. The power lies in the High Court by way of its inherent jurisdiction to achieve a fair and just outcome.

The following passage from **Jasanusa** neatly summarises the object and purpose of sections 103 and 106 of the ITA, at page 112 of the report:

> "*Matters of this nature involve, inter alia, balancing the need of the Government to realise taxes and the need of the taxpayer to be protected against arbitrary or incorrect assessments. The Court should be ever vigilant against taxpayers who may use the procedure of the Court, like applying for a stay of execution, to defer or postpone payment of his just dues or to abscond by migration or to dissipate the assets to defeat the judgment. <u>The Court should also bear in mind the possibility of arbitrary or incorrect assessments, brought about by fallible officers who have to fulfil the collection of a certain publicly declared targeted amount of taxes and whose assessments, as a result, may be influenced by the target to be achieved rather than the correctness of the assessment</u>.*" [emphasis added]

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[1] Suit No. 22-84-2003 III(II). Unreported decision of the High Court.
[2] [1995] 2 MLJ 105
[3] [1993] 4 CLJ 98
[4] [2007] 6 MLJ 65

CASE NOTE

Dato See Teow Chuan v Ooi Woon Chee[1]

IN THIS ARTICLE, K SHANTI MOGAN ANALYSES THE RECENT COURT OF APPEAL DECISION IN DATO SEE TEOW CHUAN V OOI WOON CHEE IN RELATION TO THE ISSUE OF CONFLICT OF INTEREST.

In the Recent Court of Appeal decision in the case of **Dato See Teow Chuan and 12 others v Ooi Woon Chee and 15 others** the Court of Appeal explored the conflict of interest position in respect of liquidators' awarding a bid for the purchase of Kian Joo Can Factory Berhad ("KJCFB") shares to Can One International Sdn Bhd ("Can-One International"), a client of the firm in which the liquidators were partners.

In **Dato See Teow Chuan**, a petition to wind-up KJCFB, was granted. Ooi Woon Chee and Ng Kim Tuck, both partners from KPMG Peat Marwick, were appointed as the liquidators of KJCFB. KPMG Corporate Services Sdn Bhd ("KCSSB") and KPMG Peat Marwick were the corporate vehicles/entities used by the liquidators to carry out their obligations and duties as liquidators of KJCFB. KPMG Peat Marwick are also auditors of Can-One International.

The liquidators decided to sell the KJCFB shares by way of an open public tender. Invitations for tender were solicited and various parties responded, including Gold Pomelo and Can-One International. The liquidators accepted the offer of Can-One International to purchase the KJCFB shares and a conditional share sale agreement was prepared. Before the agreement was completed, an informal meeting of the contributories was held. Those present voted against the completion of the sale of the KJCFB shares to Can-One International and raised various allegations against the liquidators in respect of breaches of fiduciary duties, conflict of interests and fraud in relation to the tender process for the sale of the KJCFB shares.

This resulted in various motions being filed with the High Court and subsequently the Court of Appeal having to consider, amongst others, if the liquidators were in fact in a conflict of interest position in their conduct of the sale of KJCFB shares to Can-One International.

The Court of Appeal felt these facts gave rise to the possibility of a conflict of interest which had to be addressed.

The Court of Appeal held that the danger of conflict was made more imminent by the fact that KPMG Peat Marwick were the reporting accountants for Can-One International's parent company, Can-One Berhad, in respect of its public listing exercise. KPMG Peat Marwick also received and was still receiving financial remuneration from Can-One International and its parent company, Can-One Berhad, in respect of the auditing and/or accounting services rendered by KPMG Peat Marwick. The Court of Appeal held that the liquidators as partners of the firm received pecuniary benefit from Can-One International and Can-One Berhad by virtue of them being clients of KPMG Peat Marwick

In relation to the issue of conflict of interest, the Court of Appeal held that once it is shown that there is any pecuniary relationship between the liquidators and their firm KPMG Peat Marwick with Can-One International and Can-One Berhad, there is an automatic disqualification in law and the liquidators are disqualified from considering and awarding the bid to "their client and paymaster". It was also held that it makes no difference whether the financial remuneration is small or nominal.

In so finding, the Court of Appeal disagreed with the High Court that there was no conflict of interest. The High Court took the position the liquidators were not acting at the same time for the majority contributories as well as Can-One "in the opposite interest". The liquidators were at all times acting for the company and at best they were only in a quasi-trustee position in relation to the contributories. Furthermore, there was no nexus between the audit work done by KPMG Peat Marwick for Can-One International and the 2008 open public tender process for the sale of the KJCFB shares. Finally, the High Court felt the fact that the liquidators procured the highest possible price for the KJCFB shares put paid to the possibility of the liquidators being in a conflict of interest position.

The Court of Appeal however felt the crucial question was whether the liquidators had placed themselves in a position of conflict of interest and/or had acted where there was a conflict of interest in receiving, evaluating and accepting the purported offers by Can-One International in the public tender process when Can-One International and its parent company Can-One Berhad were the clients and paymasters of the liquidators. The Court of Appeal answered this question in the affirmative, throwing wide open the boundaries of what amounts to a conflict of interest. In so holding, the Court of Appeal cited the case of **Prince Jefri Bolkiah v KPMG (A Firm)**[2], in which Lord Millet states that "…a fiduciary cannot act at the same time both for and against the same client, and his firm is in no better position. A man cannot without the consent of both clients act for one client while his partner is acting for another in the opposite interest. His disqualification has nothing to do with the confidentiality of client information. It is based on the inescapable conflict of interest which is inherent in the situation."

The Court of Appeal held the passage reproduced above creates an automatic conflict of interest situation where the liquidators were partners in the firm carrying out auditing work for the successful bidder Can-One International.

Extrapolating from that case, the Court of Appeal held that even if the liquidators as partners of KPMG Peat Marwick were not directly involved in auditing work for Can-One International and its parent company Can-One Berhad, the very fact that the their fellow partners were so involved, automatically created a conflict of interest situation and, consequently, the consent of both clients must be obtained.

In so holding, the Court of Appeal rejected the principle derived from the case of **Cobrico Developments Inc v Trucker Industries Inc and Trucker Enterprise Corp.**[3] that no conflict of interest arose when the receiver/manager appointed a particular auction house to dispose of the debtor's estate. There the receiver/manager provided accounting and audit services to the auction house constituting a real or apparent conflict of interest on the part of the receiver/manager. The Court in **Cobrico Developments** analysed the conflict of interest position in the following manner:

> "43. *With respect to the alleged conflict of interest, the commercial reality of receiverships is that trustees in bankruptcy, who will act as receivers, receiver / managers, monitors, trustees or as privately appointed receivers, are often affiliated with chartered accountancy practices which engage in accounting, audit, consulting, tax planning and a variety of other functions. Trustees in bankruptcy are regulated professionals who in the course of the realization on assets may be employing the services of experts, or who may be selling assets to persons, any of whom may have affiliation with the receiver.*
>
> 44. *However, generally that does not constitute a conflict of interest, nor generally does the marketplace of potential advisers or of potential purchasers have any legal standing to interfere with the performance of the receiver. That standing is generally reserved by law to those persons whose indebtedness is being protected by the receivership.*"

The Court of Appeal in the present case did not feel inclined to adopt the rationale in **Cobrico Developments**. The Court of Appeal felt the liquidators had themselves to blame for placing themselves in a position of possible conflict of interest where their confidence, trust and loyalty to Can-One International and Can-One Berhad, from whom they have received and continue to receive pecuniary benefits, could conflict with their duties as officers of the court and/or their duties owed to the appellants, as contributories. Because of the possible conflict of interest of the liquidators, and their failure to fully disclose the conflict of interest to the contributories, the Court of Appeal looked at the question of whether the entire public tender process for the sale of the KJCFB shares and the subsequent award of the bid to Can-One International were tainted and infected with the conflict of interest element, rendering the award biased, illegal, null and void.

The Court of Appeal held that the law requires that parties to be mindful of conflicts of interest arising, bearing in mind that it is difficult to determine whether a genuine conflict of interest has occurred. The remoteness of the possibility of a genuine conflict of interest is not a relevant consideration to determine the liability of a fiduciary. For example, where there exists a duty of disclosure on the fiduciary, the fiduciary must disclose this personal interest as soon as a possible conflict arises, or as soon after as is practicable. In this present case, the Court of Appeal held there was not just potential conflict of interest but also actual conflict of interest where there was a direct pecuniary relationship between the liquidators and Can-One International, the successful bidder. In so holding, the Court of Appeal amongst others, set aside the order allowing the sale to Can One International to proceed and gave leave to the contributories to proceed with legal action against the liquidators.

The decision of the Court of Appeal has far reaching ramifications as it implies that actual conflict of interest exists in a situation where partners in a professional firm award a contract to a party which is a client of the firm even though those partners have no involvement with that client and that the contract is awarded pursuant to an open public tender where the contract is awarded to the highest bidder.

The effect of the decision on professional practices such as accountants and lawyers remains to be seen.

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[1] [2010] 1 LNS 594
[2] [1999] 2 AC 222
[3] [2000] ABQB 766