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Newsletter

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INTELLECTUAL PROPERTY

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Has the "Sun-risen" in Malaysia?

IN THIS ARTICLE CAMILLA ANASTASIA ALIM AND SHARON CHIEN SEE YIM DISCUSS SOME CONCERNS IN RELATION TO THE IMPENDING LAUNCH OF THE .XXX DOMAINS DEDICATED TO THE ONLINE ADULT ENTERTAINMENT INDUSTRY.

Introduction

The dot com era has progressed by leaps and bounds since its introduction in the 80s. Brand owners have used cyber space as an extension to conventional marketing and promotional activities while others have used it as a launch pad for new products and services. Internet users continue to surf the multitude of dot coms for various reasons such as shopping, education, blogging, social networking and so on. The cyber world is an ageless realm, which serves the young, the old and the in-between.

There are things on any topic freely available online for everyone ,and, one of the more "riveting" contents is that of the "adult sites". With that in mind, the ICM Registry[1] will soon be launching the .xxx domains (also known as "dot triple-x"). This is a new top-level domain name ("TLD") dedicated to the online adult entertainment industry. Described as a "sponsored TLD", .xxx will solely serve the adult entertainment industry.

The .xxx domain names will enable the online adult entertainment industry to reach their global audiences using an easy to remember and directly relevant domain name ".xxx", which provides surfers with a clear indication as to the nature of the site before clicking or entering it. This however has raised concerns for brand owners operating outside the adult industry.

In order to avoid any misappropriation of rights, the ICM Registry has created a rights protection mechanism ("RPM") prior to the launch of the .xxx domains. Rights owners, not within the "adult industry" have the option to "opt-out" during the "pre-launch period" of the .xxx domains. This period is also known as the "Sunrise Phase".

The dawn of the 'Sunrise'

The Sunrise phase (from 7 September 2011 till 28 October 2011[2]) is when trade mark/brand owners are given an opportunity to prevent those in the adult-industry from misusing their registered trade marks.

The ICM Registry will operate two Sunrise phases: Sunrise A and Sunrise B. The former is intended for applicants who operate within the adult entertainment ("AE") industry, whilst the latter applies to those operating outside the AE industry. Brand owners operating outside the AE industry are able to protect their rights under the Sunrise B phase.

The qualifications and mechanism

Under Sunrise B, a trade mark owner can apply to block his/her trade mark(s) from the .xxx pool of domain names available for registration. This does not mean that the trade mark

owner will own the .xxx domain name corresponding to its trade mark, it merely means that the name will be "reserved" and the domain name will be unavailable for registration under Sunrise A. It is said that the reserve period may be for a period of 10 years.

Eligibility for Sunrise B is dependant on ownership of a registered trade mark at the national level and the registration must pre-date the date on which application for Sunrise B is made. Further, there must be use of the registered trade mark in the course of trade. Common law rights or brand owners with pending trade mark applications will not qualify for Sunrise B. Similarly, in order for the applicant to be successful under Sunrise A, the applicant must satisfy the "commerce" criteria, that is, manage and control an active .xxx domain which corresponds to the name applied for, an active trade in the AE industry.

If there is only one application to block a .xxx domain name, the domain name will be reserved and becomes unavailable from the pool of domain names available for registration. If there is a competing application by a Sunrise A applicant who applies to register the same domain name as that which a Sunrise B applicant has applied to block, both applicants of Sunrise A and Sunrise B will be notified of each other's applications, and the applicant of Sunrise A will be given the option of withdrawing its application for the said domain name. If the applicant of Sunrise A is reluctant to withdraw its application, priority will be given to the qualified Sunrise A applicant to register the domain name. The only recourse available to an applicant under Sunrise B would be domain name proceedings, pursuant to the rules and policies available for dot com domain name disputes.

It appears that both Sunrise A and B phases are expected to be launched simultaneously. Subsequent to the Sunrise phases, the ICM Registry will launch what is known as the "Landrush" phase (from 8 November 2011 till 25 November 2011[3]) which allows those who operate in the AE industry, who do not own any registered trade marks, an opportunity to apply for a .xxx domain name. The application for a .xxx domain name during the Landrush phase will automatically be granted to the applicant. However, where there are multiple applicants for a .xxx domain name, the ownership of the .xxx domain name will be given to the highest bidder (a type of mini-auction).

After the Sunrise period and the Landrush phase, the .xxx domain name will become available to applicants on a first come first served basis. The anticipated cost for a Sunrise B applicant is between USD200-USD300, which is a one off payment.

Should you worry about your brand?

The creation of .xxx domains will undoubtedly raise concerns for brand owners. The mere association with a .xxx domain name could be disastrous to the years of goodwill and reputation earned by a brand owner; invariably the addition of .xxx suggests association with the infamous "porn world".

In the case of **PepsiCo., Inc. v Amilcar Perez Lista d/b/a Cybersor**[4], the Administrative Panel[5] held the ***pepsix.com*** and ***pepsixxx.com*** ("disputed domain names") were identical and confusingly similar to PepsiCo., Inc.'s trade mark and further the disputed domain names were registered in bad faith. Amilcar Perez Lista d/b/a Cybersor was using the disputed domain names to divert web traffic to a pornographic website and other personal / commercial websites.

A similar outcome was seen in the case of **V & S Vin & Spirit AB v Ooar Supplies, Case**[6], when the Administrative Panel found in favour of the complainant, owner of the famous "ABSOLUT" trade mark. The disputed domain name absolutxxx.com (disputed domain name) was identical or confusingly similar to the registered trade mark, "ABSOLUT", and, it was found that the registration of the disputed domain name was done in bad faith. The disputed domain name contained commercial activity which provided links to websites containing sex products and services.

What seems apparent from the above two cases is that a mere association with 'xxx' seems to indicate some form of association with the AE industry or the likes thereof.

The onus is upon brand owners to take necessary precautions in safeguarding its registered trade marks. Taking preventive steps is generally the recommended approach rather than a curative approach, as seen in the above two cases. Trade mark owners should take advantage of the Sunrise phase by exercising "best practices" in "blocking" its registered trade mark from being wrongfully registered as a brand.xxx

The cost issue is a factor. Those with modest trade mark portfolios may be willing to pay the imposed fees to block their trade marks from being used as a domain name by the AE industry, but brands owners with large portfolios on the other hand may not be willing to bear the substantial amounts to "reserve" their trade marks in the virtual world.

Malaysian brand owners must take swift action if they wish to safeguard their brands. There are many "famous brands" that are home grown and are known globally in the last decade or so. In order for Malaysian brand owners to protect their registered trade marks and ensure disassociation from the AE realm, the time is now for local brand owners to review and consider Sunrise B.

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[1] http://www.icmregistry.com/about.php
[2] http://www.icmregistry.com/press/pressrelease13.php
[3] http://www.icmregistry.com/landrush.php
[4] Case No. D2003-0174
[5] Complaint lodged with the WIPO Arbitration and Mediation Center
[6] Case No. D2004-0962

REAL ESTATE

Requirement for stamping an Instrument under the Provisions of the Stamp Act 1949

IN THIS ARTICLE, WAI CHENG CHENG CONSIDERS THE REQUIREMENT FOR STAMPING AN INSTRUMENT[1] UNDER THE PROVISIONS OF THE STAMP ACT 1949 ("SA") AND THE CONSEQUENCES OF FAILURE TO COMPLY WITH SUCH REQUIREMENT.

Introduction

References to Sections in this Article shall be references to Sections under the SA, unless otherwise stated.

An instrument which is subject to stamp duty is to be presented for stamping within 30 days of execution if it is executed in Malaysia, and if executed outside Malaysia, within 30 days of it being received in Malaysia[2]. After the instrument has been presented for stamping, the Collector[3] shall assess the amount of duty, if any, chargeable[4]. Under section 40, the instrument shall be stamped within 14 days after the notice of assessment issued by the Collector or where an appeal to the High Court has been made against the assessment of the Collector, the instrument shall be stamped within 14 days after the issue of the order of the Court, or within such period, in either case, as the Collector when giving notice of assessment or the Court when making the order, may specify[5]. However, a cheque or promissory note drawn and made in Malaysia shall be stamped before or at the time of execution[6].

Implications of instruments not duly stamped

Penalties

Section 47A provides that an instrument which is not stamped within the period specified under section 40 or 47 may be stamped on payment of the unpaid duty and a penalty of:

(a) RM25 or 5% of the amount of the deficient duty, whichever is greater, if the instrument is stamped within three months after the required time for stamping;

(b) RM50 or 10% of the amount of the deficient duty, whichever is greater, if the instrument is stamped later than three months but not later than six months after the required time for stamping; or

(c) RM100 or 20% of the amount of the deficient duty, whichever is the greater, if the instrument is stamped beyond six months after the required time for stamping.

The Collector may however, if he thinks fit, reduce or remit any such penalty.

Impounding of instruments

An instrument may be impounded by persons who are authorized to receive evidence (for example, by the Courts, arbitrator or public officer) if the same is not duly stamped.[7]

Inadmissible in evidence

An unstamped instrument chargeable with duty cannot be admitted in evidence[8] except where:

the duty together with the stipulated penalty have been paid;

(b) the instrument is used in a criminal proceeding; or

(c) the instrument has been executed by or on behalf of the Government of Malaysia or of any State or of the Government of any other country.

In the case of **Malayan Banking Bhd v Agencies Service Bureau Sdn Bhd & Ors**[9], it was stated as follows:

> "*Failure to pay the duty or the penalty prevents the use of the instrument. If the use is intended for a judicial proceeding the document is not admissible until the duty or the penalty is paid, unless the document belongs to special categories*[10] *stated earlier. To ensure that the duty is paid section 51 imposes an obligation on those whose function is to receive evidence including the courts to be specially vigilant to see whether a document produced before them is duly stamped or not. If it appears to be unstamped the authority concerned has no choice but to impound the document and admit the same on payment of the necessary duty or penalty under proviso (a) to section 52(1) and thereafter send the*

impounded documents to the Collector of Stamp Duty together with the duty or penalty for stamping under section 53."

Having said that, an unstamped instrument only affects the admissibility of the instrument in evidence, but does not render the instrument void and/or invalid[11]. The same also does not give rise to a triable issue, where summary judgment is applied for[12].

Offences

Section 61 imposes a fine not exceeding RM2,500 on any person who with intent to evade the payment of duty:-

(a) executes any instrument where all the facts and circumstances are not truly and fully set forth as required by Section 5[13]; or

(b) where the person is being employed or concerned in or about the preparation of any instrument neglects or omits fully and truly to set forth therein all the said facts and circumstances.

A fine not exceeding RM1,500 will be imposed on any person who:-

(a) with intent to evade the payment of the duty, draws, makes, executes or signs (other than as a witness) any instrument chargeable with duty and which is not duly stamped;

(b) after drawing, making, executing or signing such instrument (other than as a witness), without lawful excuse fails to procure the due stamping of the executed instrument; or

(c) issues, endorses, transfers or presents for acceptance or payment or accepts, pays or receives payment of or in any manner negotiates any cheque or promissory note without the same being duly stamped.[14]

However, when any penalty has been paid for late stamping of instrument, the amount of such fine referred to in section 63(1) may be reduced by the amount of the penalty, if any[15].

The Collector has the power to issue a certificate to relevant immigration and police authorities in order to prevent any person in his opinion who is about or likely to leave Malaysia without paying duties[16] from leaving Malaysia. Upon receipt of the notice of the issuance of the certificate, it will be an offence for the person to which notice has been given to leave the country until the duties are settled[17].

Conclusion

Considering the object of the SA, the penalties and offences stipulated in the event of non-compliance with the requirements of the SA, and the inadmissibility in evidence of an unstamped instrument, it is always prudent to have an instrument that is chargeable with duty stamped within the requisite period stated in the SA.

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[1] "instrument" as defined in the Stamp Act 1949 ("SA") includes every written document.
[2] Section 47.
[3] "Collector" includes the Collector of the Stamp Duties and every Deputy Collector of Stamp Duties.
[4] Section 36(1).
[5] Section 40.
[6] Section 41.
[7] Section 51(1).
[8] Section 52(1).
[9] [1982] 1 MLJ 198.
[10] Special categories referred to in the old Section 47(a),(b) & (c), which have since been replaced by the new Section 47.
[11] Alliance Bank Malaysia Bhd. (formerly known as Multi Purpose Bank Bhd. and Malaysia French Bank Bhd.) v Mukhriz bin Mahathir & Anor [2006] 4 MLJ 451.
[12] American Express International Banking Corporation v Tan Loon Swan [1992] 1 MLJ 727.
[13] Section 5 states that all the facts and circumstances affecting the liability of any instrument to duty or the amount of the duty with which any instrument is chargeable are to be fully and truly set forth in the instrument.
[14] Section 63(1).
[15] Section 63(2).

EMPLOYMENT LAW

The Applicability of the Doctrine of Proportionality of Punishment in Industrial Law

IN THIS ARTICLE, SUGANTHI SINGAM EXAMINES VARIOUS CASE LAW ON THE APPLICABILITY OF THE DOCTRINE OF PROPORTIONALITY OF PUNISHMENT AND THE TEST OF REASONABLENESS IN INDUSTRIAL LAW.

In **Mohd Shakri bin Mohamad v Hong Leong Bank Berhad**[1], the Bank terminated the services of the employee, a Credit Officer arising out of his failure to comply with the

operating procedures in the Bank. In August 2004 an audit was undertaken at the Bank's Terengganu branch whereby several unusual transactions were discovered. The transactions related to the payment of "handling fees". It was discovered that there had been embezzlement of the Bank's monies which included losses of RM547,038.85 on account of overpayments made by hirers and prepaid rentals under the industrial hire purchase and leasing accounts. Further investigations revealed that the losses were on account of non-adherence to the operational procedures in the Bank by 13 employees which included the employee in the present instance. In essence the employee had allowed three cheques to be issued made payable in the name of third parties recipients despite the payment vouchers indicating the payees as different parties.

The Industrial Court after evaluating the evidence arrived at a decision that the inquiry proceedings and notes of proceedings were valid and that the employee had in fact breached the operational procedures. However in Award No. 93 of 2007 although the court held that the employee had been guilty of the charges leveled, it concluded that dismissal was too harsh a punishment. The Industrial Court awarded full back wages from the date of dismissal to the last date of hearing amounting to RM38,696.00 as well as reinstatement. The Bank being dissatisfied with the decision of the Industrial Court applied for an order of certiorari to quash that portion of the Award that held the dismissal was without just cause and excuse, the order of reinstatement and compensation. On 3 March 2010, the High Court issued an order of certiorari to quash the finding that dismissal was without just cause, the order of reinstatement and compensation awarded to the employee. The employee filed an appeal to the Court of Appeal on18 March 2010. At the Court of Appeal, one of the arguments advanced on behalf of the Appellant ("employee") was that the High Court was wrong to interfere with the findings of the Industrial Court in respect of the proportionality of the punishment meted out. Conversely the Respondent ("Bank") canvassed the argument that in the determination of whether the dismissal is with cause and excuse the Industrial Court must first determine whether the employer has established that the employee has committed the misconduct for which he was dismissed and secondly whether a reasonable employer would have dismissed the employee on the facts of the case, namely proportionality. The Bank contended that it was the failure of the Industrial Court in respect of the second issue which resulted in the issuance of the order of certiorari. The test of reasonableness or proportionality has been endorsed by the Federal Court in **Ng Hock Cheng v Pengarah Am Penjara & Ors**[2] and the Court of Appeal in the case of **Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor**[3] where the Court of Appeal held as follows**:-**

> "*The correct test was to determine* ***whether it was reasonable for the appellant's employers to dismiss him on those facts.*** *When considering the reasonableness of what a reasonable employer would have done, the Court (**whether it be** the High Court, Court of Appeal or,* ***the Industrial Court) must not substitute its own views as to what was the appropriate penalty (for the employee's misconduct) for the view of the particular employer concerned.***" (emphasis added)

The Court of Appeal in **Tan Tek Seng's** case relied upon the English Court of Appeal case of **British Leyland UK Ltd** v **Swift**[4] where Denning LJ set out the test of "the range of reasonable responses" as follows :-

> "*... The correct test is :* ***Was it reasonable for the employers to dismiss him?*** *If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might reasonably have dismissed him, then the dismissal was fair. It must be remembered that in* ***all these cases there is a band of reasonableness****, within which one employer might reasonably take one view : another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable.* ***If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair : even though some other employers may not have dismissed him.***" (emphasis added)

The findings of the High Court Judge in the present instance was upheld by the Court of Appeal. The employee being dissatisfied with the decision of the Court of Appeal applied for leave to appeal in the Federal Court. At the Federal Court the two questions posed by the Applicant were :-

(a) whether the Industrial Court has the jurisdiction to apply/invoke the "doctrine of proportionality of punishment" in determining the cases before it; and

(b) whether the test of "Reasonable Employer's Test" as decided in **Ng Hock Cheng** is applicable in representation cases under **Section 20(1) of the Industrial Relations Act 1967 ("IRA")** involving private sector employees.

At the Federal Court the Bank contended that the questions as framed by the Applicant did not satisfy the conditions for leave to be granted which are as follows:-

Section 96 of the Courts of Judicature Act 1964 provides that:-

> ***"96. Conditions of appeal.***
>
> ***Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an***

appeal shall lie from the Court of Appeal to the Federal Court with leave of the Federal Court

(a) From any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving a question of general principle decided for the first time or a question of importance upon which further argument and a decision of the Federal Court would be to public advantage; or

(b) From any decision as to the effect of any provision of the Constitution including the validity of any written law relating to such provision."

In respect of the first question, the Bank contended that in the determination of whether the dismissal is with just cause or excuse within the context of section 20 of the IRA it is trite law that the Industrial Court is to consider **whether the punishment meted out was proportionate to the misconduct committed or disproportionate to the misconduct or perverse**. In the determination of what constitutes just cause and excuse, the employer's conduct is one such factor which is taken into consideration, but not the sole criteria. The Industrial Court would also be bound to take into consideration ***Section 30(5) of the IRA*** . It is premised on this footing that the High Court in the exercise of its supervisory powers intervenes where there is evidence of perversity or unreasonableness in the decision-making process.

In respect of the second question, whether the test of the "Reasonable Employer's Test" as decided in ***Ng Hock Cheng*** is applicable in representation cases under ***Section 20(1) of the IRA*** involving private sector employees, similarly it was submitted by the Bank that the standard or test of the reasonableness of the employer's actions in meting out the punishment of dismissal was equally applicable to all employees which included private sector employees. The law as it stands does not make a distinction between the two.

Although the Federal Court did not hand down a written judgment, in unanimously dismissing the Applicant's application for leave to appeal, the answers to the above questions must be in the affirmative.

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[1] [2007] 1 ILR 448
[2] [1998] 1 CLJ 405
[3] [1996] 1 MLJ 261
[4] [1981] IRLR 91

CORPORATE LAW

Take-over or privatisation of listed companies via the assets and liabilities route

IN THIS ARTICLE, MICHELLE WONG MIN ER DISCUSSES SOME OF THE REQUIREMENTS IN RESPECT OF TAKE-OVERS OR PRIVATISATIONS OF LISTED COMPANIES VIA THE ASSETS AND LIABILITIES ROUTE.

One of the more significant changes that came into effect in 2011 and which may affect the landscape for mergers and acquisitions going forward, is the requirements with respect to listed companies being taken over or privatised via a sale or disposal of assets. Such requirements include the raising of the threshold for shareholders' approval in relation to the sale or disposal.

The Background

In recent years, some of the major mergers and acquisitions were undertaken by using what has come to be known as the "assets and liabilities route", that is, an acquirer attempting to takeover or privatise a listed company by making an offer to acquire the assets and liabilities of the listed company. By applying section 132C of the Companies Act 1965 ("Companies Act"), a listed company may be privatised via the assets and liabilities route if the disposal of its assets and liabilities is approved by a simple majority of votes (that is, more than 50%) of those shareholders present and voting at the company's general meeting. This meant that a lower threshold for shareholders' acceptance or approval applied in the case of a privatisation of a listed company via the assets and liabilities route as compared with higher thresholds applicable in other methods that may be used to privatise list-

ed companies, such as pursuant to a take-over offer being made in accordance with the Malaysian Code on Take-Overs and Mergers 2010, or a selective capital reduction under section 64 of the Companies Act.

The assets and liabilities route was used in some of the notable transactions including CIMB Group Holdings Berhad's acquisition of the entire business and undertaking of Southern Bank Berhad in 2006, the Synergy Drive merger involving the merger of Golden Hope Plantations Berhad, Kumpulan Guthrie Berhad and Sime Darby Berhad in 2007 and the acquisition of EON Capital Berhad's assets and liabilities by Hong Leong Bank Berhad ("HLBB") in 2011 ("Acquisition of EON Bank").

The widely-discussed assets and liabilities route led to the Securities Commission Malaysia ("SC") and Bursa Malaysia Securities Berhad ("Bursa Securities") issuing a consultation paper[1] explaining proposals which included, amongst others, the proposal to increase the threshold for shareholders' approval for a disposal by a listed company of all or substantially all of its assets, and inviting comments on the proposals put forth.

The Current Position

On 28 January 2011, the SC and Bursa Securities jointly announced[2] the new requirements in respect of a listed company disposing all, or substantially all, of its assets resulting in the listed company being no longer suitable for continued listing on Bursa Securities ("Major Disposal"). One of the new requirements announced by the SC and Bursa Securities was the raising of the threshold for shareholders' approval relating to a Major Disposal to 75% from the previous requirement for a simple majority of votes. Another significant requirement announced was that a listed company undertaking a Major Disposal is to appoint an independent adviser to advise its shareholders on whether the Major Disposal is "fair" and "reasonable". The new requirements were effected through amendments to Chapter 10 of Bursa Securities' Main Market Listing Requirements ("MMLR") and will apply to all announcements on Major Disposal proposals made on or after 28 January 2011.

To summarise, the amendments include the following:

(1) Definition of "Major Disposal"

A "Major Disposal" is defined to mean a disposal of all or substantially all of a listed company's assets which may result in the listed company being no longer suitable for continued listing on the Official List of Bursa Securities[3]. If, as a result of the disposal of a listed company's business or major business, the listed issuer suspends or ceases all of its business, major business, its entire or major operations, this may lead to the listed company being considered as not being suitable for continued listing.

A proposal by an acquirer to take-over or privatise a listed company by making an offer to acquire the assets and liabilities of the listed company will mean, in the context of the listed company, a Major Disposal being undertaken by the listed company thereby subjecting the listed company to the requirements imposed from 28 January 2011, further details of which are contained in the ensuing paragraphs.

(2) Threshold for shareholders' approval required for Major Disposal

A listed company which intends to undertake a Major Disposal must convene a general meeting and must now obtain the approval of at least 75% in value of the shareholders present and voting either in person or by proxy at the meeting for such Major Disposal[4].

It is to be noted that the MMLR only prescribes the minimum percentage of shareholders' approval required for the resolution to be carried but does not specify whether the resolution proposed is an ordinary resolution or a special resolution. As such, it is not immediately clear whether the resolution to be approved by the shareholders is an "ordinary resolution" or a "special resolution". There is support for the contention that the shareholders' resolution may be proposed as an ordinary resolution given that there is nothing in the Companies Act nor the MMLR which prescribes that a resolution in respect of a Major Disposal has to be proposed as a special resolution[5].

As can be seen from some of the transactions announced to Bursa Securities, listed companies seeking to undertake a Major Disposal which will result in the listed companies no longer having any business or operations, have proposed the resolution to approve such transaction as an "ordinary resolution".

(3) Appointment of independent adviser

A listed company intending to undertake a Major Disposal must, in addition to appointing a main adviser as the Principal Adviser to advise on the transaction as a whole[6], appoint an independent adviser who is a corporate finance adviser within the meaning of the SC's Principal Adviser Guidelines[7]. The independent adviser must, amongst others:

(a) comment as to whether the Major Disposal and its related proposals (if any) are fair and reasonable in so far as the shareholders are concerned. Such opinion must set out the reasons for, the key assumptions made and the factors taken into consideration in forming that opinion. The independent adviser should comply with the relevant provisions of Chapter 12 (Independent adviser's recommendation) of the Guidelines on Contents of Applications Relating to Take-Overs and Mergers issued by the SC ("SC's Guidelines on Take-

Overs"); and

(b) advise the shareholders on whether they should vote in favour of the Major Disposal and its related proposals (if any)[8].

The SC and Bursa Securities are of the view that the appointment of the independent adviser is necessary to provide an assessment on the fairness and reasonableness of the Major Disposal to assist shareholders in making an informed decision[9]. The requirement to appoint an independent adviser is a step taken by the regulatory authorities to enhance investor protection and to ensure that shareholders are provided with appropriate information for well-informed decision-making. The emphasis that such information is to be given by an independent party is made clear by the fact that Bursa Securities is given the power to disallow an independent adviser to be appointed or continue to act as an independent adviser if Bursa Securities is of the opinion that the independent adviser is not independent[10].

The SC has also indicated that it will provide guidance on the interpretation of "fair" and "reasonable" that is to be applied by independent advisers in assessing take-over offers and that a revision to Chapter 12 of the SC's Guidelines on Take-Overs will be issued in due course.

Going forward

The full implications from the amendments to Chapter 10 of the MMLR in relation to Major Disposals remain to be seen in the transactions or deals in the coming months and years. Some quarters have commented that the raising of the threshold for shareholders' approval in relation to a Major Disposal may see a decline in merger and acquisition (M&A) activities, although the regulatory authorities have indicated that the higher shareholders' approval threshold under the other routes for privatisation has not hindered M&A activities in Malaysia and research of various jurisdictions also shows that M&A activities in other markets were not adversely impacted by having the threshold[11].

With the amendments to Chapter 10 of the MMLR in place to enhance the protection of minority shareholders in a Major Disposal, attention should also be given to the role played by the directors of a listed company when faced with a take-over involving the assets and liabilities route. This will involve issues in relation to whether directors have acted in the best interest of the company in accepting or rejecting a take-over offer and the criteria that directors should take into account in discharging their fiduciary duties when it comes to making a decision on whether to accept or reject the take-over offer. In the Acquisition of EON Bank's case, the directors of EON Capital Berhad ("EON Capital") initially rejected the offer made by HLBB, resolved that the said offer was not in the interests of EON Capital and its shareholders, and accordingly, resolved not to table the said offer for consideration and approval by EON Capital's shareholders at a general meeting[12]. However, after considerable changes involving a revision to the offer price, changes to the board of directors of EON Capital and a petition to seek relief under section 181 of the Companies Act against EON Capital and several of its directors by the single largest shareholder at that time, the Acquisition of EON Bank was completed more than a year after the revised offer was received.

Conclusion

The amendments to Chapter 10 of the MMLR in relation to Major Disposals appear to have achieved the SC's and Bursa Securities' aim to align the threshold for shareholders' approval in taking over or privatising a listed company via the assets and liabilities route against the other take-over or privatisation routes. The SC and Bursa Securities are mindful of the need to have a balanced approach when framing the regulatory framework governing privatisations via Major Disposals. The framework must take into account the interests of both minority and major shareholders and the SC and Bursa Securities believe that the new policy will strike a balance between business efficacy and shareholder protection[13].

SD

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[1] Joint Public Consultation Paper No. 3/2010 dated 19 March 2010 issued by Securities Commission Malaysia and Bursa Malaysia Securities Berhad

[2] Public Response Paper No. 3/2011 dated 28 January 2011 issued by Securities Commission Malaysia and Bursa Malaysia Securities Berhad

[3] Paragraph 10.02 of Bursa Securities Malaysia Berhad's Main Market Listing Requirements

[4] Paragraph 10.11A(1)(d) of Bursa Securities Malaysia Berhad's Main Market Listing Requirements

[5] An analogy can be drawn against Section 31 of the Companies Act, 1965 which provides that, subject to the Companies Act, 1965 and to the conditions in a company's memorandum, a special resolution is required to alter or add to the company's articles.

[6] Paragraph 10.11A(1)(a) of Bursa Securities Malaysia Berhad's Main Market Listing Requirements

[7] Paragraph 10.11A(1)(b) of Bursa Securities Malaysia Berhad's Main Market Listing Requirements

[8] Paragraph 10.11A(3) of Bursa Securities Malaysia Berhad's Main Market Listing Requirements

[9] Public Response Paper No. 3/2011 dated 28 January 2011 issued by Securities Commission Malaysia and Bursa Malaysia Securities Berhad

[10] Paragraph 10.11A(4) of Bursa Securities Malaysia Berhad's Main Market Listing Requirements

[11] Public Response Paper No. 3/2011 dated 28 January 2011 issued by Securities Commission Malaysia and Bursa Malaysia Securities Berhad

[12] EON Capital Berhad's announcement to Bursa Malaysia Securities Berhad dated 2 February 2010

[13] Public Response Paper No. 3/2011 dated 28 January 2011 issued by Securities Commission Malaysia and Bursa Malaysia Securities Berhad

CASE NOTE

Grant of relief: Section 131 of the Income Tax Act 1967

IN THIS ARTICLE, IRENE YONG REVIEWS THE RECENT DECISION OF THE SPECIAL COMMISSIONERS OF INCOME TAX ("SCIT") IN RELATION TO THE GRANT OF RELIEF FOR ERROR OR MISTAKE UNDER SECTION 131 OF THE INCOME TAX ACT 1967 FOR AN OMISSION TO MAKE A CLAIM FOR REINVESTMENT ALLOWANCES ON CAPITAL EXPENDITURE UNDER SCHEDULE 7A OF THE INCOME TAX ACT 1967.

Facts

The taxpayer was carrying on the business of processing and supply of certain construction materials for the relevant years of assessment ("relevant Y/As") during which it had incurred capital expenditure on plant and machinery, a significant part of which related to certain mobile machinery ("capital expenditure").

However, by an oversight, the taxpayer omitted to make claims for Reinvestment Allowances ("RAs") on the capital expenditure under Schedule 7A of the Income Tax Act 1967 ("ITA") when the taxpayer filed its tax returns for the relevant Y/As.

Accordingly, the taxpayer wrote to the Inland Revenue Board ("Revenue") to seek relief in respect of its "error or mistake" under section 131 of the ITA arising from its omission to make a claim for RAs on the capital expenditure.

The Revenue rejected the taxpayer's claims for relief under section 131 of the ITA as well as for RAs on various technical grounds.

Against that decision, the taxpayer lodged notices of appeal by way of Forms Q with the Revenue which Forms Q were forwarded to the SCIT.

Relevant Legislative Provisions

Section 131 of the ITA reads as follows:

> *"(1) If any person who has paid tax for any year of assessment alleges that an assessment relating to that year is excessive by reason of some error or mistake in a return or statement made by him for the purposes of this Act and furnished by him to the Director General prior to the assessment becoming final and conclusive, he may within six years after the end of the year of assessment within which the assessment was made make an application in writing to the Director General for relief.*
>
> *(2) On receiving an application under subsection (1) the Director General shall inquire into the matter and, subject to this section, shall give by way of repayment of tax such relief in respect of the alleged error or mistake as appears to him to be just and reasonable. …"* (emphasis added)

The relevant RA provisions at the time governing the grant of relief are set out in Paragraphs 1 and 8(a) of Schedule 7A to the ITA which read as follows:

> *"Paragraph 1 –*
> *Where a company which is resident in Malaysia –*
> (a) *has been in operation for not less than twelve months; and*
> (b) *has incurred in the basis period for a year of assessment capital expenditure on a factory, plant or machinery used in Malaysia for the purposes of a qualifying project, there shall be given to the company for that year of assessment a reinvestment allowance of an amount equal to sixty percent of that expenditure:…*
>
> *Paragraph 8(a) –*
> *In this Schedule, "qualifying project" means – (a) a project undertaken by a company, in expanding, modernising or automating its existing business in respect of manufacturing or processing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry;…"* (emphasis added)

Taxpayer's contentions

The taxpayer contended, amongst others, that:

- the Revenue should not take advantage of such error or mistake to collect more tax than what it was entitled to;
- the Revenue would be unjustly enriched contrary to the law should the grant of relief be refused to the taxpayer;
- statutory provisions should be given a purposive reading; and
- the relevant parts of statutory provisions which favour the taxpayer must be read liberally.

SCIT's decision

The SCIT considered the following issues:

(1) whether by omitting to claim the RAs in its tax returns for the relevant Y/As, the taxpayer made an "error or mistake" within the meaning of section 131 of the ITA ("first issue"); and
(2) whether all or any of the capital expenditure incurred by the taxpayer during the relevant Y/As qualifies for RAs under Schedule 7A to the ITA ("second issue").

On the first issue, the SCIT found that section 131 of the ITA gives a taxpayer the right to claim relief where an error or mistake had been made, and such error or mistake can be by way of omission, commission, exclusion, inclusion, allowance or disallowance.

As such, the words "error or mistake" are to be interpreted to mean a slip or mischance, something that has happened not by design and the intention behind section 131 is to restore the taxpayer to the position which it would have been in had such error or mistake not occurred.

Accordingly, the SCIT held that by omitting to claim the RAs in its tax returns for the relevant Y/As 1996, the taxpayer had in fact made an "error or mistake" within the meaning of section 131 of the ITA.

On the second issue, the SCIT held that the burden was on the taxpayer to establish that capital expenditure had been incurred on a project undertaken by the taxpayer in expanding, modernising or automating its existing business in respect of manufacturing or processing of a product or any related product within the same industry or in diversifying its existing business into any related product within the same industry within the meaning of Schedule 7A of the ITA.

The SCIT found that on the facts, the taxpayer had fulfilled all the requirements to claim RAs under paragraphs (1) and 8(a) of Schedule 7A of the ITA. Accordingly, the SCIT held that the capital expenditure on plant and machinery incurred by the taxpayer during the relevant Y/As qualifies for RAs under Schedule 7A of the ITA.

Conclusion

This is a landmark case being the first decision on the grant of relief for error or mistake under section 131 and whether mixer trucks qualify for RAs under Schedule 7A of the ITA.

SD

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CASE NOTE

Harcharan Singh Sohan Singh v Ranjit Kaur S Gean Singh[1]

IN THIS ARTICLE, SAHADA SALIHIN ANALYSES THE RECENT FEDERAL COURT DECISION IN **HARCHARAN SINGH SOHAN SINGH V RANJIT KAUR S GEAN SINGH** IN RELATION TO OBTAINING LEAVE AND THE RIGHT TO APPEAL.

Section 68 of the Courts of Judicature Act 1964 ("CJA 1964") provides that leave from the Court of Appeal is required for appeal to the Court of Appeal where the subject matter is less than RM 250,000. Despite the clear and unambiguous wording of this section, there is controversy in relation to the exception to the provision particularly in the light of the Court of Appeal Practice Direction No. 2 of 1996 ("the Practice Direction"). The Practice Direction lists instances where leave of court is not required in cases where a specified amount or value is not pleaded. Item (ii) reads:

> (ii) Declaration – to declare that the giving of license, an act, an omission or decision of a body or person empowered by law is invalid and annulled.

The Federal Court in **Harcharan Singh Sohan Singh v. Ranjit Kaur S Gean Singh** had recently considered this matter in some detail.

Harcharan Singh Sohan Singh ("HS") and his brother jointly purchased a property in 1963. HS claimed he had purchased his brother's half undivided share in the property. The brother passed away in 1990. No transfer of the half share was effected in favor of HS. HS filed for a declaration in the High Court claiming beneficial ownership over the property against Ranjit Kaur S Gean Singh ("RK") – the administrator of the deceased brother's estate. HS's

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claim was dismissed and he appealed to the Court of Appeal.

RK took a preliminary objection to the appeal on the basis that leave to appeal is required as the value of the property is less that RM 250,000. HS filed a motion for a leave to appeal whilst maintaining that the subject matter of the appeal was in excess of RM 250,000. The Court of Appeal dismissed HS's motion.

Two issues were raised in the Federal Court, namely:

i) the true meaning and effect of section 68 of the CJA 1964; and
ii) at which point in time is the amount or value of a subject matter of a claim (exclusive of interest) to be determined for the purpose of section 68 of the CJA 1964.

The Federal Court held that the legal authority to decide on the leave to appeal rests solely with the Court of Appeal. The decision of the Court of Appeal on the question of leave is final.

The Federal Court did not accept the argument that the leave requirement did not apply because HS sought a specific relief. The Federal Court held that item (ii) of the Practice Direction only applied to declarations in respect of a subject matter that had no value attached to it or where the value could not be quantified. Here, HS in his statement of claim had identified and valued the subject matter as below RM 250,000. For that reason alone, HS's appeal is caught within the provision of section 68 of the CJA 1964 and leave was required.

The Federal Court further considered at which point in time the value of a subject matter of a claim (exclusive of interest) is to be determined. The Federal Court held the relevant time was at the time of the filing of the claim. The court noted that HS's pleadings and evidence pointed to the fact that his claim was below that RM 250,000. Thus, HS could not adopt RK's estimation of the value of the claim for the purpose of complying with the requirement of section 68 CJA 1964.

The Federal Court decision spells out the mandatory requirement of obtaining leave to appeal where the subject matter of the claim is below RM250,000, more importantly a claim seeking specific relief is not an automatic exemption from the requirement of leave. The Practice Direction is only applicable in respect of declarations involving subject matter that has no value attached to it or where the value of the subject matter is unquantifiable. If the subject matter of the claim is identified to be less than RM 250,000 at the time of the filing of the claim, leave to appeal must be obtained.

SD

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[1] [2011] 3 CLJ 593