Shearn Delamore &co.

NEWSLETTER

• Vol 13 No 3 • September 2014 KDN NO. PP 12544/10/2012 (030886)

TAX LAW

Goods and Services Tax Act 2014: Offences and Penalties

IN THIS ARTICLE, CHRISTOPHER TAY HANMIN BRIEFLY REVIEWS SOME OF THE OFFENCES UNDER THE GOODS AND SERVICES TAX ACT 2014 ("GST ACT").

One of the most significant tax Acts to be introduced in the past 30 years is the GST Act which was gazetted on 19 June 2014 and has set 1 April 2015 as the effective date for the imposition of the goods and services tax ("GST"). Under Section 5 of the GST Act, the Director General of the Customs and Excise ("Director General") and, by extension, the Royal Malaysian Customs Department ("RMC") will be responsible for the implementation and administration of the GST Act. Some of the more significant offences in the GST Act are discussed below.

Incorrect return

- **Statutory provision**

  Section 88 of the GST Act provides that:

  > *"Any person who*
  > *(a) makes an incorrect return by omitting from the return any information;*
  > *(b) understates any output tax or overstates any input tax in a return; or*
  > *(c) gives any incorrect information in relation to any matter affecting his own liability to tax or the liability to tax of any other person, commits an offence..."*

  Upon conviction, that person would be liable to a fine not exceeding RM50,000.00 and/or to imprisonment for a term not exceeding three years and to a penalty equal of the amount of tax which has been or would have been undercharged if the return or information had been accepted as correct.

  The liability for a penalty for this offence is a new provision as there was no provision for a penalty to be imposed for this offence in one of the predecessors to the GST Act — the Services Tax Act 1972.

- **Section 88 — a strict liability offence?**

  The manner in which Section 88 of the GST Act has been phrased and constructed could potentially be construed as a strict liability offence.

  A strict liability offence is an offence where as long as the prosecution is able to prove that *actus reus* (guilty act/physical element) has been committed it would be sufficient for the conviction of that accused person regardless of that accused person's *mens rea* (guilty mind/mental element).

• In This Issue •

01 • Goods and Services Tax Act 2014: Offences and Penalties

03 • When should a Listed Issuer make an Announcement?

05 • AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd

06 • Patent Infringement: Prior Manufacture and Use — is it an Exemption from or Defence to Infringement?

08 • Is the Purchaser in a SPA Obliged to Offer Continued Employment to the Employees of the Vendor?

10 • Conveyancing Process and Timelines in West Malaysia for Acquisition of Immovable Property for which the Separate Document of Title has been Issued

PUBLISHER
Shearn Delamore Corporate Services Sdn. Bhd. (557186 x)
Suite 10.05, 10th Floor
Wisma Hamzah-Kwong Hing
No. 1 Leboh Ampang
50100 Kuala Lumpur
Tel 603 2027 2727
Fax 603 2078 5625

- **No defence under section 88**

  Section 88 of the GST Act does not expressly provide for a defence. In comparison, Section 113(1) of the Income Tax Act 1967 ("ITA") employs the phrase "…*shall, unless he satisfies the court that the incorrect return or incorrect information was made or given in good faith, be guilty of an offence…*" which expressly provides for the defence of good faith in cases where a person has made an incorrect return or provided incorrect information.

  In the absence of a defence in Section 88 of the GST Act, general common law defences would have to be referred to.

- **Tax agents, officers, etc**

  Separately, individuals who assist in or advise with respect to the preparation of any return may be guilty of an offence under Section 89(2) of the GST Act if the return results in an understatement of liability for tax of another person.

  Upon conviction, the penalty is a fine between RM2,000.00 and RM20,000.00 and/or imprisonment for a term not exceeding three years. However, these individuals can rely on the defence provided under the same section where they must prove that any such assistance or advice was given with reasonable care.

Fraud and evasion of tax

- **Statutory provisions**

  The offence and penalty for the evasion of tax under Section 89 of the GST Act require an element of intention to evade tax or assist another in evading tax. Section 89(6) of the GST Act goes on to deem any evasion of tax as being done with the knowledge of the accused person unless the accused person can prove the contrary.

  The evasion of tax and fraud are serious offences and the financial penalty for the offenders reflects the gravity of these offences. Upon conviction, an offender will be liable to a fine of between 10 and 20 times the amount of tax involved and/or imprisonment for a term not exceeding five years.

  If the offender commits a second or subsequent evasion offence, the financial penalty would be between 20 and 40 times the amount of tax involved and/or imprisonment for a term not exceeding seven years. If the amount of tax involved cannot be ascertained, an offender would be liable to a fine between RM50,000.00 and RM500,000.00 and/or imprisonment for a term not exceeding seven years.

Offences by bodies of persons, etc

- **Statutory provisions**

  Section 97(1) of the GST Act imposes a presumption of guilt on any person who, at the time of the commission of the offence, was a director, compliance officer, partner, manager, secretary or other similar officer, and includes persons purporting to act in the capacity or was in any manner or to any extent responsible for the management of any of the affairs or was assisting in the management of the company, limited liability partnership, firm, society, association or other body of persons.

  This presumption can be rebutted if that person proves:

  a) that the offence was committed without his knowledge,
  consent or connivance, and

  b) that he took all reasonable precautions and had exercised
  due diligence to prevent the commission of the offence.

  Persons who are associated or involved in the management of the bodies of person as described above should be aware of this offence.

Other provisions

- Section 93(1) of the GST Act makes it an offence to refuse to give information reasonably required by an officer of GST or to give false information to an officer of GST. Pursuant to Section 93(2) of the GST Act, it is no defence to allege that the untrue or incorrect information was furnished inadvertently or without criminal or fraudulent intent, or was misinterpreted by the interpreter.

- Under Section 92 of the GST Act, a person who assaults, hinders, obstructs or fails to give reasonable facilities or assistance to the officer of GST in the performance of that

officer's duties under the GST Act commits an offence.

Conclusion

All taxable persons under the GST Act, including directors and managers as well as tax agents, should take note of the offences under the GST Act and exercise due care to avoid being penalised for falling foul of any of the offences in the GST Act.

CHRISTOPHER TAY HANMIN
TAX AND REVENUE PRACTICE GROUP

For further information regarding Tax matters, please contact

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

CORPORATE LAW

When should a Listed Issuer make an Announcement?

IN THIS ARTICLE, DINESH SADHWANI EXAMINES WHEN AN ANNOUNCEMENT OF MATERIAL INFORMATION BY A LISTED ISSUER SHOULD BE MADE UNDER THE MAIN MARKET LISTING REQUIREMENTS ("MMLR") OF BURSA MALAYSIA SECURITIES BERHAD ("BURSA").

Paragraph 9.02(1) of the MMLR of Bursa provides that a listed issuer must disclose to the public all material information necessary for informed investing and take reasonable steps to ensure that all who invest in its securities enjoy equal access to such information.

The disclosure obligations can be condensed into the following principal considerations:

- whether the matter needs to be announced — in general, a matter needs to be announced if it is "material". Under the MMLR, information is considered material if it is reasonably expected to have a material effect on the price, value or market activity of any of the listed issuer's securities or the decision of a holder of securities of the listed issuer or an investor in determining the investor's choice of action

- what needs to be disclosed if the matter is announced — the requirements on the content of announcements and circulars to shareholders are mainly set out in Chapter 10 of the MMLR

- when the announcement should be made — this is the main focus of this article.

Generally, in terms of the timing of announcements, the starting point is clear — a listed issuer needs to make an "immediate" announcement. However, paragraph 9.05(1) of the MMLR provides that a listed issuer may, in exceptional circumstances, temporarily refrain from publicly disclosing material information, provided that complete confidentiality is maintained. Paragraph 9.05(2) of the MMLR further clarifies that the exceptional circumstances where disclosures can be withheld are limited and constitute an infrequent exception to the normal requirement of immediate public disclosure. In cases of doubt,

the presumption must always be in favour of disclosure.

One of the examples given in the MMLR where disclosure may temporarily be withheld is where a listed issuer proposes to acquire certain real estate. Paragraph 9.05(3)(a) of the MMLR states that public disclosure of such a proposal could result in an increase in the listed issuer's cost of the desired acquisition or could prevent the listed issuer from carrying out the plan and, in such circumstances, if the unfavourable result to the listed issuer outweighs the undesirable consequences of non-disclosure, disclosure may properly be deferred to a more appropriate time.

In paragraph 9.05(3)(b) of the MMLR, another example given (and which is possibly the more often encountered situation) of where disclosure can be delayed is when the facts are in a state of flux and a more appropriate moment for disclosure is imminent. Paragraph 9.05(3)(b) is worth setting out in full:

> "*Occasionally, corporate developments give rise to information which, although material, is subject to rapid change. If the situation is about to stabilise or resolve itself in the near future, it may be proper to withhold public announcement until a firm announcement may be made, since successive public announcements concerning the same subject but based on changing facts may confuse or mislead the public rather than enlighten it. In the course of a successful negotiation for the acquisition of another corporation, for example, the only information known to each party at the outset may be the willingness of the other to hold discussions. Shortly after that, it may become apparent to the parties that it is likely an agreement can be reached. Finally, an agreement in principle may be reached on specific terms. In such circumstances a listed issuer need not issue a public announcement at each stage of the negotiations, describing the current state of constantly changing facts but may await agreement in principle on specific terms. If, on the other hand, progress in the negotiations should stabilise at some other point, disclosure should then be made if the information is material.*" (Emphasis added)

Paragraph 9.05(3)(c) provides a further example of where disclosure can be delayed — where company or securities laws may restrict the extent of permissible disclosure before or during a public offering of securities or a solicitation of proxies.

Drawing from the above, let us take a hypothetical but very plausible scenario where a listed issuer has submitted bids for contracts or assets that are material. When should the listed issuer make an announcement? If there is any doubt, a safe or conservative approach would be to make the announcement as soon as the listed issuer has submitted its bid. However, an alternative view is that, in such a scenario, as the facts are in a state of flux and successive public announcements may confuse or mislead the public rather than enlighten it, an announcement should not be made at that time.

Another argument for delayed disclosure is when public disclosure of such a proposal could prevent the listed issuer from carrying out the plan at all. For instance, if the listed issuer has announced that it has submitted a bid but the bid period is still open, the announcement could possibly provide competitors who have not yet submitted a bid with useful information and an opportunity to submit a more competitive bid. Or, if the listed issuer announces that it has submitted a bid and investors view the potential effects favourably, the announcement may possibly cause the price of its securities to soar — only to later possibly see the price plunge if the listed issuer does not secure the bid.

A third argument is that, if the bidder has executed a non-disclosure agreement agreeing not to disclose or discuss its interest in the assets, an announcement could result in the listed issuer being in breach of the non-disclosure agreement. Having said that, it should be highlighted that Bursa's *Corporate Disclosure Guide* states that a listed issuer should avoid putting itself in a position where it is bound by confidentiality obligations that may defeat its obligation to disclose material information on an immediate basis.

Although the MMLR does not provide any definite answers on the foregoing issues, it is submitted that this is not a shortcoming but, rather, one of the strengths of the MMLR. There needs to be a balance between disclosure and protection of a listed issuer's *bona fide* commercial interests — assuming the proposed transaction would add value to the listed issuer and, ultimately, its shareholders. As paragraph 2.05 of the MMLR provides, the MMLR will be interpreted in accordance with its spirit, intention and purpose and in a way that best promotes the principles on which it is based. The above should not be construed as a general endorsement for listed issuers to delay announcements by arguing that they fall within the exceptions. Ultimately, each situation must be viewed and considered based on its unique set of facts and circumstances.

Moreover, paragraph 9.06 of the MMLR provides further qualifiers to delayed announcements. The listed issuer must ensure that strictest confidentiality is maintained, a limited number of people have access to the material information and all confidential documents are secure. In the event material information is believed to have been inadvertently disclosed to third parties or where the material information has become

generally available, the listed issuer must immediately announce the information.

The continuing listing obligations of some of the other stock exchanges in the region similarly provide certain exceptions to the general disclosure requirements. Under the Singapore Exchange's Mainboard Rules, the requirement to announce information that would have a material effect is not applicable if certain conditions are met, namely:

- a reasonable person would not expect the information to be disclosed
- the information is confidential and the information either concerns an incomplete proposal or negotiation, comprises matters of supposition or is insufficiently definite to warrant disclosure, and
- is generated for the internal management purposes of the entity or is a trade secret.

In Australia, chapter 3 of the ASX Listing Rules contains a substantially similar exception to the Singapore Exchange's Mainboard Rules.

Conclusion

In summary, while it is clear that the MMLR generally leans towards immediate disclosure of material information, this principle is not cast in stone. A listed issuer could temporarily refrain from publicly disclosing material information if it satisfies the criteria discussed in this article (for example, disclosure would lead to an unfavourable result to the listed issuer that outweighs the undesirable consequences of non-disclosure or the situation is in a state of flux).

DINESH SADHWANI
CORPORATE AND COMMERCIAL PRACTICE GROUP

For further information regarding Corporate and Commercial matters, please contact

Grace C G Yeoh
gcgyeoh@sheardelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

CASE NOTE

AV Asia Sdn Bhd v Measat Broadcast Network Systems Sdn Bhd

IN THIS ARTICLE, SAHADA BINTI SALIHIN DISCUSSES THE CASE OF **AV ASIA SDN BHD V MEASAT BROADCAST NETWORK SYSTEMS SDH BHD** ON THE COURT'S DISCRETION IN GRANTING INJUNCTIVE RELIEF.

Facts

Measat Broadcast Network Systems Sdn Bhd ("Measat") sought AV Asia's expertise to reduce interruptions in its satellite transmission during inclement weather. The parties entered into an agreement referred to as a Mutual Non-Disclosure Agreement ("MNDA"). Clause 15 of the MNDA provides:

> "*The Receiving Party understands and agrees that monetary damages will not be sufficient to avoid or compensate for the unauthorized use or disclosure of Confidential Information and that injunctive relief would be appropriate to prevent any actual or threatened use of disclosure of such Confidential Information.*"

AV Asia contended that Measat had breached the confidentiality provision under the MNDA and sought an interim injunction to restrain Measat from relying on or using the confidential information for its own commercial gain. Measat denied the said contention.

Both the High Court and Court of Appeal dismissed AV Asia's application for injunctive relief. AV Asia then appealed to the Federal Court against the decision of the Court of Appeal.

Issues

The appeal before the Federal Court is in respect of the following question of law:

> "*Whether an agreement between parties to a litigation that damages are not an adequate remedy in respect of any injuries caused by breaches of an agreement between them and that injunctive relief would be an appropriate remedy: disentitles either one of them from asserting that damages are an adequate remedy; and/or disentitles the High Court from concluding*

that damages are an adequate remedy for the purposes of an application for interim injunctive relief."

The principal issue before the court was whether the nature of clause 15 of the MNDA entitles AV Asia to injunctive relief.

Both the Court of Appeal and the High Court held that, notwithstanding Clause 15 of the MNDA, the grant of an injunctive relief is still subject to the principles of law and the discretion of the court.

Decision and analysis of the Federal Court

The Federal Court held that a clause in a contract stipulating that injunctive relief "may" or "shall" be the appropriate remedy where damages may not be appropriate or where there is irreparable harm does not mean that such relief will be granted as of right. The Court must still be satisfied that the pre-requisites for granting injunctive relief are prevalent.

It was further held that the grant of injunctive relief is an equitable remedy which is within the Court's absolute discretion. The principles for the grant of such a remedy must be strictly adhered to and cannot be curtailed by any contract between the parties.

Conclusion

The Federal Court has reaffirmed the law governing the grant of injunctive relief. Courts have an absolute discretion to grant or dismiss an application for injunctive relief notwithstanding any contract between the parties that may appear to oust that discretion.

SAHADA BINTI SALIHIN
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding Dispute Resolution matters, please contact

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

INTELLECTUAL PROPERTY

Patent Infringement: Prior Manufacture and Use — is it an Exemption from or Defence to Infringement?

IN THIS ARTICLE, WOO WAI TENG LOOKS AT THE DEFENCE OF PRIOR MANUFACTURE AND USE UNDER SECTION 38 OF THE PATENTS ACT 1983.

Scenario

Company A manufactured and sold high powered drilling equipment in its home country overseas. The high powered drilling equipment manufactured by Company A was then supplied to an unrelated Malaysian company, Company B. Thereafter, Company B modified the high powered drilling equipment to meet the specifications of its customer, Company C. The modifications made to the high powered drilling equipment by Company B and the use of all requisite technology for the modification process belonged to and was licensed by Company A. The technology for the modification also necessitated having knowledge of the original technology for the manufacture of the high powered drilling equipment. Such original technology formed part of the licensing arrangement between Company A and Company B. Company B applied for and had been granted Malaysian patents for the original technology and the high powered drilling equipment and, also, the technology for the modification process and the modified high powered drilling equipment (the "Malaysian Patents"). Subsequently, Company A appointed Company D as its new licensee and importer after the termination of the appointment and licence of Company B. The question is whether Company A and/or Company D infringed the Malaysian Patents of Company B?

Is there a defence for Company A and Company D under section 38 of the Patents Act 1983 (the "Act")?

Section 38 of the Patents Act 1983 reads:

"*(1) Where a person at the priority date of the patent application—*
(a) was in good faith in Malaysia making the product or using the process which is the subject of the invention claimed in the application;
(b) had in good faith in Malaysia made serious preparations

towards the making of the product or using the process referred to in paragraph (a),
he shall have the right, despite the grant of the patent, to exploit the patented invention:

Provided that the product in question is made, or the process in question is used, by the said person in Malaysia:

Provided further that he can prove, if the invention was disclosed under the circumstances referred to in paragraph 14(3) (a), (b) or (c) that his knowledge of the invention was not a result of such disclosure.

(2) The right referred to in subsection (1) shall not be assigned or transmitted except as part of the business of the person concerned."

If the conditions are met, this provision will allow the continuation of the activities involving the complained equipment and technologies alongside the patent proprietors[1]. The effect is to "exempt" the party using the complained equipment and technologies from infringement and provides him with a "defence" against an infringement claim or suit, while on the one hand, despite the infringement, said party is nevertheless allowed to continue with the exploitation of the patented invention during the subsistence of the patent.

The requisites for the defence

In essence, what needs to be considered are:

(a) Whether Company A and Company D have made the high powered drilling equipment and used the technologies of the Malaysian patents or have made effective and serious preparations of the same in Malaysia before the priority date of the Malaysian patents.

(b) If the answer to (a) is in the affirmative, whether such activities were undertaken in good faith. "Good faith" is not defined in the Patents Act 1983. A purposive construction requires it to be judged as a matter of fact and from a commercial point of view.

(c) In the context of section 38, "good faith" activities have to be considered subject to two provisos, both of which must be met. They read:

"Proviso (1)

Provided that the product in question is made, or the process in question is used, by the said person in Malaysia.

Proviso (2)

Provided further he can prove, if the invention was disclosed under the circumstances ...... of Section 14 that his knowledge of the invention was not the result of such disclosure."

Within the scope of section 38 and the provisos, the person establishing good faith must not have any link or contact with the patentee or information on the patented invention that has been unlawfully appropriated within a year preceding the application date of the patent such as to give rise to any suggestion of the invention or knowledge of it being unlawfully appropriated.

While "making and using the process" in good faith is plain, factual and a matter of evidence, what amounts to "serious preparation" towards making the product or using the process is not so clear. The serious preparation must be an activity in Malaysia and must have been seriously undertaken in good faith. There is no mention in section 38 that the serious preparation must be to make or use the exact patented product or process. Therefore, it would seem that if the serious preparation relates in substance to the making or using of the patented inventions that would suffice. The preparation should at least be one that is workable and, if executed, is likely to infringe. That gives rise to a distinction between a defence to infringement and a right to prior manufacturing and use. While an act which in substance is that which is claimed in the patented invention might be infringement, protection is given by section 38 to enable a party successfully raising it to continue in substance what he was doing before. In that way he is provided with a defence for infringement as well as being "exempted" from it.

Is Company A and/or Company D entitled to the benefit of section 38?

There is no doubt that Company A acted in good faith as the licensor. The question to be answered is whether the good faith acts of Company A were undertaken in Malaysia and were acts related to the manufacture or use of the inventions of the Malaysian patents of Company B or are acts preparatory and serious enough to make a product or use a process substantially the same as the Malaysian patents before their priority dates. Manufacturing the product and using the process and licensing them out to Company B from where

Company A is resident overseas do not meet the conditions of section 38. It remains open to Company A to sue on the licence if a cause of action is present.

Company D obviously cannot avail itself to the benefits of section 38 as they were appointed Malaysian importer and appointed licensee after the termination of the appointment and licence of Company B. Company D is at risk of being pursued as an infringer of the Malaysian patents by Company B.

An alternative approach Company A and Company D can take.

If an infringement was alleged by Company B against Company A and/or Company D, it might be argued that in view of the availability in Malaysia prior to the priority date(s) of the Malaysian Patents of the high powered drilling equipment, modified versions of them made from the use of both the original process and modification process pursuant to the prior licensing arrangements between Company A and Company B, the Malaysian patents obviously lack novelty and inventive step and are accordingly invalid.

Can the rights be transferred or assigned?

It must be noted that the rights derived from prior manufacture or use cannot be assigned or transmitted except as part of the business of the person seeking the benefit of section 38(2) of the Act. There is no transfer or assignment of the prior manufacturing and user rights of Company A to Company B or D together with the business in connection with which the prior manufacturing and user rights were carried out. That does not arise because Company A did not make or use the inventions of the Malaysian Patents before their priority dates in Malaysia.

Conclusion

It seems the intent of section 38 is founded on public policy grounds. The need to protect the independently acquired rights of patentees and the need to protect the legitimate good faith rights of prior manufacturers and users of products and technologies substantially similar to the subsequently patented invention must be balanced. In attempting to balance the need to protect the rights of both parties, reasons of fairness and economic security for investments in innovative, inventive and creative activities would be among the factors to be considered.

WOO WAI TENG
INTELLECTUAL PROPERTY & TECHNOLOGY PRACTICE GROUP

For further information regarding Intellectual Property matters, please contact

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

[1] **Intercontinental Specialty Fats v Asahi Denka** [2000] 4 MLJ 775

EMPLOYMENT LAW

Is the Purchaser in a SPA Obliged to Offer Continued Employment to the Employees of the Vendor?

IN THIS ARTICLE, REENA ENSABAGARAM CONSIDERS THE CASE OF **ABDUL AZIZ ABDUL MAJID & 141 LAGI V KUANTAN BEACH HOTEL SDN BHD & 2 ORS** ON WHETHER A PURCHASER IN A SPA IS OBLIGATED TO OFFER CONTINUED EMPLOYMENT TO THE EMPLOYEES OF THE VENDOR.

Introduction

The Court of Appeal ("COA") in the case of **Abdul Aziz Abdul Majid & 141 Lagi v Kuantan Beach Hotel Sdn Bhd & 2 Ors**[1] answered the above question in the affirmative when it found the purchaser, Alam Venture Sdn Bhd ("Alam Venture"), liable to pay compensation in lieu of reinstatement and backwages to the employees ("Respondents") of the vendor, Kuantan Beach Hotel Sdn Bhd ("Kuantan Beach Hotel"), whose services had been terminated.

In August 2013, the Federal Court granted leave to Alam Venture and Kuantan Beach Hotel to appeal against the decision of the COA. The substantive appeal has since been heard and a decision is pending.

The decision of the COA has far-reaching repercussions in both cor-

porate and employment law. Despite Alam Venture never having employed the Respondents nor terminated their services, the COA held that the Respondents "should have been allowed to remain in the service of the Hotel".

Facts of the case

Kuantan Beach Hotel owned and operated the Hyatt Regency Kuantan ("the Hotel"). The Respondents had been employed at the Hotel. Kuantan Beach Hotel had gone into receivership with losses of over RM4 million and Messrs PricewaterhouseCoopers ("PWC") had been appointed as Receiver and Manager. As Kuantan Beach Hotel would no longer be in the hotel industry it entered into a Sale and Purchase Agreement ("SPA") with Alam Venture to dispose of the land upon which the Hotel was located as well as the hotel premises. With the sale, the purpose for which the Respondents had been employed came to an end. The Respondents' employment was accordingly terminated by PWC.

Alam Venture made the decision to continue the operations of the Hotel albeit with a minor change in its name. Although its stand was that it was not obliged in law to employ the former employees of Kuantan Beach Hotel, 15 individuals were offered employment in managerial positions on fresh terms and conditions. Similar offers of re-employment were not extended to the Respondents.

Decision of the Court

The COA's basis for its decision is that, firstly, there was in law and in fact a change of ownership of the Hotel within the meaning of Article 2.4 of the Collective Agreement dated 1.1.1999 Cognizance No 21/2001 between the National Union of Hotel, Bar & Restaurant Workers, Peninsular Malaysia ("Union") and Kuantan Beach Hotel Sdn Bhd ("CA"); and secondly, Alam Venture was held to be the successor, assignee or transferee of the CA pursuant to Section 17 of the Industrial Relations Act 1967 ("IRA").

The COA also found that a term of a collective agreement could be relied upon to compel a purchaser to employ the employees of the vendor.

In contrast, the Supreme Court in the case of **Palmo Holdings Bhd v Commissioner of Labour & Anor** had confirmed that:

> "*The person by whom the business is taken over immediately after the change occurs (these words appear in Regulation 8(2)) is not an employer as defined in the Act. The imposition of liability on such person is never envisaged by the parent Act.*"

A change in the ownership of the business will instead generally result in a termination of the employment of the employees of the business concerned, and a notice of termination or payment in lieu of notice would have to be issued by the current employer or vendor.

Further, the provisions of the Employment Act 1955 ("EA") would be invoked and termination benefits would be payable to the affected employees by the current employer or vendor, unless the procedure prescribed in Regulation 8 of the Employment (Termination & Lay-Off Benefits) 1980 Regulations is complied with. For employees outside the scope of the EA, the current employer or vendor would be liable to pay termination benefits only in the event such benefits are due under the employment contract or relevant collective agreement. In this case, the Respondents had been paid termination benefits by their employer — Kuantan Beach Hotel.

Conclusion

It is pertinent to note the majority view of the Federal Court in the recent case of **Affin Bank Bhd v Mohd Kasim Ibrahim** where a change of ownership in relation to the business took place by virtue of a vesting order which transferred the assets and liabilities of Affin-ACF Finance Bhd to Affin Bank Bhd. The issue before the Federal Court was whether Affin Bank Bhd was obliged to offer employment on no less favourable terms to the employees of Affin-ACF Finance Bhd. It was not in dispute that in offering employment to an employee of Affin-ACF Finance Bhd, Affin Bank had offered less favourable terms by reducing the retirement age of 60 years to 55 years. In finding in favour of Affin Bank Bhd, the apex court confirmed:

> "*...it means that the change of ownership ... would thus terminate the respondent's former contract of employment. ... The appellant in our opinion, is not obliged to offer the respondent continuous employment on the same terms and conditions ... We agree that the respondent's employment cannot be transferred to the appellant; his former contract of employment with the transferor company comes to an end.*"

The decision of the Federal Court is keenly awaited to see whether it would uphold the decision of the COA or otherwise.

REENA ENBASEGARAM
EMPLOYMENT AND ADMINISTRATIVE LAW PRACTICE GROUP

For further information regarding Employment Law matters, please contact

N Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

[1] [2012] 1 LNS 1294

REAL ESTATE

Conveyancing Process and Timelines in West Malaysia for Acquisition of Immovable Property for which the Separate Document of Title has been Issued

IN THIS ARTICLE, ANITA BALAKRISHNAN HIGHLIGHTS THE CONVEYANCING PROCESS AND TIMELINES IN WEST MALAYSIA FOR ACQUISITION OF IMMOVABLE PROPERTY FOR WHICH THE SEPARATE DOCUMENT OF TITLE HAS BEEN ISSUED.

1. Signing of letter of offer

The letter of offer will set out the salient terms of the sale and purchase of the property (the details of the property, the parties and the purchase price).

2. Signing of sale and purchase agreement ("SPA")

It will be provided in the letter of offer how soon from the date of the letter of offer the SPA is required to be executed by the parties. This period is to enable parties to negotiate on the other terms and conditions of the SPA not set out in the letter of offer.

3. Payment of purchase price

A sum equivalent to 2% to 3% of the purchase price is usually paid directly to the vendor as earnest deposit upon the execution of the letter of offer. The 2% earnest deposit is likely to be forfeited by the vendor in the event the SPA is not executed within the time stipulated in the letter of offer, due to the fault of the purchaser. A sum equivalent to 8% of the purchase price is usually paid as balance deposit, simultaneously with the purchaser's execution of the SPA. Such sum is usually paid directly to a vendor (if the SPA is not subject to any conditions precedent) or to the vendor's solicitors, as stakeholders (if the SPA is subject to conditions precedent). If the balance deposit is paid to the vendor's solicitors, as stakeholders, such sum is usually released to the vendor once the SPA has become unconditional. A sum equivalent to 90% of the purchase price ("Balance Purchase Price") is usually paid within one to three months from either:

(a) the date of the SPA (if the SPA is not subject to any conditions precedent), or

(b) the date the SPA becomes unconditional to the vendor's solicitors, as stakeholders.

In the event a purchaser is intending to obtain financing to assist with its purchase of a property, the purchaser would require approximately three months from the date of the SPA or unconditional date, as the case may be, to complete the SPA. This is to allow enough time for the documentation and other matters pertaining to the loan to be attended to, to facilitate release of the loan.

It is a conveyancing practice that, if requested by a purchaser, a vendor will grant to a purchaser an extension of one month from the completion date to make payment of the balance purchase price subject to payment of interest by the purchaser on such portion of the unpaid balance purchase price at the rate of 8% to 10% per annum.

4. Conditions precedent

The SPA may be subject to the following conditions precedent:

(a) The purchaser obtaining the approval of the Economic Planning Unit of the Prime Minister's Department to the purchase of the property by the purchaser pursuant to the Economic Planning Unit Guidelines.

(b) Either:

   (i) the approval of the relevant state authority to the transfer of the property to the purchaser, being obtained by the purchaser, pursuant to section 433B of the National Land Code 1965, or

   (ii) the approval of the relevant state authority to the transfer of the property to the purchaser pursuant to the restriction-in-interest endorsed on the document of title to the property being obtained by the vendor.

The SPA will become unconditional on the date on which the last of the conditions precedent is fulfilled.

In the event that the conditions precedent shall not have been fulfilled by the expiry of the period allocated for the fulfilment of the conditions precedent (and such non-fulfilment is not due to any fault of the purchaser or vendor) then the SPA shall, unless extended by the mutual agreement of the parties, terminate whereupon the vendor should refund to the purchaser, free of interest, the 10% deposit that has been paid to the vendor and/or the vendor's solicitors, as stakeholders, as the case may be.

5. Memorandum of transfer in favour of the purchaser ("MOT")

The MOT is the document by which ownership of the property is transferred from a vendor to a purchaser. The MOT which has been signed by the vendor and purchaser is required to be submitted to the stamp office for the purposes of the adjudication of the stamp duty payable on the MOT. Once the MOT has been adjudicated and the stamp duty assessment notice issued by the stamp office, the purchaser will be required to pay the *ad valorem* stamp duty stated in the adjudication notice within the period prescribed in the adjudication notice (usually within 30 days from the date of the adjudication notice) after which a penalty is also payable. Once the *ad valorem* stamp duty has been paid, the purchaser should proceed to pay the Balance Purchase Price to the vendor's solicitors, as stakeholders, to facilitate the release of the original issue document of title to the property together with other relevant documents by the vendor to the purchaser's solicitors to enable the purchaser's solicitors to present the adjudicated MOT together with the issue document of title and other relevant documents for registration at the relevant land office/registry. The purchaser will become the registered proprietor of the property upon registration of the MOT.

6. Release of balance purchase price to vendor

Once the MOT has been presented for registration at the relevant land office/registry, the vendor's solicitors would be authorised to release the Balance Purchase Price to the vendor.

7. Vacant possession

Vacant possession of a property is usually delivered to the purchaser within three to five days from the date of the purchaser paying the full payment of the purchase price to the vendor's solicitors, as stakeholders.

ANITA BALAKRISHNAN
REAL ESTATE PRACTICE GROUP

For more information regarding Real Estate matters, please contact

Sar Sau Yee
sysar@shearndelamore.com

Aileen Chew
aileen@shearndelamore.com

www.shearndelamore.com

Advocates & Solicitors
Notary Public
Registered Patent Agents
Trade Mark Agents
Industrial Design Agents

Peguambela & Peguamcara
Notari Awam
Ejen Paten Berdaftar
Ejen Cap Dagangan
Ejen Rekabentuk Perindustrian

This Newsletter is produced by the Knowledge Management Department. Please contact the Department or the Newsletter Editorial Committee at km@shearndelamore.com, if you need any further information on this Newsletter.

PARTNERS AND PRACTICE GROUPS

DISPUTE RESOLUTION

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

Rodney Gomez
rodney@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sagadaven Thangavelu
sagadaven@shearndelamore.com

Nad Segaram
nad@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

Lai Wai Fong
waifong@shearndelamore.com

Jimmy Liew
jimmyliew@shearndelamore.com

Sathya Kumardas
sathya@shearndelamore.com

Alexius Lee
alexius@shearndelamore.com

Sheila Ramalingam
sheila@shearndelamore.com

Kavitha Karuppannan
k.kavitha@shearndelamore.com

TAX & REVENUE

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Irene Yong Yoke Ngor
irene.yong@shearndelamore.com
Cynthia Lian
cynthia@shearndelamore.com

CORPORATE & COMMERCIAL

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Dato' Johari Razak
jorazak@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Marhaini Nordin
marhaini@shearndelamore.com

FINANCIAL SERVICES

Christina S. C. Kow
christina@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

Pamela Kung Chin Woon
pamela@shearndelamore.com

INTELLECTUAL PROPERTY & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

Zaraihan Shaari
zara@shearndelamore.com

Jyeshta Mahendran
jyeshta@shearndelamore.com

Janet Toh Yoong San
janet.toh@shearndelamore.com

Ameet Kaur Purba
ameet@shearndelamore.com

Michelle CY Loi
michelle.loi@shearndelamore.com

ENVIRONMENTAL

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sheila Ramalingam
sheila@shearndelamore.com

PENANG OFFICE

J. A. Yeoh
yeoh@shearnpg.com.my

J.J. Chan
jchan@shearnpg.com.my

COMPETITION LAW & ANTITRUST

Dato' Johari Razak
jorazak@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

REGULATORY COMPLIANCE & ENFORCEMENT

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

EMPLOYMENT & ADMINISTRATIVE LAW

Sivabalah Nadarajah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

Reena Enbasegaram
reena@shearndelamore.com

IMMIGRATION

See Guat Har
guat@shearndelamore.com

PERSONAL DATA PROTECTION & PRIVACY LAWS

Rabindra S.Nathan
rabindra@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

INFRASTRUCTURE & PROJECTS

Rodney Gomez
rodney@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

ENERGY, NATURAL RESOURCES & GREEN TECHNOLOGY

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Goh Ka Im
kgoh@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

REAL ESTATE

Sar Sau Yee
sysar@shearndelamore.com

Aileen P. L. Chew
aileen@shearndelamore.com

Anita Balakrishnan
anita@shearndelamore.com

Ding Mee Kiong
mkding@shearndelamore.com

TELECOMMUNICATIONS & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

KUALA LUMPUR Office:
7th Floor
Wisma Hamzah–Kwong Hing
No. 1, Leboh Ampang
50100 Kuala Lumpur, Malaysia
T 603 2027 2727
F 603 2078 5625
E info@shearndelamore.com

PENANG Office:
6th Floor
Wisma Penang Garden
42, Jalan Sultan Ahmad Shah
10050 Penang
T 604 226 7062
F 604 227 5166
E shearnd@po.jaring.my

Newsletter Editorial Committee
Goh Ka Im
Christina S.C. Kow
K. Shanti Mogan
Marhaini Nordin
Zaraihan Shaari
Lai Wai Fong

This publication is issued for the information of the clients of the Firm and covers legal issues in a general way. The contents are not intended to constitute advice on any specific matter and should not be relied upon as a substitute for detailed legal advice on specific matters or transactions.

PRINTER Inch Design & Communications (001291647-h) A88, Jalan Tuanku 2, Taman Salak Selatan, 57100 Kuala Lumpur. Malaysia. Tel 603 7983 3141 Fax 603 7983 2961