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NEWSLETTER

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CUSTOMS DUTIES

Should Royalty Form Part of The Value of Goods Imported into Malaysia for Purposes of Imposing Customs Duties and Sales Tax?

IN THIS ARTICLE, GOH KA IM ANALYSES THE RECENT LANDMARK DECISION OF THE FEDERAL COURT IN NIKE SALES MALAYSIA SDN BHD V JABATAN KASTAM DIRAJA MALAYSIA & ORS[1] WHICH DEALT WITH THE ABOVE QUESTION.

Brief facts

Nike Sales Malaysia Sdn Bhd ("Nike Malaysia") is the importer of footwear, apparel and sports equipment under the Nike brand ("licensed goods") for sale in Malaysia. The same products are also sourced by Nike Malaysia from Malaysian manufacturers for sale in Malaysia. Pursuant to a purchase commission agreement between Nike Inc and Nike Malaysia, Nike Inc will negotiate terms with the non-Malaysian manufacturers for the goods Nike Malaysia wishes to order and forward the purchase orders placed by Nike Malaysia. Pursuant to an intellectual property licence and exclusive distribution agreement between Nike Malaysia and Nike International Ltd ("NIL"), Nike Malaysia has to pay NIL a royalty of 6% of the net invoiced sales revenues of the licensed goods sold in Malaysia. Nike Inc is the ultimate holding company of Nike Malaysia and NIL. Nike Malaysia did not include royalty as part of the value of the goods imported for purposes of imposing customs duties and sales tax.

Customs (Rules of Valuation) Regulation 1999 ("the Regulations")

As a starting point, the customs value of imported goods is the price paid for the goods when exported to Malaysia but adjustments can be made to the customs value in certain circumstances, one of which is to add:

> *"royalties and licence fees, including payments for patents, trademarks and copyrights in respect of the goods that the buyer must pay, directly or indirectly, as a condition of the sale of the goods for export to Malaysia, exclusive of charges for the rights to reproduce the goods in Malaysia."*

This is provided for in Regulation 4(1) read together with Regulation 5(1)(a)(iv) of the Regulations.

Main dispute

The crux of the dispute between Nike Malaysia and the Royal Customs Department Malaysia ("KDRM") was described by the High Court in the following manner,

> *"Ignoring for the moment the intricate legal wordings applicable, the dispute between the parties is reduced to this proposition: Nike Malaysia says the royalty should not be part of the value to be assessed for customs duties and sales tax because it is not a condition of sale by the exporter, whereas KDRM says it has to be included in the customs*

▪ In This Issue ▪

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value, although the declared value states otherwise, since it must be taken as an adjustment item because the royalty is, directly or indirectly, a condition of the sale of the goods for export to Malaysia."

Regulation 5

Regulation 5 of the Regulations was adopted from the Agreement on Implementation of Article VII of The General Agreement on Tariffs And Trade 1994 ("WTO Valuation Agreement") as Malaysia is a signatory to the WTO Valuation Agreement.

Not surprisingly, the same regulation can be found in the Customs legislations of the many countries which are signatories to the WTO Valuation Agreement and the two leading cases on this issue are the unanimous decision of the Canadian Supreme Court in **Deputy MNR v Mattel Canada Inc**[2]**("Mattel Canada")** and the majority decision of the New Zealand Court of Appeal in **Chief Executive of New Zealand Customs Service v Nike New Zealand**[3] **("Nike New Zealand")**.

Decision of the High Court

While both **Mattel Canada** and **Nike New Zealand** were considered by the High Court, the reasoning in **Mattel Canada** was preferred by the High Court and the following test was adopted:

> *"The overriding test is whether the buyer or importer has, or has not, the obligation to pay the royalty in order to purchase or import the goods. If the obligation arises from a separate agreement that is unrelated to the sale or importation of the goods, it cannot be regarded as a condition of the sale of the goods."*

Applying the test, the High Court decided in favour of Nike Malaysia that the royalty payable by Nike Malaysia to NIL cannot be taken as a *"condition of the sale of the goods for export to Malaysia"*.

Decision of the Court Of Appeal

However, the Court of Appeal was in agreement with the majority decision in **Nike New Zealand** and overturned the decision of the High Court. The Court of Appeal held that in order for royalty to be added, two features had to be present, that is:

- the royalty had to be payable to the manufacturer or another person as a consequence of the export, and
- the party to whom the royalty was payable must have had control of the situation going beyond the ordinary rights of a licensor of intellectual property and giving it the ability to determine whether the export could or could not occur.

The Court of Appeal concluded that the two features were present in this case so that the royalty payable by Nike Malaysia to NIL after the licensed goods were sold in Malaysia was an adjustment item to be added to the price of the licensed goods

Decision of the Federal Court

The Federal Court agreed with the test adopted by the High Court and found the judgment of the Canadian Supreme Court in **Mattel Canada** more convincing.

It was held by the Federal Court:

> *"... Since royalties paid by the Plaintiff to Nike International Ltd. are not expressed to be paid as a condition of sale for the export of the goods by the independent foreign suppliers to the Plaintiff, the royalties are therefore not to be added to the transaction value of the imported goods.*
>
> *If the royalties are to be added in determining the transaction value of the goods exported into Malaysia regardless of whether it is expressly stated to be a condition of sale as decided by the Court of Appeal, then the words "as a condition of sale for the goods to be exported to Malaysia" would be rendered redundant as any time royalty is paid in relation to goods exported to Malaysia, royalties would be automatically added to the transaction value. If this were the true intent then the WTO Valuation Agreement could have easily made this intent explicit."*

In summary, the main issue was whether the royalties were paid as a condition of the sale of the licensed goods into Malaysia and since the obligation to pay royalty only arose from a separate agreement unrelated to the export of licensed goods to Malaysia, royalty did not have to be included for duty purposes.

The Federal Court also gave due regard to the advisory opinions given by the Technical Committee on Customs Valuation established under the WTO Valuation Agreement and the advisory opinion for a scenario similar to the current facts came to the conclusion that,

> *"Although the importer is required to pay a royalty to obtain the right to use the trademark, this results from a separate agreement unrelated to the sale for export of the goods to the country of importation. The imported goods are purchased from various sup-*

pliers under different contracts and the payment of a royalty is not a condition of the sale of these goods. The buyer does not have to pay the royalty in order to purchase the goods. Therefore, it should not be added to the price actually paid or payable as an adjustment under article 8.1(c)."

In addition, the Federal Court took into account that in other Commonwealth countries like the UK, Australia, India and Singapore, royalties paid on Nike goods have not been added to the value of imported goods for customs duties and sales tax and held that **Nike New Zealand** appeared to be inconsistent with decisions in other Commonwealth countries.

Conclusion

This is a landmark decision as:

- it is the first case in Malaysia dealing with the question of whether royalties payable upon the sale of imported goods in Malaysia should be added to the valuation of those imported goods
- it is the first case in Malaysian involving the interpretation of Regulation 5(1)(a)(iv) of the Regulations which is a provision adopted from an international agreement, that is, the WTO Valuation Agreement.

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1 Civil Appeal No: 01()-3-03/2012 (W) (unreported decision)
2 199 DLR (4th) 598
3 [2004] 1 NZLR 238

CASE NOTE

AmBank (M) Bhd v Tan Tem Son & Another Appeal

IN THIS ARTICLE, ANKIT R. SANGHVI EXAMINES THE RECENT DECISION OF THE FEDERAL COURT IN **AMBANK (M) BHD V TAN TEM SON & ANOTHER APPEAL**[1] ON WHETHER A JUDGMENT CREDITOR CAN ISSUE A BANKRUPTCY NOTICE UNDER SECTION 3(1)(I) OF THE BANKRUPTCY ACT 1967 WITHOUT OBTAINING LEAVE OF THE COURT, WHERE SIX YEARS OR MORE HAD ELAPSED SINCE OBTAINING A FINAL JUDGMENT.

The facts of the case

In 1996, AmBank (M) Bhd ("AmBank") granted a loan facility of RM1.5 million to Hwa Yak Hong (M) Sdn Bhd ("HYH"). Tan Tem Son ("Tan") and Pua Keng Siang ("Pua") were guarantors for the loan facility to HYH. HYH defaulted in the repayment of the facility. Tan and Pua had also failed to settle the same. In May 1998, AmBank filed a civil suit against HYH, Tan and Pua for recovery of the amount owing under the loan facility. On 19 August 1998, AmBank obtained a judgment in default against Tan and Pua respectively.

On 17 October 2000, AmBank commenced bankruptcy proceedings against Tan and Pua ("the first bankruptcy"). The first bankruptcy was set aside on 20 August 2004. In October 2005, AmBank applied for leave to enforce the judgment against Tan and Pua as more than six years had elapsed from the date of judgment. The court dismissed AmBank's application for leave.

AmBank then initiated a second bankruptcy proceeding on 12 March 2007 against Tan and Pua respectively. Tan and Pua applied to set aside the bankruptcy notice on the ground that AmBank had not obtained leave of court to enforce the judgment given that more than six years had elapsed from the date of judgment. The Deputy Registrar allowed Tan and Pua's application. AmBank then appealed to the judge in chambers. In Tan's case, the judge dismissed AmBank's appeal, however in Pua's case, AmBank succeeded in the appeal before the judge. Subsequently, AmBank's appeal and Pua's appeal came before the Court of Appeal. The parties in both appeals agreed that the decision in Pua's appeal would bind the parties. The Court of Appeal allowed Pua's appeal and held that AmBank is not entitled to enforce the judgment without first obtaining the leave of court under Order 46 rule 2(1)(a) of the Rules of High Court 1980 ("RHC"), read with section 6(3) of the Limitation Act 1953. The Court of Appeal had taken the following position in the delivery of its judgment:

"In the above circumstances, we are unanimous in our view, that

on the date of the issue of the impugned bankruptcy notice the JC is not, in fact and in law, a person falling within the meaning of the term 'a creditor' under s. 3(1)(i) Bankruptcy Act 1967, as without having first obtained leave of the Court under O46 r2(1)(a) of the Rules of High Court 1980, read with s 6(3) of the Limitation Act 1953, he is not entitled to enforce the judgment in default, dated 19/6/1998. A person, who cannot issue a writ of execution by the operation of O46 r2(1)(a) of the Rules of High Court 1980, without first having obtained such leave, is in fact not a 'person who is for the time being entitled to enforce a final judgment'. Such a person cannot, therefore, issue a bankruptcy notice under s. 3(1)(i) Bankruptcy Act 1967."

AmBank had thereafter obtained leave to appeal to the Federal Court on several questions of law. However, the main question for the Court's determination was whether the phrase *"any person who is for the time being entitled to enforce a final judgment"* in the proviso to section 3(1)(i) of the Bankruptcy Act 1967 required the judgment creditor to obtain leave pursuant to Order 46 rule 2(1)(a) of the RHC, prior to initiating a bankruptcy proceeding based on a final judgment obtained more than six years ago. The question also required the court to choose between two lines of conflicting authorities on the issue. There were two decisions which had answered the question in the negative, namely the cases of **Perwira Affin Bank Bhd v Lim Ah Hee @ Sim Ah Hee**[2] and **Re Chan Boon Heng; Ex P Associated Tractors Sdn Bhd**[3]. On the other hand a long line of authorities had answered the question in the affirmative, amongst them were the cases of **V Gopal, Re: Ex P; Bank Buruh (M) Bhd**[4] and **Wee Chow Yong t/a Vienna Music Centre v Public Finance Bhd**[5].

The Federal Court decision

The Federal Court followed the reasoning of Abdul Hamid Mohamed FCJ in **Perwira Affin Bank Bhd** where His Lordship ruled that *"a bankruptcy proceeding is not a writ of execution within the meaning of O. 46 r2 of the RHC and unlike execution which is the continuation of the existing proceeding to enforce a judgment provided by RHC, bankruptcy proceedings are provided by separate law and rules, the focus being the judgment debtor, not the debt and the object is to appoint a receiver in the person of the official assignee over the assets of the debtor and to convert the status of the debtor into a bankrupt with certain disqualification and disabilities, the most important being the loss of control over his properties to the official assignee."* His Lordship went on to say that unlike an execution proceeding, a bankruptcy proceeding bears the characteristics of a fresh proceeding. Thus a bankruptcy proceeding is an action caught by the provision under section 6(3) of the Limitation Act 1953. It is an action upon a judgment, that is, an action to enforce a judgment. Such being the case Order 46 rule 2 of the RHC does not apply.

The Federal Court also held that since a bankruptcy proceeding is an action upon a judgment within the meaning of section 6(3) of the Limitation Act 1953, and the limitation period for bringing the action is 12 years, a judgment creditor is entitled to enforce a final judgment by instituting bankruptcy proceeding without the leave of court within that period of 12 years. In other words, if the judgment creditor institutes a bankruptcy proceeding (to enforce a final judgment) within that 12 year period, he *"shall be deemed to be a creditor who has obtained a final judgment or final order"* within the meaning of section 3(1)(i) of the Bankruptcy Act 1967.

In essence, the Federal Court decided that the phrase *"any person who is for the time being entitled to enforce a final judgment"* in the proviso to section 3(1)(i) of the Bankruptcy Act 1967 does not require a judgment creditor to obtain leave pursuant to Order 46 rule 2(1)(a) of the RHC prior to initiating a bankruptcy proceeding based on a final judgment which had been obtained more than six but less than 12 years ago.

Conclusion

The decision of the Federal Court has finally put to rest the issue on whether leave of court is required to enforce a judgment by way of bankruptcy where more than six years has elapsed from the date of judgment. It is now unequivocally clear that so long as the bankruptcy proceeding is commenced within 12 years from the date of judgment, a judgment creditor will not run foul of the Rules of Court 2012 which have identical provisions to O46 r2(1)(a) of the RHC.

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1 [2013] 3 CLJ 317
2 [2004] 3 MLJ 253
3 [2009] 2 CLJ 552
4 [1987] 1 CLJ 602
5 [1989] 3 MLJ 508

EMPLOYMENT LAW

Social Media Privacy in the Workplace

IN THIS ARTICLE, NADIA BINTI ABU BAKAR DISCUSSES THE EMPLOYEES' RIGHT TO PRIVACY AND THE EMPLOYERS' RIGHT TO PROTECT THEIR BUSINESS INTEREST ON THE USE OF SOCIAL MEDIA IN THE WORKPLACE.

Introduction

The prevailing question is — do employees have the right to privacy in the workplace? Employees want to work in a safe environment without the fear of being constantly monitored by their employers. Consequently, employees expect that their privacy in the workplace is respected. On the other hand, employers have the right to protect their business interests against unwarranted consequences that would damage their business. This article seeks to discuss these two rights in the context of the use of social media in the workplace and the issue of privacy attached to it.

Privacy and the use of social media at the workplace

In an employment contract, there exists an implied term which is known as the duty to maintain mutual trust and confidence. Employees and employers are under a mutual obligation to mutually respect the trust and confidence in the employment relationship and must refrain from acting in any way which will damage this mutual relationship. Proponents of privacy rights have sought to rely on this implied term of mutual trust and confidence to argue that employers are duty bound in law, to respect the privacy of its employees.

However, the proliferation of social media has resulted in the extensive use of such tools and platforms at the workplace. Based on the implied term of mutual trust and confidence, employers are advised not to engage in excessive monitoring of its employees without any justifiable reason. The issue of privacy is more complex in situations where the employees are required to spend a reasonable amount of their time outside the office or perform work from home.

The right to privacy at the workplace comes with certain limitations. Whilst the law recognizes the right to privacy at the workplace, employers still have a legitimate right to either use reasonable means to monitor its employees to prevent the abuse of office facilities or to enforce discipline.

There are several situations where an employer may be justified to intervene with the employee's privacy at the workplace.

Excessive use of employer's facilities and equipment to access social media

Where employees are found to have excessively used the company's equipment to gain access to social media, the employer would be justified to monitor the use of the same.

It is to be borne in mind that the contract of employment between the employer and the employee is built based on the fiduciary relationship of trust and confidence reposed upon the employee. If sufficient evidence of a breach of the fiduciary relationship is found, the employee's conduct may amount to misconduct. Therefore, if an employee is found to have used the employer's equipment excessively to gain access to social media, the same constitutes misconduct at the workplace.

In a reported Industrial Court case, Employee A was charged for using the employer's telephone facilities to make numerous and long personal calls to Employee B. Employee B was charged for being engaged in the personal calls with Employee B. Both employees were dismissed for misuse of the company's telephone facilities. Having considered that the employees' conducts would have disrupted their daily duties, the Industrial Court was of the opinion that the employer had acted reasonably in dismissing the employees and held that:

> *"Both the claimants were employed to work for the company and to be productive. It was never meant that for a substantial period of their office hours they could use that for personal calls and resulting in the reduction of productivity and efficiency in the office."* [1]

If the same line of argument is used against an employee who excessively uses the employer's property and equipment for social media purposes to the extent that such excessive use affects the performance and productivity at the workplace, then it is clear that the employer would have the right to monitor the usage of such social media at the workplace and take action where necessary.

The misuse of social media which affects the employer's reputation or business interest

An employer would be justified to take action against an employee where it can be shown that the employee had posted a statement on the social media which affects the reputation of the employer.

In the United Kingdom, the Employment Tribunal upheld the dismissal of an employee who posted derogatory comments against employees and customers on her Facebook during working hours[2]. An employee in another case[3] met with a similar fate after posting negative comments on his employer's products and services on his Facebook.

In Malaysia, the Industrial Court is likely to adopt the same approach in determining whether the act of an employee in posting comments on Facebook can constitute a just cause and reason for dismissal. In addition, the following is an authoritative text by B. R. Ghaiye that serves as guidance to the Industrial Court:

> *"... it would be regarded as an act of misconduct for which an employer may punish him by dismissal or otherwise, even if it occurs outside the working hours and outside the factory or place of business of the employer, if the act:*
>
> *(i) is inconsistent with the fulfilment of the express or implied conditions of service, or*
>
> *(ii) is directly linked with the general relationship of employer and employee, or*
>
> *(iii) has a direct connection with the contentment or comfort of the men at work, or*
>
> *(iv) has a material bearing on the smooth and efficient working of the concern."* [4]

Whist an employee may have a right to post his private comments on Facebook, such comments must not have the effect of affecting the reputation of the employer, even though the posting may only be circulated within the employee's inner circle of friends. If the reputation or business of the employer is materially affected as a result of an employee's Facebook posting, the employer would, arguably, be justified in taking action.

Conclusion

Undoubtedly, the employer's right to protect the business interests and the employee's right to privacy collide when it comes to the issue of social media privacy at workplace. To answer the question at the beginning of this article — yes, the employee does have the right to privacy. However, this right is not unlimited. The right to privacy must be balanced with the employer's right to protect its good name, reputation and to ensure productivity of its workforce.

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1 Noor Eliza Abd Halil & Anor v BD Agriculture (Malaysia) Sdn Bhd [2013] 2 ILR 602

2 KC Preece v J D Wetherspoons Plc (UK Employment Trbunal Case No 2104806/10)

3 Samuel Crisp v Apple Retail (UK) Limited (UK Employment Tribunal Case No 1500258/2011)

4 B. R. Ghaiye, Misconduct in Employment, (1977), (2nd Ed.), (Eastern Book Company), p 615

REAL ESTATE

Amendments to Section 8A of the Housing Development (Control and Licensing) Act 1966

IN THIS ARTICLE, CHEAH WAI LEONG AND BENJAMIN TAN WEI ZHIT BRIEFLY SET OUT THE MATERIAL CHANGES INTRODUCED BY SECTION 5 ("NEW SECTION 8A") OF THE HOUSING DEVELOPMENT (CONTROL AND LICENSING) (AMENDMENT) ACT 2012 ("THE AMENDMENT ACT") TO SECTION 8A ("OLD SECTION 8A") OF THE HOUSING DEVELOPMENT (CONTROL AND LICENSING) (AMENDMENT) ACT 1966 AND CONSIDER WHETHER AN "IMPROVED" RIGHT TO TERMINATE SALE AND PURCHASE AGREEMENTS IN RESPECT OF A HOUSING DEVELOPMENT WILL BE ACCORDED TO PURCHASERS UPON THE COMING INTO FORCE OF THE AMENDMENT ACT.

Prior to the introduction of the New Section 8A, in the event that a purchaser wishes to terminate a sale and purchase agreement entered into with a developer on the basis that the developer refuses to carry out or delays or suspends or ceases work in respect of a housing development, there are certain conditions which must be fulfilled. Among others, at least 75% of the purchasers concerned must concur in such termination and the prior written consent of the developers must also be obtained, such consent being likely to be difficult to obtain in the circumstances.

In considering whether the Ministry of Housing and Local Government ("Ministry")'s introduction of the New Section 8A provides a purchaser an "improved" right to terminate the sale and purchase agreement in the unfortunate event of a developer's refusal to complete works in respect of a housing development, it is prudent to examine the right provided under the Old Section 8A and to compare this against the New Section 8A.

The Old Section 8A provides as follows:

"8A. Statutory termination of sale and purchase agreements.

(1) Notwithstanding anything contained in any agreement, a licensed housing developer or the purchasers may apply to the Minister for approval to terminate all the sale and purchase agreements entered into in respect of a housing development or any phase of a housing development which the housing developer is engaged in, carries on or undertakes or causes to be undertaken if-

(a) such application, duly made in accordance with subsection (2), is received by the Minister within six months after the execution of the first sale and purchase agreement in respect of that housing development or that phase of housing development; and

(b) at least seventy-five per cent of all the purchasers who have entered into the sale and purchase agreements have agreed with the housing developer in writing to terminate the sale and purchase agreements.

(2) Any application made under subsection (1) shall be supported by-

(a) the written consent of the licensed housing developer and or each of the purchasers who have agreed to terminate the sale and purchase agreements and such consent shall have been duly executed by the licensed housing developer and the purchaser, as the case may be, and witnessed by his solicitors or a Commissioner for Oaths not earlier than one month before the date of the application; and

(b) such other documents or evidence as the Minister may require as may be determined including such evidence which may satisfy the Minister that the licensed housing developer is financially capable of refunding to the purchasers and their financiers all the moneys paid by them to the licensed housing developer if the Minister approves such application.

(2A) In the case of an application made by the purchasers under subsection (1), no licensed housing developer shall unreasonably withhold his written consent to the termination of the sale and purchase agreement."

The New Section 8A provides as follows:

"8A. (1) Notwithstanding anything contained in any agreement, a purchaser shall at any time be entitled to terminate the sale and purchase agreement entered into in respect of a housing development which the licensed housing developer is engaged in, carries on, undertakes or causes to be undertaken if-

(a) the licensed housing developer refuses to carry out or delays or suspends or ceases work for a continuous period of six months or more after the execution of the sale and

purchase agreement;

(b) the purchaser has obtained the written consent from the end financier; and

(c) the Controller[1] *has certified that the licensed housing developer has refused to carry out or delayed or suspended or ceased work for a continuous period of six months or more after the execution of the sale and purchase agreement."*

(2) For the purpose of paragraph (1)(b), no end financier shall unreasonably withhold its written consent to the termination of the sale and purchase agreement.

(3) In the event that the purchaser exercises his right to terminate the sale and purchase agreement under subsection (1), the licensed housing developer shall within thirty days of such termination refund or cause to be refunded to such purchaser all monies received by the licensed housing developer from the purchaser free of any interest.

(4) Upon receipt of the refund under subsection (2), the purchaser shall immediately cause all encumbrances on the land to be removed and the cost and expenses for such removal shall be borne by the licensed housing developer and may be claimed as a civil debt from the licensed housing developer.

(5) Any person who fails to comply with this section shall be guilty of an offence and shall, on conviction, be liable to a fine which shall not be less than fifty thousand ringgit but which shall not exceed two hundred and fifty thousand ringgit and to a further fine not exceeding five thousand ringgit for every day during which the offence continues after conviction.

(6) This section applies only to an agreement lawfully entered into between a purchaser and a licensed housing developer after the date of coming into operation of the Housing Development (Control and Licensing) (Amendment) Act 2012 [Act A1415]"

For easy reference, the material differences between the Old Section 8A and the New Section 8A are summarised in the table below:

	The Old Section 8A	The New Section 8A
1.	The concurrence of at least 75% of the purchasers is required for the termination of the sale and purchase agreements.	A single purchaser may apply for the termination of his sale and purchase agreement without the concurrence of any other purchaser.
2.	Approval from the Minister is required.	Approval from the Minister is not required.
3.	Consent of the housing developer is required.	Consent of the housing developer is not required.
4.	Consent of the end-financier is not required.	Consent of the end-financier is required

Based on the above, it appears that the Ministry has introduced an "improved" right to afford more protection to home buyers/purchasers in so far as abandoned housing projects are concerned. However, even after termination, there is no assurance of any refund of monies from defaulting developers who are likely to have poorly-managed finances.

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CORPORATE LAW

Acquisitions and Disposals of Banks and Insurance Companies under the Financial Services Act 2013 and the Islamic Financial Services Act 2013

IN THIS ARTICLE, MICHELLE WONG MIN ER HIGHLIGHTS SOME OF THE PROVISIONS OF THE FINANCIAL SERVICES ACT 2013 AND THE ISLAMIC FINANCIAL SERVICES ACT 2013 WHICH REGULATE ACQUISITIONS AND DISPOSALS OF BANKS AND INSURANCE COMPANIES.

The coming into force of the Financial Services Act 2013 ("FSA") and the Islamic Financial Services Act 2013 ("IFSA") on 30 June this year[1] represents a significant change to the regulatory framework governing the financial services sector to date.

The conventional financial services sector is now regulated by the FSA with the repeal of the Banking and Financial Institutions Act 1989 ("BAFIA"), the Insurance Act 1996 ("IA"), the Payment Systems Act 2003 and the Exchange Control Act 1953[2].

At the same time, the IFSA seeks to regulate the Islamic financial services sector with a clear focus on *Shariah* compliance. The Islamic Banking Act 1983 and the Takaful Act 1984 were repealed by the IFSA[3].

This article highlights the regulatory approvals required under the FSA and the IFSA for acquisitions and disposals of banks and insurance companies, given that regulatory approvals will always be central to mergers and acquisitions ("M&As") involving banks and insurance companies.

Terminology

Acquisitions and disposals of "interest in shares" of:

- commercial banks, investment banks and insurance companies are regulated by the provisions under Division 1, Part VI of the FSA. Conventional banks and insurance companies are "licensed persons" under the FSA[4].
- Islamic banks and *takaful* operators are regulated by the provisions under Division 1, Part VII of the IFSA. Islamic banks and *takaful* operators are "licensed persons" under the IFSA[5].

"Interest in shares" is defined under the respective Schedules 3 to the FSA and the IFSA to include the following types of interest: legal, beneficial, direct, effective (to compute the interest of upstream entities), as well as interest held jointly. It is also worth noting that the FSA and the IFSA require a person's interest in shares to be aggregated when computing the percentage held. This means that all the various types of interest held including interests held by the person's spouse, children, family corporation[6] and interests held by persons acting in concert with him have to be taken into account.

In addition to computation of interest in shares, the FSA and the IFSA also regulate persons who have "control" over licensed persons. In this context, a person shall be presumed to have "control" over a licensed person if:

(a) such person has more than 50% interest in shares in the licensed person; or

(b) unless proven otherwise, such person has the power to:

  (i) determine the majority composition of the directors of the licensed person;

  (ii) decide on the business or administration of the licensed person; or

  (iii) direct or instruct the directors, chief executive officer or senior officers of the licensed person[7].

Acquisition of interest in shares

Section 87 of the FSA and the corresponding section 99 of the IFSA stipulate the circumstances where the prior written approval of Bank Negara Malaysia (Central Bank of Malaysia) ("BNM") or the Minister of Finance ("Minister") is required for a person to acquire interest in shares of a licensed person. To summarise:

(a) BNM's prior written approval is required before a person can enter into an agreement or arrangement to acquire interest in shares of a licensed person which agreement or arrangement would result in such person holding (together with any interest in shares already held) an aggregate interest of 5% or more in the shares of the licensed person[8].

(b) The prior written approval of the Minister, on the recommendation of BNM, is also required if a person wants to enter into an agreement or arrangement to acquire interest in shares of a licensed person which agreement or arrangement would result in such person holding (together with any interest already held) an aggregate interest of more than 50% in the shares of the licensed person[9].

(c) Similarly, a person who wants to "control" a licensed person (apart from the directors or chief executive officer of the licensed person in respect of the carrying out of the management duties and functions) must first obtain the prior written approval of the Minister, on the recommendation of BNM[10].

A person who has control over a licensed person, whether by way of holding more than 50% interest in shares or has the power to exercise control, is known as a "Controller".

If a Controller is a company which is not a licensed person under the FSA and the IFSA, the Controller is required to submit an application to BNM to be approved as a "financial holding company"[11]. BNM has powers to regulate and supervise financial groups and apply prudential requirements and standards on both a licensed person and other entities within the group of the financial holding company.

(d) Furthermore, for a person who has already obtained the requisite approvals under paragraphs (a) or (b) above, he must go on to obtain another prior written approval from BNM if he wants to enter into any subsequent agreement or arrangement which would result in his aggregate interest in shares to exceed:

(i) any multiple of 5%; or

(ii) 33% or if a person already holds more than 33% but less than 50%, he goes on to acquire 2% in any six-month period (these are the percentages to trigger a mandatory offer obligation under the Malaysian Code on Take-overs and Mergers 2010)[12].

Disposal of interest in shares

Where there is an acquisition of shares, there will be a corresponding disposal of shares. It is interesting to note that the FSA and the IFSA prescribe different percentage thresholds when it comes to regulatory approvals for disposals.

Only a Controller is required to obtain the prior written approval of the Minister, with the recommendation of BNM, to enter into an agreement or arrangement to dispose interest in shares of a licensed person which agreement or arrangement would result in such person holding less than 50% or in any way ceasing to have control over the licensed person[13].

Who can be a shareholder

All applications for approval, whether it be for BNM's approval or the Minister's approval, are to be submitted to BNM. Where the Minister's approval is required, BNM will assess the application first and make a recommendation to the Minister for approval if BNM is satisfied with the application[14]. Nonetheless, the Minister retains the power to reject an application even with a recommendation from BNM[15].

In considering applications to acquire interest in shares or whether a person is suitable to become a shareholder of a licensed person, BNM shall consider various factors including those set out in Schedules 6 to the FSA and the IFSA respectively[16]. BNM also has powers to specify standards on shareholder suitability to give full effect to Schedule 6[17]. Some of the factors to be considered are:

- the character and integrity of the applicant, or if the applicant is a body corporate, its reputation for being operated in a manner that is consistent with the standards of good governance and integrity

- the soundness and feasibility of the plans of the applicant for the future conduct and development of the business of the licensed person

- the nature and sufficiency of the financial resources of the applicant as a source of continuing financial support to the licensed person

BNM shall also consider the factors set out in Schedules 6 of the FSA and the IFSA respectively and any other standards specified when assessing applications for approval to be a "financial holding company"[18].

Maximum permissible holdings

Under the FSA and the IFSA, the maximum permissible holdings only apply to individual shareholders. An individual is only allowed to hold up to 10% interest in shares of a licensed person[19].

Whilst the FSA does not provide for a waiver of this restriction, the IFSA stipulates that BNM may allow a person to hold more than 10% interest in shares if BNM is satisfied that:

(a) it would not result in the individual having the power to exercise control over the licensed person; and

(b) such individual has given a written undertaking that he will not, either directly or indirectly through any person connected to him, exercise any control over the licensed person[20] ("Written Undertaking").

The maximum permissible holdings for individuals under the FSA is consistent with that previously imposed under BAFIA[21]. However, the IA did not contain a similar prohibition and this may have resulted in individuals holding more than 10% interest in shares of insurance companies. In order to ensure compliance with the FSA, an individual who holds more than 10% shares in an insurance company shall take such necessary action within five years to pare down his shareholdings in order to comply with the maximum permissible holdings[22].

The IFSA does not provide any saving or transitional provision for individual shareholders who currently do not comply with the maximum permissible holdings in Islamic banks and *takaful* operators. Thus, a question arises as to whether such individual shareholders are bound by any requirement to pare down their shareholdings or whether they are required to provide the Written Undertaking to BNM within a certain timeframe.

Even though body corporates are not bound by any maximum permissible holdings under the FSA and the IFSA, one should still be mindful of the prevailing limits to a foreign corporation's equity participation in a licensed person.

Conclusion

The full impact of the FSA and the IFSA and how it will affect M&As involving banks and insurance companies remain to be seen, although practitioners have been waiting and preparing to apply the new regulatory framework since the FSA and IFSA received the Royal Assent in March this year.

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1 With the exceptions of section 129 and Schedule 9 of the FSA and paragraphs 1 to 10 and paragraphs 13 to 19 of Schedule 9 of the IFSA which have yet to come into force

2 Section 271 of the IFSA
3 Section 282 of the IFSA
4 Section 2 of the FSA
5 Section 2 of the IFSA
6 "Family corporation" is defined under paragraph 6, Schedule 3 of the FSA and the IFSA respectively
7 Section 2(3) of the FSA and Section 2(3) of the IFSA
8 Section 87(1)(a) of the FSA and Section 99(1)(a) of the IFSA
9 Section 87(2) of the FSA and Section 99(2) of the IFSA
10 Section 88 of the FSA and Section 100 of the IFSA
11 Section 110 of the FSA and section 122 of the IFSA
12 Section 87(1)(b) of the FSA and section 99(1)(b) of the IFSA
13 Section 89 of the FSA and section 101 of the IFSA
14 Section 90(3)(b) of the FSA and section 102(3)(b) of the IFSA
15 Section 90(6) of the FSA and section 102(6) of the IFSA
16 Section 90(2) of the FSA and section 102(2) of the IFSA
17 Section 91(1) of the FSA and section 103(1) of the IFSA
18 Section 112(2) of the FSA and section 124(2) of the IFSA
19 Section 92 of the FSA and section 104(1) of the IFSA
20 Section 104(2) of the IFSA
21 Section 46(1)(a) of the now repealed BAFIA
22 Section 279(2) of the FSA

INTELLECTUAL PROPERTY

Fashion Apparel — Design or Copyright Protection?

IN THIS ARTICLE, SIM SOOK ENG CONSIDERS THE EFFECTIVENESS OF BOTH INDUSTRIAL DESIGN PROTECTION AND COPYRIGHT PROTECTION FOR FASHION DESIGNS.

The fashion industry

Fashion designs are highly valuable assets as designers have expended much creative effort and resources in their creation. Although there is rampant copying and derivative reworking by appropriation of fashion designs, little action is seen taken against those who copy the designs of others. As a safeguard, tradebe mark protection seems to be the preferred choice of protection for brands in the fashion industry. However, despite the copying, the fashion industry continues to grow. Creative and innovative ideas continue to flourish to develop new prestigious design trends, and investments in the fashion industry continue to be dynamic. Certain fashion designs having a short product life cycle might also be a reason for inaction. However, as there are still classic fashion designs that do not go out of fashion, the question is to what extent these and the new fashion designs are protected by the intellectual property laws of Malaysia.

Fashion designs are to be considered from the perspective of their:

(i) two-dimensional design sketches, drawings and prints, and

(ii) outward visual appearance such as the shape, ruffles and flow lines, cuts and contours, patterns, ornamentation, colours and the material texture out of which they are made.

It is a combination of these elements that gives the fashion design the branding and image and hence, the value that is considered worthy of protection.

Design rights — Industrial Designs Act 1996

A registered design protects the features of shape, configuration, pattern or ornament applied to an article by any industrial process or means, the features which in the finished article appeal to and are judged by the eye. It is therefore the visual appearance or eye appeal of the non-utilitarian aspects of the fashion apparel (ie the article) in its complete and ready form and its elements such as the shape, ruffles and flow lines, cuts and contours, patterns, ornamentation or even colours as are perceived and appreciated by the eye that may be protected as an industrial design. The comfort, feel and function of fashion apparel are not protected.

The design of the apparel often is undoubtedly suggestive of its use function. The apparel itself is therefore not protected per se. Only the eye appealing features of the design applied to the apparel are. The difficulty is that the eye appealing attributes can hardly be separated from the functionality of the apparel itself. Upon registration, the owner is able to prevent others from exploiting the design or the two-dimensional features of the pattern on the material or textile print or its ornamentation aspects.

As a fashion design is made up of the shape and configuration of the fashion apparel in its complete and ready form and the elements of the patterns and ornaments of it taken as a whole, its scope of protection is certainly wider than is the case afforded by copyright protection. The elements of pattern and ornamentation may be separately protected as a design.

It is a requirement under the Industrial Designs Act 1996 ("IDA 1996") that to qualify for protection under the IDA 1996 the design must be new and not disclosed to the public anywhere in Malaysia or elsewhere before the priority date of the application. The definition of "newness" is provided under section 12 of the IDA 1996. However, the "newness" of a fashion design survives if it was disclosed in an official or officially recognised exhibition, or was unlawfully disclosed by a person other than the applicant or his predecessor within six months preceding the application date for registration of the design. Whether a fashion apparel design is new is to be judged by the eye and the consideration of whether it is distinctive and has a discernible character of its own. In terms of its design, it must differ materially from prevailing designs and elements of design features commonly adopted and used in the fashion apparel industry. Public domain design elements ought to be available for common use by fashion designers and the fashion industry. They are incompatible with any notion of exclusive ownership. These prevailing designs and industry generic elements or features of designs may even be the two-dimensional drawings or sketches of designs that have been disclosed; but if the design sought to be registered is recognised as having qualitatively copied and adopted these drawings and sketches, it may well not have met the "newness" requisite. Caution has to be exercised particularly in the case of derivative or adaptive reworking by appropriation of the essential and obvious design elements of prevailing fashion apparel designs.

Unregistered design

In the United Kingdom, right to a design comes into existence automatically without a need for registration. The term of protection for an unregistered design is usually 10 years from the date the design is first launched. However, unlike in the United Kingdom, our Malaysian IDA 1996 does not provide any protection for unregistered designs.

Copyright protection — Copyright Act 1987

Artistic works are protected under the Copyright Act 1987 and such works are defined to mean, amongst others, graphic works that include paintings, drawings, plans and diagrams. It must be accepted that paintings can be done on cloth and fabrics, and drawings are the two-dimensional line drawings of the design.

The question may be asked — what aspects of a fashion apparel design may be protected by copyright? Patterns may be the artistic and decorative designs constituting the diagram or plan to be followed and used as a guide in the multiplication of the apparel by an industrial process. So long as they are not applied by an industrial process onto the fashion apparel so as to form part of it, they must to that extent be entitled to copyright protection as artistic works. Ornaments may be the accessories, articles or even the two- and three-dimensional details added to embellish and adorn the design. Such ornaments may be protected by copyright within the stipulated categories of works that qualify for copyright protection. The two-dimensional line drawings and sketches of the design are in their own right separately protected as artistic works; but if they are design features that give form to the shape and configuration of the fashion apparel, then it is more a matter for industrial design protection.

It would seem that copyright can protect some individual elements of a fashion design but not the fashion design in its ready and complete form of the apparel. So looking at an allegedly infringing apparel and comparing it to the original, it would be difficult to tell whether there is any slavish or qualitative copying.

The perception that copyright protection for fashion apparel designs is less efficient than industrial design protection is further compounded by section 7(5) of the Copyright Act 1987 which states that any article which by definition is an industrial design must be registered as an industrial design for protection.

All articles which are industrial designs that come into existence on or after 1 September 1999 (which is the enforcement date of the IDA 1996) must be registered as industrial designs if any form of protection is desired. Although section 12 of the Copyright (Amendment) Act 1996 (which came into force on 1 September 1999) provides that industrial designs or any given aspects or elements of it which had been enjoying copyright protection before the enforcement date of 1 September 1999 will continue to enjoy copyright protection, such copyright protection ceases at the end of 25 years from the end of the calendar year in which the article was first marketed as provided in section 13B of the Copyright Act 1987. The unfortunate consequence of this is that fashion apparel of classic designs made and used only for rare and specific occasions automatically lose their copyright unless it can be argued that such restricted making and use of such apparel of the design cannot be regarded as them having been "marketed".

Conclusion

There is no doubt that intellectual property protection is necessary for the protection of fashion designs. It is only then that fashion designers are provided with the incentive to create more original and unique fashion designs. Though industrial design protection expires after 25 years as provided in section 25(2) of IDA 1996, it has to be acknowledged that more fashion designs will find their way into the public domain upon the expiry of the rights thereby resulting in newer and more fashion designs. Design elements may be borrowed and adopted from the public domain in the creation of new and more pleasing designs. It encourages creativity and competition. That fashion apparel designs are limited in their duration of protection under the IDA 1996 and the Copyright Act 1987 seems just.

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CASE NOTE

Kenneison Brothers Construction Sdn Bhd v Utararia Development Sdn Bhd

IN THIS ARTICLE, CHAI YEE HOONG LOOKS AT THE COURT OF APPEAL DECISION OF **KENNEISON BROTHERS CONSTRUCTION SDN BHD V UTARARIA DEVELOPMENT SDN BHD**[1] ON WHETHER PROCEEDINGS MUST BE STAYED UNDER SECTION 10(1) OF THE ARBITRATION ACT 2005[2] IN ORDER TO REFER THE DISPUTE TO ARBITRATION.

Brief facts

In a contract entered into on 8 June 2005 ("the Contract"), Kenneison Brothers Construction Sdn Bhd ("Kenneison") was appointed by Utararia Development Sdn Bhd ("Utararia") to undertake construction works. The project was completed and the final payment of RM1,305,575.53 was certified on 10 May 2010.

Meanwhile on 24 August 2009, the parties entered into another Settlement Agreement ("the Agreement") under which Utararia agreed to pay Kenneison RM3.7 million for additional works. Under the Agreement, RM1.6 million was paid by Utararia, leaving a balance of RM2.1 million.

Kenneison demanded the sums of RM1,305,575.53 and RM2.1 million that Utararia did not pay.

Decision of the High Court

A suit was filed by Kenneison on 5 October 2011 in the High Court. However, the High Court allowed Utararia's application for the proceedings to be stayed in order to refer the dispute to arbitration under subsection 10(1) of the Arbitration Act 2005[3].

Kenneison appealed against the High Court's order.

Decision of the Court of Appeal

The Court of Appeal had to ascertain if there was in fact a dispute that must be referred to arbitration and subsequently for the proceedings in the High Court to be stayed under section 10(1) of the Arbitration Act 2005[4].

Kenneison contended that:

- the Certificate of Practical Completion for the project, dated 13 June 2006, certified that the project was practically completed as at 9 June 2006;
- the architects on behalf of Utararia issued a Certificate of Making Good Defects certifying that the defects for the project had been made good by 8 August 2008; and
- the quantity surveyors on behalf of Utararia issued a Final Certificate of Payment on 10 May 2010 certifying the amount of RM1,305,575.54.

Utararia however relied upon clause 34.1(i) in the conditions of the Contract for their application for stay which reads as follows:

> *"34.1 In the event that any dispute or difference arises between the Employer, or the Architect on his behalf, and the Contractor, either during the progress or after the completion or abandonment of the Works regarding:*
>
> > *34.1(i) any matter or thing of whatsoever nature arising thereunder or in connection therewith, including any matter or thing left by this Contract to the discretion of the Architect; or*
> >
> > *xxx*
> >
> > *then such disputes or differences shall be referred to arbitration."*

The Court of Appeal was of the view that "*any matter or thing of whatsoever nature arising thereunder or in connection*" with the works must naturally refer to the performance or non-performance of the works or any part of the works. The Court also found that the Contract was not in dispute as it had been completed, defects had been made good and, for that reason, a final certificate of payment was issued. For those reasons, the Court agreed with Kenneison that there was no dispute that can be referred to arbitration under clause 34. As there was no such dispute, the exception in paragraph 10(1)(b) of the Arbitration Act 2005[5] applies and the court can refuse to stay proceedings.

The Court further considered clause 3.1 of the Agreement which provides that the Contract is to be read and construed as one document with the Agreement which thereby implies that clause 34 of the Contract also applies to the Agreement. However, clause 3.3 of the Agreement provides that in the event of inconsistency between any provision of the Contract and the Agreement, the Agreement shall prevail unless otherwise specified in the Agreement. The Court went on to add that as the Agreement is not an agreement for the perfor mance of any works but rather the additional works which had been acknowledged to have been completed, clause 34 of the Contract has no application in the context of the Agreement and its purpose. In this regard, the Court was of the view that the Agreement and its stated purpose must prevail and set aside the order of the High Court.

Conclusion

Following the Court of Appeal's decision, as the Contract was found not to be in dispute, clause 34 had no application in the context of the Agreement and the proceedings should not be stayed.

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1 Civil Appeal No B-02(IM)(NCVC)-928-04/2012

2 Section 10(1) provides, *"A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds (a) that the agreement is null and void, inoperative or incapable of being performed; or (b) that there is in fact no dispute between the parties with regard to the matters to be referred."*

Section 10(1) of the Arbitration Act 2005 has been amended by the Arbitration (Amendment) Act 2011 since 1 July 2011 and now provides, *"A court before which proceedings are brought in respect of a matter which is the subject of an arbitration agreement shall, where a party makes an application before taking any other steps in the proceedings, stay those proceedings and refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed."*

3 *Ibid*

4 *Ibid*

5 *Ibid*

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