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NEWSLETTER

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DISPUTE RESOLUTION

"Pay Now Talk Later"

IN THIS ARTICLE, MICHELLE LIM WAN FOONG HIGHLIGHTS THE IMPORTANCE OF INTERPRETING THE *CONSTRUCTION INDUSTRY PAYMENT AND ADJUDICATION ACT 2012* IN LIGHT OF ITS LEGISLATIVE PURPOSE

Introduction

Protracted and drawn-out payment disputes have persistently led to cash flow problems in the construction industry. *The Construction Industry Payment and Adjudication Act 2012* ("CIPAA") introduced adjudication as a mechanism to provide speedy provisional resolution for such disputes. Nevertheless, despite the CIPAA's focus on the speedy resolution of such disputes by adjudication, section 16 of the CIPAA provides circumstances where a stay of an adjudication decision may be appropriate. The limited scope where a stay may be granted under section 16 makes it a unique provision that has no equivalent in other jurisdictions with comparable statutory adjudication regimes.

In *Arkema Thiochemicals Sdn Bhd v Foster Wheeler E & C (Malaysia) Sdn Bhd* (unreported), one of the early cases applying the CIPAA, the Malaysian courts once again emphasised the importance of interpreting the CIPAA in light of its legislative purpose.

Facts

A payment dispute arose out of a construction contract between Arkema Thiochemicals Sdn Bhd ("Arkema") and Foster Wheeler E & C (Malaysia) Sdn Bhd ("Foster Wheeler") relating to the works done and services rendered by Foster Wheeler. Foster Wheeler initiated statutory adjudication claiming for the cost of:

- the equipment and material supply ("EMS") amounting to USD7,629,529.65; and
- reimbursable construction management services ("CMS") for the sum of RM3,792,556.52.

Foster Wheeler succeeded in obtaining an adjudication decision with interest and costs against Arkema. Arkema settled the EMS claim pursuant to the adjudication decision but refused to settle the outstanding CMS claim.

Foster Wheeler proceeded to enforce the adjudication decision through a court application under section 28 of the CIPAA. Arkema sought to stay the enforcement application pursuant to section 16(1)(b) of the CIPAA on, *inter alia*, the following grounds:

- The dispute was "*pending final determination by arbitration*" as the parties had triggered the multi-tier dispute resolution clause under the contract prior to the end of the adjudication process. This clause requires parties to firstly participate in negotiation, followed by mediation, and lastly arbitration to finally resolve the dispute;

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- Arkema has *bona fide* claims in the arbitration which have a real chance of succeeding and Arkema's claims will exceed the adjudication amount;

- The adjudicator had wrongfully relied on confidential and "*without prejudice*" material in the adjudication;

- Arkema would suffer greater prejudice if a stay was not granted as Foster Wheeler is not an impecunious contractor who has not been paid by the employer at all and the project has been completed and is operational. There will be neither cash flow issues nor negative impact on the progress of the works or project;

- The justice of the case favours an exercise of the Court's discretion when Foster Wheeler's "*questionable*" conduct throughout the duration of the project is examined.

The law

> "***16. Stay of adjudication decision***
> *(1) A party may apply to the High Court for a stay of an adjudication decision in the following circumstances:*
> *(a) …*
> *(b) the subject matter of the adjudication decision is pending final determination by arbitration or the court.*"

Foster Wheeler contended that Arkema had not met the threshold requirements in section 16(1)(b). The term "*pending final determination by arbitration*" should be given its literal meaning that is arbitration proceedings must have already commenced before a stay can be granted. Arbitration is generally considered as having commenced once a notice of arbitration is issued. In this case, under the multi-tier dispute resolution clause, parties were only allowed to commence arbitration after an allocated time frame for negotiation and mediation had passed. At the time of the stay application, parties were only in the negotiation phase of the dispute resolution procedure. Hence, Arkema failed to satisfy the threshold condition under section 16(1)(b). In the circumstances, it was further contended that the Court does not even have the discretion to consider the merits of the stay application.

Arkema argued that the literal interpretation of the provision would deprive Arkema of the opportunity to rely on the contractual dispute resolution arrangements between the parties. Instead, the Court should give effect to the multi-tier dispute resolution clause and encourage alternative dispute resolution. As such, the phrase "*pending final determination by arbitration*" should be interpreted to include arbitrations that will take place at the end of a series of events in the multi-tier dispute resolution process.

Decision

The Court rejected Arkema's arguments and held that, although it is a general policy of Malaysian courts to promote and encourage alternative dispute resolution, adjudication does not alter the parties' entitlement to participate in any other alternate dispute resolution as section 37(1) clearly acknowledges the right to initiate arbitration proceedings concurrently with adjudication proceedings.

Parliament has firmly endorsed the principle of "*pay now talk later*". An application for a stay should only be allowed in limited circumstances. Arbitration or court proceedings must have already commenced before the Court could exercise its discretion to grant a stay. Arkema's contention that a stay should be allowed at the negotiation phase leading up to arbitration would make stay too readily available and would undermine the purpose of the CIPAA. The Court held that strong emphasis should be placed on the legislative purpose of the CIPAA — "*Speedy resolution of disputes and temporary finality are the twin central features of CIPAA*". In a multi-tier process, the twin objectives of the CIPAA may be diluted or undermined if the right to apply for a stay is available from the very first tier.

Arkema failed to satisfy the fundamental threshold requirement under section 16 as the subject matter of the adjudication decision was not subject to any pending determination in arbitration.

Conclusion

This case highlights the Malaysian courts' desire to give effect to the legislative purpose of the CIPAA which is to provide speedy resolution of disputes and temporary finality through the adjudication process.

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CORPORATE LAW

Recent Amendments to the ACE Market Listing Requirements

IN THIS ARTICLE, TEO EU JOHN EXAMINES SOME OF THE RECENT AMENDMENTS TO THE ACE MARKET LISTING REQUIREMENTS ("ACE LR")

Bursa Malaysia Securities Berhad ("Bursa Malaysia") had recently published amendments to the ACE LR, which took effect on 13 July 2015. The amendments made were pursuant to a review of the ACE LR undertaken with an aim to enhance the overall attractiveness and competitiveness of the ACE Market through, among others, improving clarity of the ACE market admission criteria, enhancing disclosure of initial public offering ("IPO") applications and to promote the ACE market as an attractive and competitive platform for listing and investment. Bursa Malaysia had also reviewed the ACE LR in light of the *Financial Services Act 2013* ("FSA") in order to ensure the policy and terminology used in the ACE LR is consistent with the FSA. This article highlights some of those amendments. The recent amendments to the ACE LR cover both the admission and post-listing obligations for the ACE Market.

Pre-IPO consultation

The recent amendments introduce a new pre-IPO consultation procedure to the ACE Market which allows applicants to seek guidance as to ACE Market admission requirements from Bursa Malaysia at an early stage[1]. Although pre-admission consultation is not a mandatory requirement, it is strongly encouraged for potential applicants. The potential applicants who are seeking a pre-admission consultation are required to furnish to Bursa Malaysia the prescribed information and documents at least one week prior to their consultation with Bursa Malaysia[2].

There is no fee payable by potential applicants to Bursa Malaysia for a pre-admission consultation[3]. If necessary, potential applicants may request for more than one pre-admission consultation with Bursa Malaysia[4]. The potential applicants should ensure that its key promoters, chief executive officer or chief financial officer is present at the pre-admission consultation[5]. The pre-admission consultation may be done with or without a sponsor[6].

Exemption from the sponsorship requirement

Under the ACE LR, applicants must maintain the services of a sponsor for three full financial years after its admission to the ACE Market or at least one full financial year after the applicants have generated operating revenue, whichever is later[7]. The recent amendments introduce an exemption to this requirement whereby a listed corporation may apply to be exempt from the sponsorship requirement if one full financial year has lapsed since its admission to the ACE Market and the listed corporation meets the quantitative criteria for admission to the Main Market of Bursa Malaysia, as confirmed by the listed corporation's sponsor[8]. Bursa Malaysia will not approve any application for such exemption unless it is satisfied with the corporate governance and compliance record of the listed corporation[9].

Pre-vetting of prescribed circulars by Bursa Malaysia

Previously, Bursa Malaysia would not peruse circulars and documents issued to shareholders of a listed corporation before its issuance, except in a few prescribed instances[10]. The amendments introduce a requirement whereby all listed corporations must submit to Bursa Malaysia for its perusal one draft copy of all circular and other documents proposed to be sent to the listed corporation's shareholders within a reasonable time before printing[11]. A listed corporation must not issue any such documents until Bursa Malaysia has confirmed in writing that it has no further comments on the documents[12].

This new requirement does not apply to, among others, an annual report, any document that is not prepared by the listed corporation or its advisers on its behalf and any such other document as may be prescribed by Bursa Malaysia[13]. In conjunction with this new requirement, Bursa Malaysia has issued a new guidance note[14] setting out:

- which documents are not required to be submitted to Bursa Malaysia;
- which documents are subject to limited review by Bursa Malaysia; and
- which documents are subject to full review by Bursa Malaysia.

The FSA amendments

Previously, there was an exemption granted to "*scheduled institutions*" [15] (as defined in the repealed Banking and Financial Institutions Act 1989), registered with and supervised by Bank Negara Malaysia, from complying with the provision on financial assistance[16] in the ACE LR. As the FSA no longer governs "*scheduled institutions*" the previous exemption for "*scheduled institutions*" is now deleted. This means that listed corporations (or its subsidiaries) which were previously "*scheduled institutions*" and which are now no longer subject to Bank Negara Malaysia's regulation and supervision must now adhere strictly to the requirements in the ACE LR when providing financial assistance[17].

However, previous "*scheduled institutions*" which are still regulated and supervised by Bank Negara Malaysia will continue to enjoy the

exemption from the provision on financial assistance[18]. For example, this would include development financial institutions which are prescribed under the *Development and Financial Institutions Act 2002* as they are still regulated and supervised by Bank Negara Malaysia.

In addition, Bursa Malaysia has streamlined the references in the ACE LR with the FSA by amending previous terminologies such as "*Controller of Foreign Exchange*" and "*merchant bank*" which are no longer used under the FSA.

Conclusion

The recent amendments to the ACE LR may be viewed as part and parcel of Bursa Malaysia's efforts to enhance its regulatory approach and ensure the continued effectiveness of the ACE Market as a platform for capital raising and investment. Through the recent amendments, Bursa Malaysia has provided greater clarity in the rules governing admission to the ACE Market and obligations of corporations listed on the ACE Market.

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[1] Rule 3.01A of the ACE LR.
[2] Rule 3.01A(2) and Appendix 3A of the LR.
[3] Paragraph 3.0(c) of the Q&A to the ACE LR.
[4] Paragraph 3.0(d) of the Q&A to the ACE LR.
[5] Paragraph 3.0(a) of the Q&A to the ACE LR.
[6] Rule 3.01A(1) of the ACE LR.
[7] Rule 3.21(1) of the ACE LR.
[8] Rule 3.21(2A) of the ACE LR.
[9] Rule 3.21(2B) of the ACE LR.
[10] Previous rule 9.30 of the ACE LR.
[11] Rule 9.30A(1) of the ACE LR.
[12] Rule 9.30A(3) of the ACE LR.
[13] Rule 9.30A(2) of the ACE LR.
[14] Guidance Note 22 to the ACE LR.
[15] Previous rule 8.25(4)(c) of the ACE LR.
[16] Rule 8.25(1), 8.25(2) and 8.25(3) of the ACE LR.
[17] Paragraph 8.42 of the Q&A to the ACE LR.
[18] *supra*

EMPLOYMENT LAW

The Effect of Vague Charges in a Domestic Inquiry

IN THIS ARTICLE, JAMIE GOH MOON HOONG DISCUSSES THE IMPORTANCE OF CAREFULLY DRAFTING CHARGES IN A DOMESTIC INQUIRY

A domestic inquiry is a proceeding held by an employer to determine whether or not an employee is guilty of the charges levelled against him. The domestic inquiry provides an accused employee with an opportunity to defend himself against specific charges. Key issues which need to be carefully managed by employers are:

- the conduct of an investigation or the fact-finding exercise;
- the drafting of charges; and
- the appointment of officers in the domestic inquiry.

Once an investigation has been conducted and evidence gathered, charges may be drafted and issued to the accused employee. It is clear that the employer cannot justify his action on any ground other than those contained in the charge sheet and/or stated in the letter of termination. A charge should normally include:

- the specific nature of the offence or misconduct of which the employee is accused;
- the date and time when the misconduct was committed; and
- the location where the misconduct took place.

It is also pertinent to note that a charge should not include any extraneous statements which may be intended to make the charge appear serious but which cannot be proven. For instance, if a charge stated that, as a result of certain actions allegedly committed by an employee, the employer suffered monetary losses, the employer must be able to prove that the monies were not earned as a direct result of the misconduct of the employee.

The importance of careful drafting cannot be overemphasised as the Industrial Court is highly likely to strike down any dismissal based on poorly drafted charges. The purpose of any ensuing domestic inquiry is negated when an employee is unable to properly prepare his defence as a result of a defective charge. In the case of *Rama Krisna Balan v Digi Telecommunications Sdn Bhd*[1], the employee was dismissed after being found guilty of harbouring the intention to deceive the company by asking two of his colleagues to clock-in for him and deceiving the

company by clocking-in his attendance card before the start of his shift hour. The Industrial Court found the charge defective for want of material particulars, specifically the names of the two colleagues.

In the recent case of *Soo Kwok Wah v F & N Beverages Manufacturing Sdn Bhd* [2], the employee was dismissed by the company after being found guilty of gross negligence in managing the company's products resulting in ullages of the same as well as proceeding to dispose ullages of the company's products despite instructions from his superiors to the contrary.

In respect of the gross negligence in managing the company's products, the Industrial Court said:

> "*… of utmost importance in my view is the company's failure to particularize in the 3 charges according to the type of ullages which the claimant is alleged to have failed to effectively manage, since the alleged ullages were made up of 3 types of ullages viz-a-viz market returns, secondary corrosion and excess stocks. By not specifically particularizing the type of ullages, it has indeed clearly prejudiced the claimant because that would mean that he is liable for all types of company's product which are rendered ullages including ullages resulting from market returns or through corrosions of cans, which by right he should not be held liable.*"

As for disposing ullages of the company's products, the Industrial Court stated that there is a need to specify what were the alleged instructions from the claimant's superiors, who were his superiors and when were the alleged instructions given to the claimant so as to enable the claimant to defend himself effectively. The Industrial Court quoted the cases of *Esso Production (Malaysia) Inc v Maimunah Ahmad & Anor* [3] and *Intrakota Consolidated Bhd v Mohamad Roslin Md Shah & Anor* [4] which found that if the charges were lacking in material particulars, any decision of guilt made by the domestic inquiry panel was void and perverse.

The above cases stand for the proposition that where the charges are vague and the employee is unable to prepare his defence properly the domestic inquiry will not be in conformity with the rules of natural justice. It is worth noting however that the decision of the Court of Appeal in *Esso Production* (supra) is inconsistent with the decision in the case of *Wong Yuen Hock v Syarikat Hong Leong Assurance Sdn Bhd & Another Appeal*[5]. It was held in the Federal Court case of *Wong Yuen Hock* that a defective inquiry or failure to hold a domestic inquiry is not a fatality but only an irregularity curable by *de novo* proceedings before the Industrial Court.

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[1] [2011] 2 LNS 1480
[2] [2015] 1 ILR 25
[3] [2002] 3 CLJ 242
[4] [2008] 8 CLJ 81
[5] [1995] 3 CLJ 344

Must a Registrar of Trade Marks be made a Party?

IN THIS ARTICLE, TEO EU JINN LOOKS AT WHETHER THE REGISTRAR OF TRADE MARKS ("REGISTRAR") MUST BE MADE A PARTY IN EXPUNGEMENT AND RECTIFICATION PROCEEDINGS

Introduction

"*Is it mandatory or necessary to cite or make the Registrar of Trade Marks as a party in expungement and rectification proceedings?*" — this is an issue that has undergone much debate. One of the earlier cases on point is the case of *Godrej Sara Lee Ltd v Siah Teong Teck & Anor* (Part 1)[1]. The Federal Court of Malaysia has recently shed some light on the issue by delineating the role and the position of the Registrar in expungement and rectification proceedings in the leading case of *Ho Tack Sien & Ors v Rotta Research Laboratorium SpA & Anor; Registrar of Trade Marks (Intervener) & Another Appeal*[2].

Decision of the High Court

The Respondent, being the registered proprietor of the trade mark "*Viartril-S*", brought an action of infringement and passing-off against the Appellants in the High Court of Kuala Lumpur to expunge the trade mark "*Atril-250*" registered under the name of the third Appellant. The action was on the basis that "*Atril-250*" was similar or so closely resembling the Respondent's "*Viartril-S*" mark and was likely to cause confusion and deception. The High Court held in favour of the Respondent and ordered the "*Atril-250*" mark to be expunged.

Decision of the Court of Appeal

While agreeing with the findings of the High Court on passing-off, the Court of Appeal nevertheless disagreed with the order of the High Court in the expungement of the mark and rectification of the register to remove the "*Atril-250*" trade mark. The Court of Appeal held that the High Court should not have made an expungement order without the benefit of the evidence of the Registrar. This could be by way of either making the Registrar a party to the proceedings or by summoning the Registrar to give evidence pursuant to section 62 of the *Trade Marks Act 1976*. The reasoning adopted by the Court of Appeal was that the Court always retains the discretion as to whether an expungement order should be made. Even assuming the Respondents succeed in establishing infringement and passing-off, the Court of Appeal held it does not necessarily imply that the Court would make an expungement order. As such, the Registrar's evidence should have been heard. The matter was appealed to the Federal Court.

Decision of the Federal Court

The core issues were whether the evidence of the Registrar is material before an expungement order is made and whether it is a pre-requisite to name the Registrar as a party in expungement and rectification proceedings.

The Federal Court held that it is not necessary to name the Registrar as a party to the suit on the basis that there is no cause of action against the Registrar. Moreover, there is no provision under the *Trade Marks Act 1976* that provides for the requirement to cite the Registrar as a party in expungement and rectification proceedings. Even section 45 of the *Trade Marks Act 1976*, which deals specifically with rectification of the Register, is silent on this aspect. As *Godrej Sara Lee Ltd v Siah Teong Teck & Anor* (Part 1) was referred to by the Federal Court in its judgment, it is worthwhile to discuss Order 87, Rule 4 of the Rules of High Court 1980 or Order 87, Rule 4 of the Rules of Court 2012. Order 87, rule 4 states that all applications to Court under the *Trade Marks Act 1976* whether by appeal or otherwise shall be served on the parties and the Registrar. Hence, what is required under the provisions is to serve the notice on the Registrar and not for the Registrar be made a party.

The Federal Court clarified the meaning of this section as conferring on the Registrar a right of appearance either based on his discretion if he thinks that it is indeed a necessity or if he is so directed by the Court. Alternatively, the Registrar may submit a statement in writing duly signed by him which can be deemed to form part of the evidence in Court. The Federal Court made it clear that the purpose of the Registrar, if directed to appear in Court, is merely to assist the Court or to enhance the Judge's understanding with regard to points of contention relating to the Registrar's scope of duties.

Another reason given by the Federal Court was that the Registrar plays an administrative role in the prosecution of trade marks. The Court of Appeal's decision was contrary to the exercise of the Registrar's powers and duties. The repercussion in upholding the Court of Appeal's decision is that the Registrar will be placed in an undesirable position and could lead to favouritism and biasness that would eventually destroy the neutrality of his office.

Conclusion

This case provides a clearer understanding on the role and position of the Registrar in expungement and rectification proceedings.

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[1] [2007] 7 MLJ 153

[2] [2015] 4 CLJ 20; [2015] 4 MLJ 166

REAL ESTATE

Material changes to Schedule H of the *Housing Development (Control And Licensing) Act 1966*

IN THIS ARTICLE, BENJAMIN TAN WEI ZHIT CONSIDERS WHETHER STRICTER DUTIES AND RESPONSIBILITIES HAVE BEEN IMPOSED ON HOUSING DEVELOPERS AND GREATER PROTECTION HAS BEEN PROVIDED TO PURCHASERS

Introduction

Throughout the years, the *Housing Development (Control and Licensing) Act 1966* ("HDA 1966") has undergone many amendments with the intention to impose stricter rules and responsibilities on developers and to afford greater protection to purchasers. Pursuant to section 11 of the Housing Development (Control and Licensing) Regulations 1989, for the sale and purchase from a housing developer of any housing accommodation where such building or land is intended for subdivision into parcels, the contract shall be in the form prescribed in Schedule H.

The Housing Development (Control and Licensing) Regulations 2015 ("HDR 2015") came into force on 1 July 2015 and provide a substituted version of Schedule H ("New Schedule H"). The New Schedule H imposes stricter rules and responsibilities on developers. This article examines some of the material changes provided in the New Schedule H in relation to the delivery of strata title to purchasers.

(a) Clause 3 of the New Schedule H — parcel free from encumbrances before the purchaser takes vacant possession of the said parcel

A new subclause (4) has been added to clause 3, in which only instalments under item 2(a), (b) and (c) of the Third Schedule of the New Schedule H ("Third Schedule") (totalling 35% of the purchase price) may be utilised for the redemption of the land/property by the developer from its financier. There was no such limitation before.

(b) Clause 12 of the New Schedule H — separate strata title and transfer of title

The developer is now required to apply for subdivision of the building or land intended for subdivision into parcels and to obtain separate strata title before the delivery of vacant possession to the purchaser in the manner stipulated in clause 27 (as mentioned below). The developer is also required to deliver the instrument of transfer together with the original strata title to the purchaser or the purchaser's solicitors upon the delivery of vacant possession of the parcel to the purchaser, unless the circumstances under clause 28 arise (as mentioned below). There was no such requirement before.

(c) Clause 25 of the New Schedule H — time for delivery of vacant possession

In the event the developer fails to deliver vacant possession of the parcel to the purchaser within 36 months from the date of the agreement, the developer will have to pay liquidated damages to the purchaser immediately after the developer has given notice to the purchaser to take vacant posession of the parcel. There is now an express contractual right for the purchaser to deduct such liquidated damages from the purchase price due to the developer, if the developer fails to pay the same in the manner provided.

(d) Clause 27 of the New Schedule H — manner of delivery of vacant possession

New and additional conditions have been imposed on the delivery of vacant possession of the parcel by the developer to the purchaser, which requires the developer to deliver the vacant possession with, *inter alia*, the separate strata title.

(e) Clause 28 of the New Schedule H — strata title not yet issued and transfer of title

If the vacant possession of the parcel is to be delivered to the purchaser within the time stipulated in the agreement without the strata title, the developer must obtain the written certification from the Controller[1]. A copy of the written certification is to be furnished to the purchaser. Upon the issuance of the strata title to the parcel, the developer must (i) do all necessary acts to ensure that the strata title is registered in favour of the purchaser, and (ii) handover the duly registered original strata title to the purchaser within the timeframe stipulated therein, failing which the developer shall be liable to pay the purchaser liquidated damages.

(f) Third Schedule of the New Schedule H — schedule of payment of purchase price

Two point five percent (2.5%) of the purchase price under item 4 of the Third Schedule shall now only be paid by the purchaser or be released by the purchaser's financier to the developer after the receipt by the purchaser or the purchaser's solicitors the duly executed instrument of transfer together with the original issue document of strata title to the parcel.

Conclusion

It is hoped that these recent amendments to the New Schedule H which impose stricter duties and responsibilities on developers will assist in expediting delivery of strata titles to purchasers.

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[1] "*Controller*" means the Controller of Housing appointed under section 4 of the *Housing Development (Control and Licensing) Act 1966*.

TAX LAW

Everise Sprint (M) Sdn Bhd v Minister of Finance, Malaysia & Anor [1]

IN THIS ARTICLE, JESS NGO HUI ZHONG ANALYSES THE CASE OF *EVERISE SPRINT (M) SDN BHD V MINISTER OF FINANCE, MALAYSIA & ANOR* ON THE IMPORTANCE OF STRICT INTERPRETATION OF TAX STATUTES

Facts

Everise Sprint (M) Sdn Bhd ("Everise") is in the business of buying and selling used primed movers ("Goods"). Everise bought the Goods from Scania Malaysia Sdn Bhd ("Scania Malaysia"). The Goods were supplied by Scania (GB) Ltd United Kingdom ("Scania UK"), the exporter. In the customs declaration form, Red Synergy Corporation Sdn Bhd ("Red Synergy") was specified as the consignee or the importer of the Goods. After clearing Customs, the forwarders issued the invoices for customs duties and sales taxes to Everise which were duly paid by Everise.

Following an audit conducted on Scania Malaysia, the State Director of Customs Selangor ("SDCS") discovered that the declared value and the assessed value of the Goods were not based on the actual amount paid to the exporter. Accordingly, the SDCS claimed the shortfall ("short-paid taxes") from Scania Malaysia and Everise.

Everise refused to pay the short-paid taxes claiming that they were not the importer of the Goods and applied to the Minister of Finance ("MOF") for a remission of the short-paid taxes.

Aggrieved by the MOF's decision to refuse its application for remission, Everise filed an application for judicial review in the High Court against the decision of the MOF.

Issues

The central issues were whether Everise was an importer under section 2 of the *Customs Act 1967* ("CA") and whether the MOF had failed to carry out his discretion in a "*just and equitable*" manner under section 14A of the CA and section 33 of the *Sales Tax Act 1972* ("STA").

Decision of the High Court

The High Court concluded that the MOF had considered all evidence before him in exercising his discretion and dismissed Everise's application.

Decision of the Court of Appeal

Everise appealed to the Court of Appeal and the Court of Appeal set aside the decision of the High Court for the following reasons:

- **The MOF and SDCS ("Respondents") failed to appreciate relevant facts and took into consideration irrelevant matters.**
  The Respondents had taken into consideration irrelevant matters in relying on the email communication between Everise and Scania UK which were completely unrelated to the importation of the Goods in an attempt to prove that Everise was an importer.

  Further, the Respondents failed to take into account the dealings between Everise and Scandia Malaysia as it was a relevant fact to ascertain if Everise was indeed an importer. In this regard, it must be highlighted that Everise paid the purchase price of the Goods locally to Scania Malaysia and Scania Malaysia was the party which paid for the price of the Goods to Scania UK directly.

- **It was absurd and unjust for SDCS to seek the short-paid taxes from both Everise and Scania Malaysia.**
  The claim made by the SDSC against both parties for the same short-paid taxes had created an ambiguity and serious doubt as to who should be liable under the law.

  A taxing statute must be given strict interpretation and there is no room for intendment, equity or presumption as stated by the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetables Oils Sdn Bhd* [2]. In this regard, the Supreme Court in *National Land Finance Co-operative Society Ltd v Director General of Inland Revenue* [3] had stated that the courts have refused to adopt a construction of a taxing statute which would impose liability when doubt exists.

  Accordingly, it would be ludicrous and unjust to impose liability on Everise and Scania Malaysia simultaneously.

Conclusion

The Court of Appeal's decision reiterates the importance of strict interpretation of tax statutes and that the discretion granted to an authority must be exercised in a just and equitable manner by appreciating relevant facts and disregarding irrelevant matters.

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[1] [2015] MSTC 30-093
[2] [2005] 3 MLJ 97
[3] [1994] 1 MLJ 99

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