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DISPUTE RESOLUTION

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Insured risk, excluded risk, the insured, and the insurer — A love rectangle in the insurance universe

IN THIS ARTICLE, AHMAD AIZEK BUSU ABDUL AZIZ ANALYSES THE DECISION IN **MALAYSIAN MOTOR INSURANCE POOL (FORMERLY KNOWN AS HRMIP) V NAZA MOTOR TRADING SDN BHD**[1] IN RELATION TO THE INSURED RISK OF THEFT AND EXCLUDED RISK OF CHEATING IN A MOTOR TRADE INSURANCE POLICY.

Introduction

According to the statistics[2] by Persatuan Insurans Am Malaysia (PIAM) on stolen vehicles, a total of 41,920 vehicles were stolen in the year 2009, followed by a slight decrease to a total of 37,564 vehicles in 2010.

Comprehensive motor vehicle insurance policies regulated by tariff wording offer coverage for losses due to, among others, the peril of theft but exclude coverage for the loss of motor vehicle due to cheating.

What is "theft" and "cheating"?

Section 378 of the Penal Code states that:

> *"Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft."*

Section 415 of the Penal Code states that:

> *"Whoever by deceiving any person, whether or not such deception was the sole or main inducement, —*
>
> *(a) fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain property; or*
>
> *(b) intentionally induces the person so deceived to do or omit to do any thing which he would not do or omit to do if he were not so deceived and which act or omission causes or is likely to cause damage or harm to any person in body, mind, reputation, or property, is said to cheat."*

There are instances where the loss of a motor vehicle on the facts of the case can be attributed to both theft and cheating, giving rise to the question on whether the loss is recoverable or otherwise.

The position in Malaysia was established by the Federal Court in the case of **Malaysian Motor Insurance Pool (formerly known as HRMIP) v Naza Motor Trading Sdn Bhd** in relation to the insured risk of theft and excluded risk of cheating in a motor trade insurance policy operating simultaneously.

Facts of the case

In this case, the Malaysian Motor Insurance Pool ("MMIP") issued a motor trade policy to Naza Motor Trading Sdn Bhd ("Naza Motor") to provide cover and to indemnify Naza Motor in respect of loss of motor vehicles arising from, among others, theft, but excluded liability in respect of loss of motor vehicles arising from cheating.

On one particular day, a person representing himself as one Dato' Ahmad Rosli Bachik ("the customer") visited Naza Motor's showroom and indicated his intention to purchase a motorcar and was attended to by a sales representative of Naza Motor.

The customer requested to test-drive the motorcar and was accompanied by the sales representative during the test drive. During the test drive, the customer stopped and requested the sales representative to buy fried chicken from a Kentucky Fried Chicken outlet. The sales representative went to buy the fried chicken and upon his return, the customer and the motorcar had disappeared.

Naza Motor made a claim under the policy in which the MMIP had rejected liability on the ground that the motorcar was stolen by way of cheating under the general exclusion clause of the policy. Naza Motor then brought the matter to the High Court.

The High Court dismissed Naza Motor's claim. On appeal to the Court of Appeal, Naza Motor's claim was allowed whereby the MMIP appealed to the Federal Court.

The decision of the Federal Court

The gist of the dispute between Naza Motor and the MMIP was whether the loss of the motorcar was due to theft, as contended by Naza Motor, or cheating, as contended by the MMIP, in order to establish the MMIP's liability under the policy.

The relevant part of the policy in respect of coverage relied upon by the Naza Motor was in clause 1[3]:

> *"Section I — Loss or Damage*
>
> *(1) The Pool will indemnify the Insured against loss of or damage to the Motor Vehicle and its accessories and spare parts whilst thereon —*
>
> *(a) …*
>
> *(b) by fire, external explosion, self-ignition or lighting or burglary housebreaking or* ***theft****…"*

In this case, the definition of theft was not defined in the policy so the court adopted the definition in s 378 of the Penal Code.

The relevant part of the policy relied upon by the MMIP to exclude liability was under clause 8 of the policy[4]:

"8 Any loss or damage caused by or attributed to the act of ***cheating*** *by any person within the meaning of the definition of the offence of cheating set out in the Penal Code."*

At the end of the day, the Federal Court made a decision in favour of Naza Motor and further held that the proximate cause of the loss or the inevitable cause of the loss of the motorcar was due to the act of theft by the customer and not cheating.

Covered risk and excluded risk: is it mutually exclusive?

Among the questions posed to the Federal Court was[5]:

> *"...In interpreting a policy of insurance to determine if a given event is covered under the policy, what are the rules of interpretation in the following circumstances:*
>
> *(a) When the coverage agreement (section I — theft is covered) and the exclusion clause (exception 8 — cheating is excluded) are both applicable. Is the event (loss of the motor vehicle) covered?…"*

Principles of law and the position in the United Kingdom

In practice, a loss suffered by an insured may be brought about by more than one possible cause. When two or more causes are responsible for a loss, it may be necessary to determine the main or dominant cause of the loss in order to fix the liability of the insurer. This is especially so when one of these causes falls within an exclusion provision in the insurance policy. If it is not possible to determine which of these causes is more dominant than the others and the loss is attributable to two or more equally dominant causes, an insurer will not be liable for the loss if one of these causes falls within an exclusion provision[6].

It was stated by Lord Denning in the English Court of Appeal decision in **Wayne Tank and Pump Co v Employers' Liability Assurance Corporation**[7] as follows:

> *"…One of them is within the general words and would render the insurers liable. The other is within the exception and would exempt them from liability. In such a case it would seem that the insurers can rely on the exception clause…"*[8]
>
> *"…The effect of an exception is to save the insurer from liability for a loss which but for the exception would be covered. The effect of the cover is not to impose on the insurer liability for something which is within the exception…"*[9]

This English case was not referred to in the Federal Court judgment.

The Federal Court's answer and conclusion

The Federal Court held that the cause of the loss of the motorcar was due to theft and not cheating and, therefore, there is no conflict as to whether there existed two dominant causes namely theft and cheating. Consequently the answer to the question posed, whether the loss of the motorcar is covered if both the insured risk and the excluded risk are applicable, was purely academic.

The Federal Court answered the above question in the affirmative and stated that the Court ought not to interpret the clauses of the insurance policy which, if it did, would result in the insured losing the benefits of the coverage by applying the exclusion clause to exclude liability.

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[1] [2012] 1 MLJ 16
[2] http://www.piam.org.my/news/piamnews/motortheft.pdf
[3] [2012] 1 MLJ 16 at page 21
[4] [2012] 1 MLJ 16 at page 21
[5] [2012] 1 MLJ 16 at page 20
[6] Poh Chu Chai, Principles of Insurance Law, (2000), (5th Ed), Butterworths, pp 411
[7] [1974] QB 57
[8] Ibid page 67
[9] Ibid page 69

CORPORATE LAW

Ho Hup and the Bukit Jalil land dispute

IN THIS ARTICLE, LAI ZHEN PIK AND GERALD CHEAH WAI KEAT DISCUSS THE OUT-OF-COURT SETTLEMENT OF THE BUKIT JALIL LAND DISPUTE AND THE ISSUES SURROUNDING THE STATUTORY CAUSE OF ACTION OF HO HUP CONSTRUCTION COMPANY BERHAD UNDER SECTION 132C OF THE COMPANIES ACT 1965.

After a riveting court dispute that grabbed headlines for months, on 3 July 2012, Ho Hup Construction Company Berhad ("Ho Hup") announced to Bursa Malaysia that the company and its 70% subsidiary, Bukit Jalil Development Sdn Bhd ("BJD"), had come to an amicable out-of-court settlement with Pioneer Haven Sdn Bhd ("PHSB"), a wholly owned subsidiary of Malton Berhad, on the developmental rights of its 24.28 hectares (60 acres) land in Bukit Jalil ("Land"), thus officially ending the year-long court battle on a high note.

Background facts

Ho Hup is a public-listed company that owns 70% of the issued and paid-up capital in BJD. BJD in turn owns the Land, which is central to the dispute. Having suffered losses over several years, Ho Hup announced that it was an affected issuer under Bursa Malaysia Practice Note No 17 ("PN17") and would have to carry out a regularisation plan to address its accumulated losses by 4 April 2010.

An Extraordinary General Meeting ("EGM") of Ho Hup was requisitioned to be held on 17 March 2010. However, on the eve of the EGM, that is on 16 March 2010, a board meeting of BJD was held to consider the entry into a Joint Development Agreement ("JDA") between BJD and PHSB, where PHSB would solely fund the development of the Land while BJD would get a division of the profits as the landowner. The JDA proposal was approved by the Ho Hup Board later the same day. Along with the JDA, an endorsement and undertaking ("Endorsement") was given by Ho Hup and a power of attorney ("PA") by BJD in favour of PHSB.

The following day, during the EGM of Ho Hup, the directors who supported the JDA proposal were removed, and others were appointed in their place. Less than two months later, the directors of BJD who voted for the JDA proposal were removed at a general meeting of BJD. The new board of directors of Ho Hup filed a claim in the High Court:

(a) to have the JDA avoided on the ground that shareholders' approval of BJD and Ho Hup were not obtained pursuant to s 132C of the Companies Act 1965 ("s 132C"), as the JDA entailed a disposal of the Land to PHSB; and

(b) against the directors of both Ho Hup and BJD who approved the JDA, and against PHSB for knowingly assisting those Ho Hup and BJD directors to breach their duties.

Section 132C reads as follows:

> *"(1) **Notwithstanding anything in the memorandum or articles of association of the company, the directors shall not carry into effect any arrangement or transaction for—***
> *(a) the acquisition of an undertaking or property of a substantial value; or*
> *(b) the disposal of a substantial portion of the company's undertaking or property,*
>
> *unless the arrangement or transaction has been approved by the company in a general meeting.*
> *…*
> *(2) The Court may, on the application of any member of the company, restrain the directors from entering into a transaction in contravention of subsection (1).*
> *(3) Where an arrangement or transaction is carried into effect in contravention of subsection (1), the arrangement or transaction shall be void except in favour of any person dealing with the company for valuable consideration and without actual notice of the contravention.*

…
(5) Any director who contravenes the provision of this section shall be guilty of an offence against this Act.
Penalty: Imprisonment for five years or thirty thousand ringgit or both."

The High Court decided in favour of Ho Hup that, among others, the JDA was void, the directors had breached their fiduciary, common law and statutory duties, and PHSB was liable for knowingly assisting the directors to breach their duties. PHSB and the other defendants appealed.

The pivotal issue — Ho Hup's *locus standi*
In the Court of Appeal[1], the foremost issue considered was whether Ho Hup had the *locus standi* to commence the suit. Ho Hup claimed that it had (a) a personal right of action against the defendants under statute (s 132C(2)) and in common law by virtue of a loss to its shareholding value in BJD caused by the entry of BJD into the JDA; and (b) the right to bring a derivative action (on behalf of BJD) against the defendants.

The issue on *locus standi* was considered by the Court within the context of the JDA and s 132C. Specifically, whether the JDA, Endorsement and PA amounted to a "disposal" of the Land under s 132C, and whether the directors of Ho Hup had breached their fiduciary duties by committing BJD to the JDA without the approval of the shareholders of BJD.

In this article, we will focus on Ho Hup's statutory cause of action under s 132C(2).

In essence, in order for Ho Hup to rely on s 132C(2), the two elements of subsection 132C(1) that must be proved are:

(i) there was a "disposal"; and
(ii) the directors had "carried into effect" the transaction for such disposal.

"Disposal"
In considering what amounts to a "disposal" under s 132C, the Court had referred to relevant judgments of the Australian Courts[2], which construed the term "disposition" as a change or transfer of beneficial ownership in an asset to someone else.

In applying those authorities, the Court held that there was indeed no transfer of land ownership from BJD to PHSB as the parties' intention was to jointly develop the Land. In fact, it was expressly stated in the JDA that the ownership of the Land would remain with BJD. As regards the rights conferred to PHSB under the PA and the Endorsement, it was held that the PA was limited to enable PHSB to enter into sale and purchase agreements of the units of the development and, further, the rights given under the Endorsement and PA were typical of a profit sharing venture and did not confer a transfer of interest in the Land.

Accordingly, there was no "disposal" and s 132C(1) was not contravened. Consequently, s 132C(2) could not be relied upon.

"Carry into effect" the transaction
The second element to be satisfied to come within s 132C(1) is that the directors must "carry into effect" the transaction. The Court observed that the wording used was "carry into effect" and not "enter", the former being more stringent. The Court inferred that the intention of the legislation was to restrict the operation of the section to a situation where the directors were "carrying into effect" the impugned transaction as opposed to merely entering into it by executing an agreement.

In the present case, the "carrying into effect" clearly meant the implementation of the JDA. The Court held that all that was done was the signing of the JDA. After the signing of the JDA, the old directors were removed the next day and therefore they took no further steps to "carry into effect" the JDA. Accordingly, there was no breach by the previous Ho Hup Board.

Even in the event that both the elements of "disposal" and "carry into effect" were satisfied, the question that remained was whether s 132C(2) could be relied on to avoid the JDA.

Section 132C(2), a pre-emptory relief
The Court had pointed out that s 132C(2) contemplates a pre-emptory relief to restrain the entry into a transaction. In the present case, the JDA had already been executed prior to the commencement of the suit. Clearly, s 132C(2) is inapplicable.

Premised on the above, the Court decided that Ho Hup is not entitled to sue in its own right pursuant to s 132C, firstly, as the JDA did not amount to a disposal and the directors did not carry into effect the transaction and, further, Ho Hup had failed to come within the purview of s 132(C).

The Court also held that Ho Hup had not suffered any kind of loss or diminution in value of its shares in BJD to confer it any personal cause of action against PHSB. As Ho Hup was legally and factually in control of BJD, it had no right to commence a derivative action on BJD's behalf. As regards the directors, they were found not to have acted contrary to good faith or for irrelevant purposes and PHSB bore no liability in respect of the alleged breaches of duty.

The amicable settlement
Since the judgment was delivered by the Court on 27 February 2012, the Federal Court ("FC") had granted Ho Hup leave to appeal to the FC. The Chief Judge of Malaya Tan Sri Zulkefli Ahmad Makinudin, who chaired the five-man panel of judges, held that Ho Hup had met the threshold requirement under s 96 of the Courts of Judicature Act 1964 for leave to be granted to appeal to the FC.

However, instead of proceeding with the FC amore &co

appeal, Ho Hup agreed to settle out of court with BJD and PHSB, through the execution of a supplemental agreement to the original JDA ("Supplemental Agreement"). Under the Supplemental Agreement, the joint development is on 5/6 of the original Land, with the remaining 1/6 to be developed solely by BJD. Among others, BJD is also entitled to 18% of the gross development value, subject to a minimum value of entitlement of RM220 million, instead of the original 17% agreed on.

With the Supplemental Agreement, Ho Hup agreed to discontinue its appeal to the FC and to withdraw the suit and any ancillary matters related to it, bringing an amicable end to the Bukit Jalil land dispute. SD

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[1] Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and other appeals [2012] 3 MLJ 616

[2] Re Margart Pty Hamilton v Westpac Banking Corp & Another [1985] BCLC 314

Minimum Retirement Age Act 2012

IN THIS ARTICLE, WONG KIAN JUN CONSIDERS THE EFFECT OF THE MINIMUM RETIREMENT AGE ACT 2012 IN THE PRIVATE SECTOR.

The Minimum Retirement Age Act 2012 ("the Act"), which was passed by the Malaysian Parliament, is aimed at ensuring the retirement age in the private sector is in line with the current retirement age policy in the public sector. The Act is expected to be effective next year but no firm date has been ascertained as yet. The Malaysian Trades Union Congress ("MTUC") has urged the private sector to implement the new minimum retirement age with immediate effect rather than wait for the implementation date to be announced. Prior to the passing of the Act, the retirement age in the private sector was governed by the terms and conditions contained in the contract of service or, where applicable, the collective agreement between an employee or union and the employer.

The current practice in the private sector is to retire employees when they attain the age of 55 years. There are also instances where in certain establishments female employees may be required to retire at the age of 50 years.

The Act now provides that the minimum retirement age of an employee shall be upon the employee attaining the age of 60 years[1]. Under the Act, the Minister has the discretion to prescribe a higher retirement age[2]. An employer who prematurely retires his employee before he attains the minimum retirement age would be liable to a fine not exceeding RM10,000[3]. A premature retirement does not include an optional retirement or termination of contract of service for any other reason other than age[4]. Pursuant to the Act, any retirement age in the contract of service or collective agreement which is less than the minimum retirement age as provided by the Act shall be deemed void and substituted with the minimum retirement age as provided by the Act[5].

In the event an employee believes he has been prematurely retired by an employer, he can make a complaint in writing to the Director General of the Department of Labour within 60 days from the date of the retirement[6]. If an employee makes a complaint to the Director General he shall not make a representation under s 20 of the Industrial Relations Act 1967 until his complaint to the Director General has been resolved[7].

In the event the Director General finds that the employee had been retired prematurely by his employer, the Director General may direct the employer[8]:

(i) to reinstate the employee in his former employment and to pay the employee any arrears of wages calculated from the date the employee has been prematurely retired to the date of his reinstatement; or

(ii) to pay the employee compensation in lieu of reinstatement, not exceeding the amount of total wages of the employee calculated from the date the employee has been prematurely retired to the date the employee attains the minimum retirement age.

Any party dissatisfied with the decision of the Director General may appeal to the High Court[9].

In the event the Director General dismisses an employee's complaint, the employee can still make a representation under s 20 of the Industrial Relations Act 1967 within 30 days after the decision to dismiss the complaint was communicated to the employee[10].

The Act, however, provides that it will not be applicable to certain jobs or categories of workers.

The Schedule to the Act provides that the following categories are not covered under the Act[11] :

> "(a) *a person who is employed on a permanent, temporary or contractual basis and is paid emoluments by the Federal Government, the Government of any State, any statutory body or any local authorities;*
>
> (b) *a person who works on a probationary term;*
>
> (c) *an apprentice who is employed under an apprenticeship contract;*
>
> (d) *a non-citizen employee;*
>
> (e) *a domestic servant;*
>
> (f) *a person who is employed in any employment with average hours of work not exceeding seventy percent of the normal hours of work of a full-time employee;*
>
> (g) *a student who is employed under any contract for a temporary term of employment but does not include an employee on study leave and an employee who studies on part-time basis;*
>
> (h) *a person who is employed on a fixed-term contract of service, inclusive of any extension, of not more than twenty four months; and*
>
> (i) *a person who, before the date of coming into operation of this Act, has retired at the age of fifty five years or above and subsequently is re-employed after he has retired."*

With the coming into force of the minimum retirement age, the retirement age for both private and public sector workers will be standardised. The Act will also ensure that there will not be any dispute on retirement age in the future.

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[1] Section 4(1)
[2] Section 4(2)
[3] Section 5(2)
[4] Section 5(3)
[5] Section 7(1)
[6] Section 8(1)
[7] Section 8(2)
[8] Section 8(5)(b)
[9] Section 10(1)
[10] Section 8(6)
[11] Schedule to the Act

INTELLECTUAL PROPERTY

Lack of patents for Malaysian inventions and strategic use of patent opinions as business toll by Malaysian business enterprises

IN THIS ARTICLE, MICHELLE LOI HIGHLIGHTS THE LACK OF PATENTS FOR MALAYSIAN INVENTIONS AND THE STRATEGIC USE OF PATENT OPINIONS BY MALAYSIAN BUSINESS ENTERPRISES.

Intellectual property is a valuable asset and is integral to the success and, ultimately, the value of a business enterprise. A business enterprise has to know the value of its intellectual property assets. An awareness and understanding of the intellectual property rights of competitors will avoid unnecessary expenditure and time wastage in defending an infringement claim or warding off allegations of infringement. This article looks at patents as an asset. Its importance may be seen when a due diligence exercise is performed in the context of business transactions including in instances of mergers and acquisitions.

A patent is a form of intellectual property that confers exclusivity of 20 years to its owner to exploit its invention. An invention in turn has been defined to mean an idea (be it relating to a product or process) which permits in practice the solution to a specific problem in the field of technology. A patentable invention is one that is novel at the time of its priority filing date, involves an inventive step and is industrially applicable[1].

The Malaysian Intellectual Property Office ("MyIPO") has recently released the statistics for patent filings in Malaysia over the course of 25 years. It is evident from the statistics that the number of filings by Malaysians and Malaysian corporations is still not encouraging. Although there is a marked increase in the number of patent filings among Malaysians since 1986 (a whopping 3817% increase as at the end of 2011)[2], the number of patent filings by Malaysians still remains low as compared to patent filings by foreign inventors and entities. The proportion of patent filings by Malaysians as compared to patent filings by foreign inventors and entities never exceeds 30% of the total number of filings in any given year. Out of the 9,952 patent applications filed by Malaysian applicants with MyIPO since 1986 till June 2011, only 20.33 % of the patents filed have been granted so far. Further, for patent applications filed after Aug 2006 (Malaysia became a Patent Co-operation Treaty Applications ("PCT") member on 16 August 2006), the statistics and figures released by MyIPO do not indicate the extent or the number of PCT international applications that Malaysians might have filed.

The dearth of patents granted to Malaysians does not necessarily indicate that Malaysian inventions and innovations lack patentable subject matter, nor does it mean that there is a scarcity of innovative ideas among Malaysians or that Malaysia lacks research and development facilities. It also cannot be that the applications are rejected because of inadequately drafted specifications. Malaysia has a mature class of professional patent agents who are well qualified and experienced in the drafting and preparation of patent specifications, and some of the inventors themselves have acquired drafting skills. If the Malaysian patents granted to Malaysians were examined, it may be observed that a significant number of these patent specifications were drafted by Malaysian patent agents or inventors, rather than by overseas patent drafters. They are accepted as having met the requirements of the law, regulations, and the drafting standards, and the fact that the patent applications progress to granted patents speak out in support of the contention that they have met MyIPO's patentability requirements. That said, it has to be acknowledged that there are occasions where the specifications are drafted by the inventors themselves and the patents are granted based on the inventor-drafted specifications.

There are various reasons, whether taken in isolation or in combination, that may have caused the relatively low number of Malaysian-owned patents in Malaysia as compared to those filed by foreign applicants. Readily identifiable reasons are instances where the patent applications are abandoned for want of a response to adverse substantive examination reports or are being converted into utility innovation applications[3]. Non-familiarity with the patent process and inadequate knowledge of the law and technology in the field of the invention hinder the preparation of a convincing and forceful response to the adverse substantive reports issued by the patent examiners. The assistance of patent professionals (see below) is often necessary.

The tardy normal examination process which takes up to 36 months from the date of filing to grant and the high cost of an expedited examination process are also deterrents. Even in the case of a modified examination procedure where the Malaysian application is brought into conformity with the corresponding patent granted in certain specified countries, the time to obtain the grant still remains unnecessarily long. The culture, thinking and mindset of those in business often dictate and influence a decision on whether to file for patent protection for the invention. While the innovation and invention is the result of the application of creative and inventive skills of the inventor, it is always those who are likely to commercially exploit the invention who decide whether to file for protection of the invention. Often, the inventor or the researcher does not have the financial means or backing to see a patent application through to its grant.

Many companies take the erroneous view that given the sensitivity, specificity or nature of their businesses (eg manufacturing, services and retail), there is no necessity for them to rely on patents for inventions to sustain or progress their businesses. Some even hold the erroneous view that unless the product of the invention has proven sales or guaranteed prospects for increased sales, it is unjustifiable for them to have to spend money for the filing of applications or, if filed, prosecute them to grant. To them, the money can be better spent on advertising and promoting the product. Even in instances where there is an inclination to file for patent protection, the costs that need to be incurred necessarily and prudently for prior patentability or prior art searches before filing are regarded as wasteful and unjustified. Many are driven by short-term benefits and profits without paying any attention to, or recognising, the commercial value and benefits a patented product can bring in the long term.

Despite a noticeable increase in awareness of the importance of patent protection for inventions, Malaysian companies very often still have only a vague idea of the entitlements patent protection provides. They have little knowledge of what subject matter or process is patentable, how long they can monopolise the exploitation of their invention or whether their granted patents can ever be challenged and, if so, on what grounds. These uncertainties contributed to their lack of confidence in the patent system and the scope and extent of their rights and protection they are entitled to, flowing from the grant of the patent. While patent protection might be expensive, it has to be acknowledged as well that the cost of enforcement of patent rights can be equally prohibitive. Such expenses are often looked at from a cost-effectiveness and profitability point of view. Time spent in court enforcing a patent or resisting an invalidation attack or infringement claim is deemed time wasted. There is a perception that time wasted means profits being forgone.

The issues discussed in the preceding paragraphs which clearly contribute towards the relatively small number of Malaysian patents owned by Malaysians as compared to foreign applicants need to be seriously addressed if Malaysians are to benefit from the protection conferred by the patent system. The following paragraphs provide some ways and means of addressing the above problems and highlight the importance of Malaysians protecting their own inventions/innovations as well as being aware of inventions/innovations owned by others.

There is little appreciation of the fact that while a new innovative or inventive product accompanied by focused advertisements and promotion may sell and catch on in the market, it might also infringe an existing patent granted to third parties, and subsisting on record. The damages and costs of proceedings that might have to be paid if infringement is proved might well wipe out all the profits made. Any goodwill and reputation of the business by being associated with the infringing product will be irreparably tarnished. The negative perceptions associated with the infringing product in particular, and the infringer's other products and good business name in general, are a stigma that is very difficult to remove. Significant business value is also lost if substantial investments have been made in a new product's development, promotion and marketing only to find some years into the future that competitive patents stand in the way of the product or parts of the new product.

So as to avoid any of these complications and to better ensure that the new product of the invention can be exploited in the most advantageous manner possible, it is best that at the outset, a patent opinion be sought to provide a better understanding of the business as well as the litigation strategy; in the case of the latter, from the aspects of patent enforcement, contesting any invalidity challenges or defences available in the case of any infringement assertions. Let the patent professionals advise on the complexities and nuances of the patent laws and on the extent of the need to secure protection of ideas, the pitfalls to avoid in the commercialisation of the new product and issues on misuse or designing around a prior patent that might potentially be infringed or strategic alliances on licensing programs. Such a due diligence exercise, often referred to as freedom to practice or freedom to operate opinions, should be seriously considered not only by established technology-based companies, but by all entrepreneurial individuals and venture start-up businesses. Such an opinion will provide an indication as to whether the new product or process will infringe any granted patents.

Other patent opinions that may be sought include infringement opinions which focus on an evaluation of the new product or process against a given or a group of prior granted patents to determine whether there is in fact an infringement. Such an infringement opinion is useful in deciding whether to sue for infringement or embark upon licensing considerations. It usually includes a claims construction analysis and possible defences to an infringement claim. A validity opinion may be sought on competitors' patents. It will assist in deciding whether to approach the competitor for a license or to utilise the prior patented product or technology without the need to pay a license fee or royalty. Often, legal patent professionals work with technical patent professionals who are well versed theoretically and practically experienced in the given field of the invention. With their combined legal and technical skill, they can search for prior art disclosures, technical publications and relevant patent documents of the various patent offices of the world to assist in the rendering of a patentability opinion as well as in the preparation of adequate responses to adverse substantive examination objections. A patentability opinion usually precedes any forward steps taken with regard to the filing of any applications for patent protection. The strength and weaknesses of the purported new product from a patentability perspective can then be better judged. Such exculpation and clearance should be obtained ahead of the research and development process.

Professional guidance on patent protection, scope of the claimed invention and territorial extent of protection needed, if obtained at the outset, is often of great value. Teamwork is the best. The team should ideally include patent professionals, and business and technical staff members. Together, they should constantly evaluate and assess current products and the need for research into and development of new products that are in alignment with business objectives and that are based upon strong patent protection to shield them against any infringement.

Patent strategy is therefore a critical part of strategic business counseling. It requires the skill and experience of patent professionals who are not only lawyers but those knowledgeable in the business of the field of the invention as well. It is this patent strategy that should ideally and ultimately bear on decisions such as whether a new product needs to be developed or whether there is a ready market sector for the intended new product which in turn can determine whether a business enterprise will succeed in the long run. Until this is fully realised, there remains much to be said of business enterprises' unfulfilled potential.

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[1] See s 11 and 12(1) of the Patents Act 1986

[2] http://www.myipo.gov.my/web/guest/paten-statistik — In 1986, Malaysians filed 29 patent applications. This is in contrast to 1136 patent applications that were filed in 2011

[3] "utility innovation" means any innovation

which creates a new product or process, or any new improvement of a known product or process, which is capable of industrial application, and includes an invention — s 17 of the Patents Act 1983. Section 17B(1) provides conversion of patent application into an application for a certificate for a utility innovation

REAL ESTATE

Liberalisation of s 23 of the Valuers, Appraisers and Estate Agents Act 1981

IN THIS ARTICLE, DING MEE KIONG LOOKS AT THE LIBERALISATION OF SECTION 23 OF THE VALUERS, APPRAISERS AND ESTATE AGENTS ACT 1981 AFTER THE COMING INTO FORCE OF THE VALUERS, APPRAISERS AND ESTATE AGENTS (AMENDMENT) ACT 2011.

In Malaysia, only a registered valuer, appraiser or estate agent duly authorised by the Board of Valuers, Appraisers and Estate Agents ("Board") established under s 9 of the Valuers, Appraisers and Estate Agents Act 1981 ("Act") is allowed to practise his profession. A registered valuer or appraiser shall be authorised to undertake property management. A person who is not a citizen or permanent resident of Malaysia shall not qualify for registration as a valuer, or as an appraiser or estate agent.

Section 23 of the Act deals with the practice (of valuers, appraisers and estate agents) by firms. Section 23(1) of the Act specifically requires a firm to be duly licensed under the Act by the registration of the firm with the Board. A "firm" means a "body corporate", a "partnership" or a "sole proprietorship". The amendment to the Act which came into force on 19 August 2011 and is cited as the Valuers, Appraisers and Estate Agents (Amendment) Act 2011 ("Amendment Act") has amended, among others, s 23(2) of the Act. Section 23(2) of the Act provides that (with the new provisions in bold):

"A partnership or body corporate practising valuation, appraisal or estate agency, as the case may be, shall not be registered by the Board unless —

(a) all partners of the partnership or all directors and shareholders of the body corporate are —

(i) in the case of a valuation practice —

(A) solely registered valuers;
(B) a combination of registered valuers, registered appraisals, and registered estate agents; or
(C) a combination of registered valuers and any other persons or bodies corporate; and

(ii) in the case of an appraisal practice —

(A) solely registered appraisers;
(B) a combination of registered appraisals, registered valuers and registered estate agents; or
(C) a combination of registered appraisers and any other persons or bodies corporate; and

(iii) in the case of an estate agency practice —

(A) solely registered agents;
(B) a combination of registered estate agents, registered valuers and registered appraisers; or
(C) a combination of registered estate agents and any other persons or bodies corporate; and

(b) the shares in the partnership or body corporate are held —

(i) in the case of a valuation practice, solely by registered valuers;

(ii) in the case of an appraisal practice, solely by registered appraisers;

(iii) in the case of an estate agency practice, solely by registered estate agents; and

(iv) ***in the case of a partnership or body corporate where all partners of the partnership or all directors and shareholders of the body corporate are a combination of registered valuers, registered appraisers and registered estate agents and any other persons or bodies corporate —***

(A) ***in the case of a valuation practice, by a majority of valuers who hold the majority interest and the voting rights;***
(B) ***in the case of an appraisal practice, by a majority of appraisers who hold the majority interest and the voting rights; and***
(C) ***in the case of an estate agency practice, by a majority of estate agents who hold the majority interest and voting rights; and***

(c) it satisfies all the conditions specified by the Board."

The new provisions make reference to "*any other persons or bodies corporate*" and "*majority interest and the voting rights*" but these words are not defined in the Amendment Act. Following the Amendment Act, the Board has issued a notification dated 28 December 2011 ("the Notification") setting out the criteria to be adopted by the Board when registering companies. The salient points of the Notification are as below:

1. A registered company shall comprise both registered persons and/or non-registered persons as shareholders subject always to the registered persons collectively holding (whether directly or indirectly) not less than 51% of the equity interest or ordinary shareholding in the company. "Registered company" means a company that is undertaking or intends to undertake a valuation practice, an appraisal practice, a property management practice or an estate agency practice whose shareholdings have been duly approved by the Board. "Registered Person" means a registered valuer, a registered appraiser or a registered estate agent.

2. The registered persons shall incorporate a company as an investment holding company to hold the majority equity interest in a registered company subject always to approval being granted by the Board.

3. There shall be at least two directors and the registered persons shall make up the majority of the board subject always to the composition of the board of directors to reflect the proportion of equity interest between the registered persons and non-registered persons.

4. The chairperson of the board of directors of a registered company shall be nominated by the Approved Holding Company. "Approved Holding Company" is a company approved by the Board to be an investment holding company for a registered company.

5. A partnership shall comprise both registered persons and/or non-registered persons as partners subject always to the registered persons collectively holding (whether directly or indirectly) not less than 51% equity interest in the partnership.

6. The management of a company shall be vested in the hands of registered persons only.

Conclusion

The amendment to s 23(2) of the Act allows a company or a partnership having a combination of registered and non-registered persons as shareholders or partners to undertake a valuation practice, an appraisal practice, a property management practice or an estate agency practice if the criteria of the Notification are met. This indirectly means that a company consisting of local and foreign equity may now apply to the Board to undertake a valuation practice, an appraisal practice, a property management practice or an estate agency practice.

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CASE NOTE

Wincor Nixdorf (M) Sdn Bhd v Minister of Finance and Director General of Customs & Excise

IN THIS ARTICLE, IRENE YONG YOKE NGOR REVIEWS THE CURRENT CASE OF WINCOR NIXDORF (M) SDN BHD V MINISTER OF FINANCE AND DIRECTOR GENERAL OF CUSTOMS AND EXCISE[1] RELATING TO THE NOVEL ISSUE FOR CUSTOMS DUTIES AND SALES TAX PURPOSES, AND WHETHER A MINISTERIAL DISCRETION IS SUBJECT TO JUDICIAL REVIEW PROCEEDINGS.

Facts

Wincor Nixdorf (M) Sdn Bhd ("WN") carried on business of distributing automated teller machines ("ATMs") and other products and solutions and had engaged certain freight forwarders to handle the importation of the ATMs and parts into Malaysia. However, without WN's knowledge or authorisation, the forwarders had engaged other forwarders ("unauthorised forwarders") to clear the goods through the Customs Departmment ("Customs").

Upon suspicion of commission of fraud or other wrongdoing ("Fraud") by the unauthorised forwarders, Customs commenced investigations in 2007 into the operations of the unauthorised forwarders.

A notice of demand was thereafter issued by Customs alleging short payment of customs duties and sales taxes which WN was required to make good. The alleged short payment had taken place over a period of almost 22 months.

As WN had already paid the relevant duties and taxes to its appointed forwarders, it denied liability for the Fraud and sought a remission of the said duties and taxes from the Minister of Finance ("MOF") under s 14A of the Customs Act 1967 and s 33 of the Sales Tax Act 1972 respectively. The relevant provisions are as follows:

Section 14A of the Customs Act 1967 reads:

> *"The minister may, if he thinks it just and equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of the customs duties or any other prescribed fees or charges payable under this Act."*

Section 33 of the Sales Tax Act 1972 reads:

> *"The Minister may, if he thinks it just and*

equitable to do so, and subject to such conditions as he may deem fit to impose, remit the whole or any part of any sales tax due and payable under this Act, or the whole or any part of any penalty payable under the provision in section 24."

Accordingly, under s 14A of the Customs Act 1967 and s 33 of the Sales Tax Act 1972, respectively, the MOF may, where he thinks it just and equitable to do so, remit the duties and taxes as he deems fit. However, WN's remission application was rejected by the MOF.

Subsequently, WN filed an application for judicial review to the High Court to, among other things, quash the MOF's decision on the basis that the MOF's decision had been arrived at unreasonably considering the facts and circumstances of the case.

Decision of the High Court

The Court quashed the MOF's decision and held that while the Minister was given the discretion on whether or not to grant the remission, such discretion was not unfettered, and referred to the Federal Court case of **Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd Federal Court**[2], where Justice Raja Azlan Shah AG CJ (Malaya) (as His Majesty then was) held that an unfettered discretion to be a contradiction in terms.

Based on the facts of the instant case, the Court found that WN was a victim in a scam that was well beyond its control. The Court also found that there was uncontroverted evidence tending to point towards negligence on the part of the officers of Customs as the ATM machines had been released from controlled areas within the absolute control and supervision of Customs officers without the proper taxes having been paid for their release.

The Director General of Customs & Excise ("DG") thus had the attendant statutory duty to regulate this activity, as well as the capacity and capability to detect and probe the matter thoroughly and at the earliest opportunity as all the irregular particulars were captured in the declaration Form K1 and these numerous declarations in Form K1 were at all material times in the possession of the Customs.

Further, it was for the Customs to regulate the appointment or accreditation of forwarding agents whom the Customs had licensed to be permitted to clear goods on behalf of their clients.

In this regard, the MOF and DG had contended that the forwarding agents were agents of WN so that WN can recover or otherwise be indemnified by the forwarding agents based on the principal–agent principle. WN, on the other hand, contended that the forwarding agents were merely independent contractors and there was no vicarious liability or fiduciary duty between them.

In holding that the forwarders were not agents of WN, the Court applied the principles enunciated in **Kennedy v de Trafford**[3].

The Court held, quoting Lord Greene MR in the case of **Associated Provincial Picture House, Ltd v Wednesbury Corporation**[4], that the public expectation of public officials in discharging their public functions, including in exercising their discretion, "must produce a result which does not offend against common sense".

The Court further held that,

> *"… had the First Respondent [MOF] taken into account relevant factors such as those alluded to above, he would not have been so misdirected in the exercise of his discretion so as to deny the remission that was urged upon him to be exercised in favour of the Applicant, a remedy that was founded upon the elements of justice and equity that must of necessity be considered on the simple yet hallowed altar of reasonableness."*

Subsequent to the substantive decision, the Court granted relief of 100% remission on the duties and taxes on 23rd July 2012.

Conclusion

The power to grant a remission of duties is to be found in a number of tax statutes. The principles enunciated in this case have a far-reaching effect on how such discretionary powers should be exercised.

The MOF and DG have filed an appeal against the High Court's decision.

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1 MTKL No R1-25-431-2010
2 [1979] 1 MLJ 135
3 [1897] AC 180
4 [1948] 1 KB 223