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REGULATORY FRAMEWORK AND INCENTIVES FOR RENEWABLE ENERGY — TOWARDS A CARBON NEUTRAL NATION

by Farizal Farhan

The concept of climate change is no longer a foreign concept to society, and it has become apparent that the utilisation of indigenous renewable energy ("**RE**") is significant in combatting climate change to facilitate a sustainable socio-economic development. In September 2021, Prime Minister Ismail Sabri Yaakob presented the 12th Malaysia Plan ("**12MP**") in which he pledged for Malaysia's RE target input in the national power generation mix to account for 31% of total energy capacity and for us to be a carbon neutral country by as early as 2050.

This insight discusses the current regulatory framework and the incentives provided for the RE industry in Malaysia in achieving the carbon neutral aim.

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Governing Authorities

The main governmental bodies involved in the regulation of the RE industry are:

(1) Energy Commission of Malaysia ("**EC**")[1]

Established under the Energy Commission Act 2001, EC is responsible in regulating the electricity and gas sector in Peninsular Malaysia and Sabah. EC does not only look to promote the efficiency and economy in electricity and gas supply industries but also RE. Other roles of EC include advising KeTSA on matters related to energy supply activities and enforcing and reviewing energy supply legislations, including tariffs and generation licensing.

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(2) Ministry of Energy and Natural Resources ("**KeTSA**")[2]
KeTSA is the ministry that is responsible for affairs concerning energy, natural resources, land, forestry and more. Its mission is to ensure sustainable environmental and water conservation through policy formulation, legal compliance, mitigation activities, adaptation and education, in line with international standards and practices.[3]

(3) Ministry of Environment and Water ("**KASA**")[4]
KASA deals with the governance of environmental conservation and sustainability. It supervises the overall planetary health by establishing policy frameworks to ensure a clean and safe environment in achieving sustainable development. Its mission is to ensure sustainable environmental and water conservation through policy formulation, legal compliance, mitigation activities, adaptation and education, in line with international standards and practices.

(4) Sustainable Energy Development Authority ("**SEDA**")[5]
Established under the SEDA Act 2011, SEDA is the primary regulatory body which oversees RE development in Malaysia by promoting and implementing national policy objectives for RE.

Approving Bodies

Prior to the commencement of any RE project the proposed development requires authority approval from various bodies. These include, but are not limited to:

(1) Construction Industry Development Board ("**CIDB**")[6]
Established under the Construction Industry Development Board Act 1994, the function of CIDB is to regulate, develop and facilitate the construction industry. An approval from CIDB is essential prior to the construction of RE power plants.

1 EC, 'About Us' (https://www.st.gov.my/en/details/aboutus/2)

2 KeTSA, (https://www.ketsa.gov.my/ms-my/Pages/default.aspx)

3 KeTSA, 'KeTSA Background' (https://www.ketsa.gov.my/en-my/AboutKetsa/Pages/default.aspx)

4 KASA, https://www.kasa.gov.my/ms/maklumat-bahagian/bahagian-pengurusan-alam-sekitar

5 SEDA, 'Overview of SEDA' (http://www.seda.gov.my/about-seda/overview-of-seda/)

6 CIDB, 'About Us' (https://www.cidb.gov.my/en/about-us)

(2) Forestry Department
Pursuant to s.15 of National Forestry Act 1984, a license is required from the forestry department for any person to take any forest produce from a permanent reserved forest or state land.

(3) Department of Environment
Pursuant to s.34A of the Environmental Quality Act 1974, any prescribed project requires an Environment Impact Assessment ("**EIA**") to be conducted by an approved EIA Consultant to ensure compliance with the relevant environmental legislation before commencement of such projects.

Governing Legislations

The following are some of the key legislations that regulate the supply of RE in Malaysia:

(1) Renewable Energy Act 2011 ("**REA**")
The REA is the principal legislation governing the legal framework for RE in Malaysia, primarily the establishment and implementation of the Feed-In Tariff ("**FiT**") system and RE Fund to subsidise the FiT system.

(2) Sustainable Energy Development Act 2011 ("**SEDA Act**")
Provides for the establishment of SEDA and its functions and powers.

(3) Energy Commission Act 2001 ("**ECA**")
Provides for the establishment of EC and governs the technical, safety and implementation of regulations related to the electricity sector.

(4) Electricity Supply Act 1996 ("**ESA**")
The ESA regulates, amongst others, the electricity supply industry. This legislation is important in the RE industry as RE installations generate electricity to supply to the main grid which is subsequently distributed to the public.

(5) Subsidiary Legislations and Guidelines
The energy industry in Malaysia is guided and regulated by various rules and guidelines which are administered by SEDA and EC pursuant to REA/ESA as part of the RE legal framework. These include Renewable Energy (Feed-in Approval and FiT rate) Rules 2011 and Renewable Energy (Technical and Operational Requirements) Rules 2011.

RE Policies

The current key policies on RE in Malaysia are as follows:

(1) National RE Policy
This policy was approved with the primary objective of catalysing the RE sector in Malaysia by increasing the RE input in the national power generation mix and enhancing awareness on the importance of RE in conserving a sustainable growth for future generations[7]. The government has consistently indicated that it is in the

7 SEDA, 'National Renewable Energy Policy and Action Plan' (http://www.seda.gov.my/policies/national-renewable-energy-policy-and-action-plan-2009/)

final phase of launching a long-term and comprehensive National Energy Policy 2021-2040 ("**NEP**") which will replace the existing National RE Policy. We anticipate that the NEP will be in alignment with Malaysia's commitment to the Paris Agreement.[8]

(2) Malaysia Energy Supply Industry 2.0 ("**MESI 2.0**")
In September 2019, the government approved a 10-year generation plan to transform and liberalise the energy sector by increasing efficiency, future-proofing key regulations and structure and democratizing and decentralizing the electricity supply industry to encourage the generation and utilisation of RE in an efficient manner.

(3) RE Transition Roadmap 2035 ("**RETR 2035**")
This strategic roadmap was developed by SEDA and is part of the 12MP, whereby it defines the action plans proposed to achieve the RE target aspirations.

RE Initiatives/Programmes

SEDA has implemented several initiatives to advance the progress of RE in this country, namely:

(1) Feed-In Tariff System (FiT)
FiT is a scheme that obliges distribution licensees ("**DLs**"), ie. Single Buyer (in the case of Peninsular Malaysia) and Sabah Energy Sdn Bhd (in the case of Sabah) to buy electricity produced from RE installations from private RE producers at a fixed price set by SEDA for a fixed period. This aims to attract long-term potential entrants in producing RE in Malaysia as Feed-in Approval Holders ("**FiAHs**") will look to gain benefits for generating electricity in the form of generation tariff payments for generating electricity and export tariff payments for exporting electricity to the main grid, if applicable. Incentives are also offered under the Green Technology Tax Incentives Programme to further encourage and promote the generation and utilisation of RE including biomass, biogas and small hydro.

(2) Net Energy Metering Programme ("**NEM**")[9]
Implemented in 2016, this programme was initially introduced by SEDA to replace the FiT scheme for solar PV installations. The energy produced from the solar PV system will first be consumed by the consumer and any excess energy from the consumption will be exported to the grid and sold to TNB. The value of such excess energy will then be credited into the consumer's account, which can then be offset against their electricity bill payment. In the second cycle of this programme, NEM 2.0, the true NEM concept was adopted where the sale and purchase transaction will be on a "one-on-one" offset basis at a price set by the EC[10].

In 2020, due to the positive response to the second cycle, NEM 3.0 was announced. A new category has been introduced under NEM 3.0, namely NEM Net Offset Virtual Aggregations ("NOVA") Programme. Here, any non-domestic NOVA consumer ("NC") now has a second option of exporting the excess energy to other designated premises ("DPs") instead of the sole option to TNB's national grid. The DP, as stated in the Guidelines provided by EC includes premises used or operated by its wholly owned subsidiary company[11].

The offset will be credited to the specific DP's accounts instead of the generation site billing account (NC's account), which will then reflect in the DP's electricity bill. The aggregation of such credits to the DP's accounts will be priority-based decided at the NC's discretion. Another distinction to be made is that the unit price of the energy exported will be based on the average system marginal price instead of the prevailing tariff in the other categories of NEM 3.0. The total quote allocation for this cycle is 500MW and subscriptions are open until 31st December 2023 or until the quota is fully filled.

(3) Peer-to-Peer Solar Energy Trading ("P2P")
In 2019, SEDA initiated this trading programme to permit consumers who generate and consume electricity from their installed solar PV systems ("Prosumers") to sell their excess energy to other consumers at a rate competitive to the grid operator's tariff. Consumers can therefore either purchase electricity through the grid from prosumers or TNB. This initiative presents a win-win situation for both producers and consumers as producers receive small financial gains from the compensation fee provided by the government for generating electricity while consumers receive small energy savings by purchasing electricity at a cheaper rate.

Government Incentives

In its effort to further strengthen the sustainability and carbon neutral agenda, the government has announced a number of measures in their Budget 2022[12] speech. These include:

(1) Voluntary Carbon Market to be launched under the advocacy of Bursa Malaysia[13].

(2) Incentive for low carbon transition[14]
RM1 billion fund will be allocated under Bank Negara Malaysia to assist small and mid-size enterprises ("**SMEs**") to transition to low-carbon operating models.

(3) Incentive for Sustainability Sukuk[15]
Up to RM10 billion will be issued to eligible socially or environmentally friendly projects to further aid the efforts in protecting the environment and empowering the community.

(4) Extension and expansion of Green Technology Tax Incentives ("**GTTI**")
In Budget 2014, the government launched the Green Technology Tax Incentives[16] to companies involved in the purchasing and usage of green technology with the aim to provide a conducive and viable investment environment for RE investors and promote green technology in Malaysia. In Budget 2022, the government has announced that GTTI will be extended until 31st December 2023 and is now expanded to include Rainwater Harvesting System[17]. GTTI can be categorized into the following:

8 The Edge Markets, 'Govt in final phase of developing National Energy Policy, says Mustapa', (https://www.theedgemarkets.com/article/govt-final-phase-developing-national-energy-policy-says-mustapa)

9 SEDA, 'Net Energy Metering (NEM)' (http://www.seda.gov.my/reportal/nem/)

10 SEDA, 'About NEM 3.0' (http://www.seda.gov.my/reportal/nem/)

11 EC, 'Guidelines for Solar Photovoltaic Installations under Net Offset Virtual Aggregations (NOVA) Programme'

12 Minister of Finance, '2022 Budget Speech' (https://budget.mof.gov.my/pdf/2022/ucapan/bs22.pdf)

13 Ibid.

14 Ibid.

15 Ibid.

16 MyHijau, 'Green Incentives' (https://www.myhijau.my/green-incentives/)

17 Minister of Finance, '2022 Budget Speech' (https://budget.mof.gov.my/pdf/2022/ucapan/bs22.pdf)

a. Green Investment Tax Allowance ("**GITA**")
This incentive is applicable to corporations looking to develop green technology projects or purchase any green technology asset. Companies participating in such activities will be entitled to 100% income tax allowance on qualifying capital expenditure. In addition to this, such allowance can be offset against 70% of statutory income in the year of assessment and any unused allowance can be carried forward until fully utilised. GITA for assets is, however, only applicable to the purchase of green technology assets registered under the MyHIJAU Directory. This incentive is applicable to corporations looking to develop green technology projects or purchase any green technology asset. Companies participating in such activities will be entitled to 100% income tax allowance on qualifying capital expenditure. In addition to this, such allowance can be offset against 70% of statutory income in the year of assessment and any unused allowance can be carried forward until fully utilised. GITA for assets is, however, only applicable to the purchase of green technology assets registered under the MyHIJAU Directory.

b. Green Income Tax Exemption ("**GITE**")
Participants are eligible for income tax exemption up to 70% of statutory income for the year of assessment in regard to:
i. Services
Specific only to corporations providing green technology services i.e., services relevant to RE projects which have been verified by Malaysian Green Technology Corporation ("MGTC") and are set out under the MyHIJAU Directory.
ii. Solar Leasing
GITE is applicable to corporations participating in solar leasing schemes for a maximum period of 10 years.

All GITA projects and GITE services applications must first obtain approval from the Malaysian Investment Development Authority ("**MIDA**"), before being evaluated and verified on the green technology technical aspect of the project based on Project Assessment Criteria by MGTC[18]. As for GITA assets, applications are approved and verified solely by MGTC. A validation letter will be issued for successful GITA and GITE applicants[19].

(5) Introduction of Tax Incentives for electric vehicles ("**EVs**")[20]
In stimulating low carbon transition to achieve the carbon neutrality aim, the government has introduced import duty, excise duty, sales tax, and road tax exemption for EVs in Budget 2022 to encourage the nation to adopt the use of EVs. The specification of these exemptions are as follows:
a. 100% import duty exemption on imported components for locally assembled EVs effective from 1 January 2022 to 31 December 2025;
b. 100% excise duty and sales tax exemption on locally manufactured EVs effective from 1 January 2022 to 31 December 2025;
c. 100% import duty and excise duty exemption on imported complete built unit EVs effective from 1 January 2022 to 31 December 2023; and
d. Personal tax relief of up to RM2,500 given to resident individuals in relation to the cost of installation, lease, and purchase including hire-purchase of equipment and subscription fee for EVs charging stations.

(6) Green Technology Financing Scheme 3.0[21] ("**GTFS**")
The Ministry of Finance also launched the third edition of GTFS following Budget 2021 to promote sustainable and responsible investments and the further use of green technologies by providing financial aids to investors, producers, consumers of green technology as well as Energy Services Companies. A total allocation of RM2 billion has been put aside for the funding of this scheme and applications are currently still open until 31 December 2022.

12th Malaysia Plan and Carbon Neutrality

In 2015, the landmark Paris Agreement ("**Agreement**') was formed to combat climate change. The main goal of this Agreement is to restrict global average temperature increase confined to a maximum of 2 degrees celsius when compared to pre-industrial levels. As a signatory to this Agreement, Malaysia has pledged to reduce its greenhouse gases emissions by 45% by 2030[22]. As energy production and consumption directly contributes to global greenhouse emissions, the development of the RE industry in Malaysia is consequential in achieving its commitment to the Agreement.

Since the implementation of these initiatives and policies, the RE installed capacity in the national grid has seen some improvements. By the end of 2019, a total of 21 large scale solar ("**LSS**") plants have begun operations which have boosted the RE capacity. LSS is a programme launched by EC and administered by KeTSA where potential developers are selected through a competitive bidding process to build and operate LSS power plants in Malaysia to accelerate the development of the nation's electricity supply industry, specifically solar energy. The EC has held 4 bidding cycles of LSS programs, the first being in 2016 ("**LSS1**"). The most recent in May 2020 ("**LSS4**") offered the biggest solar quota of 1000MW, which has doubled from the quota of 500MW offered in LSS3[23]. According to the EC Annual Report 2019, due to the commissioning of the LSS projects, the national grid saw an increase from 179MW in 2018 to 725MW by the end of 2019, out of 26,132MW total installed capacity[24]. Given the fruitful growth arising from this programme, the government has expressed that it is now targeting RE to account for 31% of total energy capacity by 2025 as part of the 12MP[25].

Furthermore, in the recent 2021 United Nations Climate Change Conference ("**COP26**"), Malaysia's Ministry of Environment and Water ("**KASA**") has affirmed that Malaysia has indeed joined the Global Methane Pledge to reduce global methane emissions as well as the Glasgow Leaders' Declaration on Forests and Land Use to reduce deforestation by 2030[26]. This appears to be in line with Malaysia's commitment to maintaining at least half of its land area under forest and tree cover, which was acknowledged in the Malaysian Forestry Policy 2020.

18 GreenTech Malaysia, 'Guidelines for Green Technology Tax Incentive' Para 3.4 (https://www.myhijau.my/wp-content/uploads/2021/02/REC-GTGT-007-GUIDELINES-FOR-GREEN-TECHNOLOGY-TAX-INCENTIVE.pdf)

19 Ibid.

20 Minister of Finance, '2022 Budget Speech' (https://budget.mof.gov.my/pdf/2022/ucapan/bs22.pdf)

21 `Dajajamin, 'Government Guarantee Scheme, GTFS 3.0' (https://www.danajamin.com/business/green-technology-financing-scheme/)

22 KETSA, 'Malaysia's Energy Transition Plan 2021-2040 featured at the Special Meeting of Asean Ministers on Energy and the Minister of Economy, Trade and Industry of Japan', (https://www.ketsa.gov.my/ms-my/pustakamedia/KenyataanMedia/Press%20Release%20ASEAN%20Energy%20Meeting%2021%20June%202021.pdf)

23 www.mida.gov.my/mida-news/ministry-to-offer-1000MW-solar-quota-under-email-protected-programme/

24 Energy Commission Annual Report 2019 (https://www.st.gov.my/en/contents/files/download/87/Laporan_Tahunan_ST_2019.pdf)

25 Twelve Malaysia Plan, 'A Prosperous, Inclusive, Sustainable Malaysia' Main Document, Chapter 9, Page 15 (https://rmke12.epu.gov.my/en)

26 Earth Journalism Network, 'COP26: Malaysia focuses on climate ambitions, financing, carbon markets' (https://earthjournalism.net/stories/cop26-malaysia-focuses-on-climate-ambitions-financing-carbon-markets)

Malaysia's main focal points from COP26 are three-fold[27]. The first fold would be the enhanced revision on the National Determined Contributions ("**NDC**") agreed during the Agreement whereby Malaysia has announced early this year that it is committed to reducing its economy-wide carbon intensity (against GDP) by 45% by 2030[28]. Over and above, the government has also vowed to stop building new coal-fired power plants as part of Malaysia's proposed transition from coal to natural gas as a source for non-renewable energy. In spearheading the advancement of RE in the nation and achieving the carbon neutrality goal, the government in its 12MP publication has also put forward its plan to introduce carbon tax and carbon trading as part of Malaysia's move to tackle carbon emissions. The second fold would be deliberations by Malaysian delegation on Article 6 of the Agreement which tackles instruments for carbon market. Evidently, these will be put into effect with the introduction of voluntary carbon market and domestic emissions trading scheme in Budget 2022[29]. Malaysia has also taken part in the carbon market scheme under the Kyoto Protocol which allows countries to sell their excess emission capacity to countries that have over exceeded their emission limits. The final fold will be the focus on climate finance. The Malaysian delegation plans to focus on negotiations on climate financing with developed countries to provide their share of financing in tackling climate change. Although negotiations are taking place, it appears that that the government's commitment towards attaining the country's NDC climate targets will not be dependent on climate financing from other nations.

The government is also consistently introducing programmes to encourage consumers to participate in Malaysia's path towards carbon neutrality. On 23rd November 2021, the Malaysian government launched the Green Electricity Tariff ("**GET**") programme to enable consumers to subscribe to green electricity supply in return for the payment of 3.7 sen/kWh (in contrast to 8 sen/kWh under the existing myGreen+ scheme) for the total RE generation subscribed on top of the standard applicable tariff for their monthly electricity consumption[30].

The government's efforts in achieving net zero emissions have also been well received with encouraging response by many energy corporations like Petroliam Nasional Berhad ("**PETRONAS**") and Tenaga Nasional Berhad ("**TNB**"). For instance, in August 2021, TNB announced its sustainability pathway with an aspiration to reduce 35% of its emissions intensity as well as 50% of its coal generation capacity by 2035[31].

Green Hydrogen

In more recent times, green hydrogen generation has surfaced as an alternative to reduce emissions. As the electricity used in electrolysis process comes from renewable sources, green hydrogen could be the next clean energy source to decarbonise Malaysia for the generation of heat or electricity.

27 Ibid.

28 Ibid.

29 Ibid.

30 Malaysia Green Attribute Tracking System, 'Green Electricity Tariff', (https://www.mgats.com.my/green-electricity-tariff)

31 Tenaga Nasional Berhad, 'TNB SETS NET ZERO EMISSIONS ASPIRATION BY 2050' (https://www.tnb.com.my/assets/press_releases/202108114bi.pdf)

Other nations have started to invest in green hydrogen. In 2020, Portugal launched a national hydrogen strategy worth 7 billion EUR[32]. Australia is currently developing several green hydrogen projects, namely The Asian RE Hub which plans to produce 26 gigawatts of cheap solar and wind power for the Pilbara region of Western Australia, some of which will be used for the electrolysis to produce hydrogen.[33]

Malaysia has also begun to adopt the transition into the green hydrogen generation. As an example, as part of PETRONAS' effort to achieve Net Zero Carbon Emissions by 2050, on 10 September 2021, PETRONAS, through its subsidiary PETRONAS Gas & New Energy Sdn Bhd has signed a Memorandum of Understanding with ENEOS Corporation to jointly develop a competitive, clean hydrogen supply chain between Malaysia and Japan, and to explore other hydrogen business opportunities[34]. Presently, PETRONAS is already producing low carbon hydrogen from its facilities and plans to explore the commercial production of green hydrogen from RE soon to further complement and accelerate Malaysia's transition towards a low carbon economy and the eventual achievement of being a carbon neutral nation by 2050[35].

Conclusion

RE is indeed the way to go in attaining our target of combatting global warming and promising a sustainable future for humankind. It is no debate that the government's implementation of various policies and incentives over the recent years has catapulted Malaysia's transition towards carbon neutrality. Nonetheless, there is always room for improvements, and we still have a long way to go before transitioning into a carbon neutral nation. Various stakeholders including the government, energy providers, tech companies, service providers, industrial, commercial, and residential users must all make continuous efforts and positive contributions as part of their Environmental, Social and Corporate Governance ("**ESG**") initiatives. We recognise that progress may not be linear, but as long as we embrace the ups and downs of genuine sustainable growth, such growth and progress will definitely benefit us in the long run.

"It is our collective and individual responsibility to preserve and tend to the world in which we all live in." – Dalai Lama

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32 International Energy Agency, 'Hydrogen Strategy' (https://www.iea.org/policies/12436-hydrogen-strategy)

33 https://asianrehub.com/about/

34 PETRONAS, 'PETRONAS and ENEOS Expand Energy Partnership to Include Hydrogen Business' (https://www.petronas.com/media/press-release/petronas-and-eneos-expand-energy-partnership-include-hydrogen-business)

35 Ibid.

RETENTION SUMS – TRUST MONIES OR NOT?

by Shaun Tan

A Retention sum is often a percentage of the amount of certified as due to a contractor in an interim certificate, that is deducted from the amount due and retained by an employer. The Retention Sum is form of security to ensure that a contractor duly complies with their obligations and responsibilities under a contract. It will be released to the contractor once the conditions for release are fulfilled.

The Federal Court in **SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd** & Another Appeal [2019] 4 CLJ 590, discussed and decided on the issue as to whether retention sums under a construction contract are held on trust by the employer for the benefit of the contractor.

Facts

The facts are similar in both appeals. Pembinaan Legenda Unggul Sdn Bhd ("**Respondent**") had engaged Geohan Sdn Bhd and SK M&E Bersekutu Sdn Bhd ("**Appellants**") to carry out sub-contract works in relation to a mixed development project in Sungai Buloh and a project in Johor. The Appellants completed their works and the respective certificates of practical completion were issued by the architect. Both the sub-contracts contained a clause which provided for the release of the retention sum in 2 tranches. Which are as follows:

Sungai Buloh project:

(i) First moiety due upon issuance of the Certificate of Practical Completion ("**CPC**"); and
(ii) Second moiety due upon the expiry of Defect Liability Period ("**DLP**").

Johor project:

(i) First moiety due upon issuance of CPC; and
(ii) Second moiety due upon issuance of the Certificate of Making Good Defects ("**CMGD**").

Despite the expiration of the defects liability period and legal demands from the sub-contractors, the Respondent failed to release the first moiety. On 2 November 2015, the shareholders of the Respondent passed a special resolution for the voluntary winding up of the Respondent. Based on the Respondent's statement of affairs as at 8 October 2015, there were about 250 creditors, out of which 128 were creditors claiming retention sums. The total amount owed to creditors for retention monies was RM8,230,087.61. This included the amounts owed to the Appellants. The Respondent did not open a separate bank account for the retention monies including the amounts owed to the Appellants.

High Court

The Appellants commenced an action at the High Court seeking leave to commence and proceed with court, arbitration and/or adjudication proceedings against the Respondent and for the Respondent to be order to preserve the retention sums in a separate account pending the final determination of the arbitration and/or adjudication proceedings.

Premised on the Court of Appeal's judgment in **Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor [2012] 3 MLJ 422** ("**Qimonda**"), the High Court held that the retention sums were being held on trust by the Respondent. While there was no express clause providing for the creation of a trust over the retention monies, a trust could still arise due to the fact that there was a provision for the release of the retention monies upon any rectification work on any defect completed and since no notice was received from the Respondent of any defect. The High Court granted the relief sought for by the Appellants.

Court of Appeal

On appeal, the Court of Appeal reversed the High Court's decision. The Court of Appeal held that there could be no trust because of the lack of an express clause or clear conduct from the parties as well as the fact that the retention monies were never segregated.

The Court of Appeal took the view that a trust cannot be implied purely from the nature and purpose of retention monies per se, and that the concept of a trust is not inherent in the use of the word "deductions". It went on to hold that most construction contracts do not operate via a trust, unless otherwise expressly stated, but at the level of contract and debt. A mere debt is a chose in action and does not confer any beneficial right in retention monies on the basis of trust.

The Court of Appeal also observed that there is no general proposition of law in a building contract that retention monies are, as a rule, held by way of trust between an employer and a contractor. However, the Court of Appeal accepted the principle that a trust may exist without the necessity of having to use express words relating to trusts to create it. However, there is a clear difference between an intention to create a trust and the creation of a valid trust.

Issues before the Federal Court

The Federal Court granted leave to the Appellants to appeal to the Federal Court on the following questions of law:

(i) Where a building contract provides that a certain percentage of the certified sum for work done by a contractor is to be retained by the employer until the conditions for the release of the sum retained ("retention sum") are met:
   (a) Is it implied by law that the retention sum is to be held in trust by the employer for the benefit of the contractor; or
   (b) Is it a matter of construction (interpretation of contract) whether or not the retention sum is to be held in trust by the employer for the benefit of the contractor?

(ii) Where in a building contract there exists an agreement (whether arising by implication of law or upon construction of the contract) that the retention sum is to be held in trust by the employer for the benefit of the contractor, can the trust of the retention sum be constituted without the employer first appropriating and setting aside the money as a separate trust fund?

Determination

The Federal Court held that the contract between an employer and a contractor usually has a provision that gives the employer the right to retain certain percentage from the interim sums certified payable to the contractor for work done. Such a contractual provision may also stipulate the purpose of the retention sum, its management and keeping pending usage or release, and the time for its actual release to the contractor. Therefore, being a creature of contractual provision, the legal status of a retention sum, including its management pending release to the rightful payee, is very much subject to the terms or terms as stipulated in such a provision. In reaching its decision the Federal Court considered the legal status of retention sums under English and Scottish law.

English Law

The legal status of a retention sum under English law is circumscribed by the standard-term of building contracts of the United Kingdom. The Federal Court used Clause 30.5.1 of the JCT 1998 standard construction contract as an example. Clause 30.5.1. provides that:
"the employer's interest in the retention is fiduciary as trustee for the contractor and for any nominated sub-contractor"

The effect of such a contractual provision is to impose upon the employer a personal obligation to appropriate and set aside as a trust fund the amount of retention money withheld. If this is successfully done, the contractor's claim to the retention money takes priority over the employer's general creditors in the event of the employer's insolvency, and a liquidator of the employer would be obliged to hand over the retention fund in full to the contractors and sub-contractors involved.

Being a creature of contractual provision, the legal status of a retention sum, including its management pending release to the rightful payee, is very much subject to the terms or terms as stipulated in such a provision.

Therefore, in the United Kingdom, when a solvent employer neglects to perform its obligations as mandated by such clause, the contractor may apply for a mandatory injunction against such employer. The employer is then compelled to set aside the retention sum in order to protect the contractor against the employer's insolvency.

However, the position would be different where the contractor had gone into liquidator without having set aside as a trust fund the amount of retention money withheld. If the employer merely deducts the contractually agreed percentage from interim payments which he would have otherwise paid to the contractor, there is only a withholding of payment instead of the setting up of a distinct fund. Consequently, there would be no trust asset which the contractor could have recourse in the event of the employer's insolvency.

As such, under English law, where parties have agreed by contract for the retention monies to be impressed with a trust, it is vital for the trust to have been established before the employer's insolvency. Otherwise, the money will form part of the monies to be distributed pari passu in the winding-up, and the contractor will be unsecured.

Scottish Law

The position under Scottish law is similar to the English position. Even if the contract provides a mechanism whereby the retention deducted by the employer is to be held on trust on behalf of the contractor, the existence of express terms per se is insufficient to create a trust without any other actions.

Under the Standard Building Contract and the Design and Build Contract (which is a commonly used standard form of contract in Scotland), if an employer becomes insolvent, then, in respect of the payment of retention fund that has been deducted, the contractor may find themselves in no better position than other ordinary creditors.

Legal Principles on Retention Sums

After distilling the legal position on retention sums in the United Kingdom and Scotland. The Federal Court summarised the legal position on retention sums as follows:

1 *499 U.S. 340 (1991)*
2 *(2012) 287 ALR 403*

(i) An agreement must employ sufficiently unambiguous terms to show that a trust is created with the contractor or subcontractor as the beneficiary;
(ii) While an explicit clause creating a trust may be of help, it does not mean that an absence of such a clause negates the existence of a trust;
(iii) There is no presumption that monies held in a separate account must necessarily be held on trust;
(iv) At any rate, each case depends on the parties' specific intention as expressed in the relevant construction contract and
(v) Even where there is a fiduciary relationship between an employer and a contractor, not every fiduciary is a trustee. Such a person can have obligations towards another's property even though it may not be vested in him. The nature and extent of a fiduciary's duties are variable and depend on the circumstances of each case.

It is a settled principle of law that in order for the legal relationship of trustee and beneficiary to come into existence as regards express private trusts, three essential features must be present:
(i) Certainty of words;
(ii) Certainty of subject; and
(iii) Certainty of object.

Qimonda Malaysia Sdn Bhd (in liquidation) v Sediabena Sdn Bhd & Anor [2012] 3 MLJ 422

In Qimonda, the Court of Appeal found that there was a trust of the retention sum despite the absence of an express trust clause or words to that effect in the contract and there were no unusual terms as well. The Court of Appeal held that although the "requisites" of a valid trust were present, there seemed to be no evidence of either intention or trust property.

The Federal Court departed from Qimonda. The Federal Court noted that Qimonda had relied on **Re Kayford Ltd [1975] 1 ALL ER 604** ("**Re Kayford**") to support the proposition that it was not necessary to set aside money for the purpose of creating a trust. The Federal Court distinguished Re Kayford on the ground that the context of payment in that case concerned customers paying for their goods in advance whereas there was no such advance payment by the contractor in Qimonda. There was merely an agreement that the employer would release the retention sum to the contractor after the final correction of defects. Accordingly, it would be difficult to sustain the decision in Qimonda in light of the settled principles in trust law.

The Federal Court's Findings

After considering the evidence presented, the legal positions set out above and the Hong Kong Court of Appeal case of **Yew Sang Hong Ltd v Hong Kong Housing Authority [2008] HKCA 109**, the Federal Court found that::

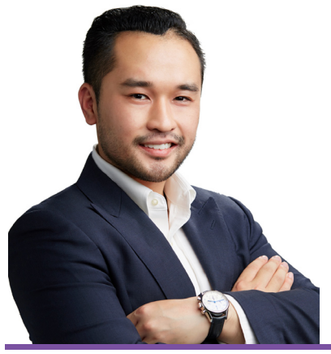
(i) there were no facts to support a finding that a trust was in existence;
(ii) there were no express provisions requiring the retention sums to be held on trust with the employer as the fiduciary; and
(iii) there was no clause mandating that the retention monies be kept separate from the assets of the Respondent. Accordingly, the Federal Court was unable to discern any clear intention or evidence that indicated that the retention monies should be accorded the status of trust monies.

Accordingly, the Federal Court answered the Leave Question (i)(b) in the affirmative and Leave Questions (i)(a) and (ii) in the negative and dismissed the appeals.

Conclusion

The Federal Court was cognisant of the fact that departing from Qimonda would expose contractors and subcontractors to a high risk in the event of employers going into liquidation. However, this is the position in other jurisdictions such as the United Kingdom, Australia and New Zealand. The Federal Court concurred with the Court of Appeal on its view that legislative reform is necessary to address this issue. The Federal Court suggested to enact legislation enabling retention sums to be placed in authorised deposit taking institutions such as banks. Failure to do so would invalidate the provision on the retention sum in the contract. Another solution may be to legislate that retention sums should be deemed as trust monies.

Until legislative reforms are introduced, a contractor seeking to establish a trust over retention monies must:
(i) Include express provisions in a construction contract that create a trust over the retention sum (for an example, inserting a clause mandating that the retention monies be kept separate from other assets and inserting a clause according the status of trust monies to the retention sum); and
(ii) Ensure that the retention sum is deposited into a separate trust account while the employer is still solvent.



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THE WAX AND WANE OF HOUSING DEVELOPMENT LAWS; A STUDY OF RECENT LANDMARK CASES

by Kimberly Lim Ming Ying

In recent years, there has been a steady increase of cases that have contributed to the growth of housing development laws. The landscape of housing development has seen further reinforcement in cases decided by the Apex courts whereby the scales had been consistently tipped to a side more favourable to the general public as compared to the housing developers.

Laying down the summary of these groundbreaking cases, this Legal Insight article serves as an overview of the trend surrounding housing development.

Ang Ming Lee v Menteri Kesejahteraan Bandar

At this point, it is unanimously accepted that this decision by the Federal Court has been a game-changer in this field. The mere mention of the name of this case is often met with differing reactions depending on the position of involvement of that particular person.

The main takeaway from this groundbreaking case is simply this; the granting of the Extension of Time ("**EOT**") to deliver vacant possession -- something that is of the norm in practice — by the Controller is invalid as it goes beyond what is allowed in the Housing Development Act 1966 ("**HDA**") The effect of this decision is tumultuous amongst housing developers, while welcomed with open arms by home buyers.
To understand why the Federal Court had decided in this manner, the facts of this case ought to be explored in furtherance.

The Developer, BHL Construction Sdn Bhd, entered into a prescribed Schedule H SPA with the Purchasers on 3 May 2012. The delivery of vacant possession ("**VP**") was agreed to be 36 months from the date of signing the SPAs.

The Developer applied for an EOT for the Delivery of VP via a letter dated 20 October 2014. This Application was made to the Controller of Housing, pursuant to Regulation 11(3) of the Regulations, which reads:

> *(3) Where the Controller is satisfied that owing to special circumstances or hardship or necessity compliance with any of the provisions in the contract of sale is impracticable or unnecessary, he may, by a certificate in writing, waive or modify such provisions:*
>
> *Provided that no such waiver or modification shall be approved if such application is made after the expiry of the time stipulated for the handing over of VP under the contract of sale, or after the validity of any extension of time, if any, granted by the Controller"*

The Controller rejected the Application via a letter dated 24 October 2014.
The Developer appealed via a letter dated 28 October 2014, pursuant to Regulation 12, which provides:

> *"Notwithstanding anything to the contrary in these regulations, any person aggrieved by the decision of the Controller may within 14 days after been notified of the decision of the Controller, appeal against such decision to the Minister; and the decision of the Minister made thereon shall be final and shall not be questioned in any court."*

The Appeal was purportedly allowed by the Minister, and the letter dated 17 November 2015 granting such an EOT was signed by one Jayaseelan a/l Navaratnam on behalf of the Controller.

Therefore, the Developer now has 48 months to deliver VP. This in turn, resulted in the Purchasers unable to claim for the Liquidated Ascertained Damages ("**LAD**").

This matter went all the way up to the Federal Court, to which three important questions were posed:

1) Whether the Housing Controller has the power to waive or modify any provision in the Schedule H;
2) Whether Section 24 of the HDA confers power on the Minister to make regulations for the purpose to delegate the power to waive or modify the Schedule H;
3) Whether Regulation 11(3) of the HDA Regulations 1989 is ultra vires the HDA Act 1966;

The court reached a decision based on the following grounds;

1) Section 24(2)(e) allows the Minister to regulate and prohibit the terms and conditions of the SPA. Having regard to the object and purpose of the Act, the

words "to regulate and to prohibit" in subsection 24(2)(e) should be given a strict construction. The Minister is expected to apply his own mind to the matter and not delegate the responsibility to the Controller. The letter granting the EOT was signed by an officer on behalf of the controller and therefore could not be said to be the Minister applying his own mind to granting the EOT.

2) Parliament has entrusted the Minister to safeguard the interests of the Purchasers. They cannot delegate their duties to some other authority. The Minister, in delegating the power to regulate to the Controller by Regulation 11(3) may be construed as having exceeded what was intended by the Parliament.

3) Further, by modifying the prescribed terms and conditions, and by granting the EOT, the Controller has denied the Purchasers' rights to claim for LAD. This modification and the granting of EOT would more or less protect the Developer, thus militating the intention of the Parliament.

4) Consequently, Regulation 11(3) of the Regulations conferring power on the Controller to waive/modify the terms and conditions is therefore ultra vires the Act.

The impact of this case is undeniable, considering that the EOT is a common occurrence in any housing development. Due to current industry trends which may involve mixed development that may require more than 36 months to be completed, an EOT may be an application that is unavoidable for the betterment of the housing project as a whole. To say that it is invalid right off the bat without consideration of the reasons for applying for an EOT may implicate more harm than good in the long run for both parties.

The aftermath of this case lingers even until today and will continue for a significant amount of time in the future.

One case, which was decided subsequently was one that brought about significant effects as well. The High Court and Court of Appeal of Alvin Leong Wai Kuan made interesting references to the Ang Ming Lee case -- such will be expounded in the following section.

Alvin Leong Wai Kuan v Menteri Kesejahteraan Bandar

The significance of this case could be divided into its two decisions from both the High Court and the Court of Appeal. Both had focused on two differing aspects of the *Ang Ming Lee* case and are worthy to be penned down.

To keep the facts brief and concise, the Purchasers entered into a SPA with the Developer where the delivery of VP is to be within 42 months from the date of the SPA. The Developer wrote to the Controller on 7 Sept 2016 to seek for EOT up to 59 months. The Controller partially allowed the EOT up to 54 months.

The Developer appealed to the Minister via letter dated 21 Oct 2016 on the basis of Reg. 12 of the HDR. The Minister allowed the appeal, hence the EOT was now 59 months. It is vital to note the difference between this case and the Ang Ming Lee case is that the Appeal for EOT this time was granted by the Minister rather than an officer on behalf of the Controller.

The main takeaway from the High Court decision had been a question that many had pondered after the decision of *Ang Ming Lee* was decided by the Federal Court; whether or not the decision applied retrospectively pre the *Ang Ming Lee* case. In this case, the High Court had decided on the affirmative, citing the reason that as there was no express statement to say otherwise - *i.e.*, that the case only applies prospectively, it should therefore, by general rule, apply retrospectively. This decision was further supported by another High Court decision, *Kok Chay Har & Ors v BH Realty Sdn Bhd [2021] MLJU 402*.

The High Court also went on to say that since Regulation 11(3) had been decided to be ultra vires the HDA, the Controller could not exercise their power to extend the 36 months period and that there was nothing in the HDR that empowered the Minister to give EOT.

This point was further expounded in the Court of Appeal, where it had been said that even if Regulation 11(3) was *ultra vires* the HDA, this did not equate to the Minister not having the power to grant the EOT. The Court was of the opinion that Section 24(2)(e) was broad enough to interpret that the Minister has discretionary powers to grant the EOT based on a case-to-case basis.

From this decision by the Court of Appeal, some form of relief was provided to housing developers. Now, the scales are no longer tipped to just the other end; it is not a lost cause where an EOT would be deemed invalid without considering other factors surrounding that particular application.

Before the Court of Appeal's decision was decided, however, there had been another prominent Federal Court case that had once again served a timely reminder to the housing developers to be mindful of their stance in particular matters.

This case is *PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor.*

PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor

What had shaken the arena of housing development through this decision had been a long-standing debate about an important element in the house buying process – whether or not the date of calculation of the LAD ought to begin from the date of the booking fee or the SPA date.

What had shaken the arena of housing development through this decision had been a long-standing debate about an important element in the house buying process — whether or not the date of calculation of the LAD ought to begin from the date of the booking fee or the SPA date.

The answer determined by the Federal Court had been that of the booking fee date.

The Court arrived at that decision based on a few precedents where LAD was calculated from the booking fee rather than the SPA. Moreover, emphasis was greatly placed on the fact that the HDA was described to be a "social legislation". A "social legislation" serves purposefully to accord maximum protection to a weaker class of people, which in this scenario would be the home buyers. The collection of booking fees from the beginning was deemed to also be an "illegal" act, as prohibited by Regulation 11(2) of the HDR. Despite having a phrase "from the date of the Agreement" written in the statute itself, the Court did not interpret the sentence in its literal meaning. Rather, because the Act is a "social legislation", the purposive meaning ought to be interpreted instead.

With all of these in mind, the Federal Court was convinced that the intention of the HDA could never be one that would allow a developer to bypass the statutory protection accorded to the home buyers. They were of the opinion that if an illegal act of collecting the booking fee was one that the developers were still boldly doing, then it was only right that they must bear the consequence of having the LAD computed from the booking fee date.

The Court went on to say that when a booking fee is collected, it could be implied that offer and acceptance had been fulfilled by both parties. An intention to enter into a contract is thus formed. Interestingly, the Court did not consider situations whereby there had in fact not been a true meeting of minds; in scenarios where for example, a home buyer's loan was not approved, or they had simply changed their mind to purchase a property, a full refund of the booking fee would most often be given back to the home buyers. Arguably, the notion that a binding contract has been formed would definitely be up for debate.

With this decision cemented at the Federal Court level, housing developers must now keep in mind the practice of collecting booking fees before signing the SPA. Despite this being a practical commercial gesture that had been carried out for decades, should there ever be a claim for LAD in the future, they must be ready for it to be calculated from the date of the booking fee.

Conclusion

From the above summary of the three recent landmark cases for housing development, it could be construed that the Courts are somewhat inclined to traverse down the path of providing maximum protection for the home buyers. The phrase of the HDA being social legislation is one that is used to the brim as of late and seems to be the pinnacle reason for most of recently decided cases. It cannot be disputed that the rights of a homebuyer are important.

However, what has perhaps been glossed over by the Courts is recent trends surrounding industry and conveyancing practices. As briefly mentioned above, sometimes it is unavoidable for housing developers to apply for an EOT to complete their projects or dispense with the practice of collecting booking fees which could mutually benefit both parties. Ultimately, to keep up with the current trends of housing development, there is a need to balance the interest of both parties and to achieve an equilibrium in terms of the law.

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THE STATUS OF E-HAILING DRIVERS IN MALAYSIA?

by Hayden Tan

In recent years, the technological advancement and convenience of mobile apps have resulted in the emergence of e-hailing, which has revolutionised the public transport and taxi industries in many countries. It is impossible to think about e-hailing without an eye to companies like Uber and Grab. Companies such as these often do not treat themselves as providers of transportation services, but more as providers of technological solutions and digitial platforms to connect individual drivers to the masses.

If this is the position, then e-hailing drivers would be consumers of these companies, in that they use the digital platforms to sell their riding services to the masses. In reality, however, these companies do much more than merely providing technological solutions and digital platforms. For instance, these companies regulate the fares, receive and handle complaints from passengers in relation to their riding experience. There is also a huge disparity of bargaining power between e-hailing drivers and these companies, more akin to an employer-employee relationship, than to a commercial relationship at arm's length. Yet, it is undeniable that e-hailing drivers retain significant freedom to decide whether or not, when and where to work, and are even working with their very own cars.

These create and rapidly expand the grey area regarding the legal relationship between e-hailing drivers and companies like Uber and Grab, with very different decisions reached by the courts of different jurisdictions in this regard. In Malaysia, it was an uncharted territory until the recent High Court's decision in **Loh Guet Ching v Menteri Sumber Manusia & Ors**. Even then, the decision in **Loh Guet Ching** is currently the subject of an appeal. Clearly, the law is far from settled. This article will analyse the approaches adopted by the courts and will attempt to set out the ideal way forward.

The Uber Decision In UK

On 19 February 2019, in the case of **Uber BV & others v Aslam & others**[1], the UK Supreme Court unanimously upheld that drivers working for Ride-Hailing giant Uber Technologies Inc. are to be categorised as "workers" under employment law and are not self-employed. It is worthwhile to note that Uber had been defeated at every stage of its appeal against the original decision of the Employment Tribunal in 2016, which held that drivers who sign up with Uber are classified as "workers" within the meaning of the Employment Rights Act 1996. In reaching the decision, the Tribunal referred to a similar case in the United States, **Douglas O'Connor v Uber Technologies Inc**,[2] where a number of drivers filed a class suit against Uber for classifying the drivers as independent contractors as opposed to classifying the drivers as its employees.

Uber argued that it was merely an intermediary booking agent, facilitating the independent work of drivers. Notwithstanding, it was observed that drivers display a sufficient degree of subordination to qualify as workers. Uber drivers' hours of work were confirmed to have started when they logged into the Uber app and were ready to accept requests for rides and accordingly, they must be paid for hours worked, regardless of the demand for rides. Hence, they now have associated worker rights including holiday pay, rest breaks, the national minimum wage and protection against unlawful discrimination.

Rationale For The Decision

In UK, there are three categories of working relationships present, the employees, who have the most rights and benefits in employment law, the self-employed, who have little legal protection and "workers," and the hybrid category, who are entitled to some rights. The tests for employment, worker, or self-employment status are multifactorial and are generally considered independently of the label given to the relationship by the parties. One factor which will add weight in favour of employment or worker status rather than self-employment is if the individual is subject to significant control over what, when and how to work. This is important in Uber.

The Supreme Court's decision was premised on 5 considerations as follows: (1) Uber controls how much drivers are remunerated for the work they do, as Uber sets fare prices; (2) drivers have no autonomy in respect to the contract or terms of service; (3) drivers are subject to Uber's control, pursuant to a passenger rating system, which can result in a driver's service being discontinued when delivering services; (4) drivers are subject to penalties if they decline a certain number of ride requests and therefore are subject to monitoring from Uber; and (5) Uber restricts communication between a driver and a passenger and no independent commercial relationship could be formed beyond an individual ride.

In this case, the contract between Uber and its drivers did more than simply labelling the relationship as one of self-employment, as it described the manner of Uber's operations, including its driver app, in terms that supported a finding of self-employment. Throughout this case, the English courts, including the Supreme Court, have consistently found that the reality of how the relationship and the driver app operated was very different from the way it was presented in the contract and was not consistent with the term self-employment. In short, substance over form.

1 *[2021] UKSC 5*

2 *[2015] Case 3:13-cv-034260EMC*

Position In Malaysia

In Malaysia, employees can be divided into full-time employees, part-timers and casual workers. Employees who fall within the definition of the "employee" under the Employment Act 1955 are entitled to the benefits as accorded under the Employment Act 1955. In view of Loh Guet Ching, the law in Malaysia as it stands today does not consider independent service providers or self-employed persons as "employee(s)" for the purposes of the Employment Act 1955. The drivers who have registered with Uber and Grab in Malaysia are considered to be self-employed. Thus, a Grab driver may not claim unfair dismissal if they are removed from the e-hailing platform. Loh Guet Ching entailed a claimant, an e-hailing driver for Grab whose account with Grab was suspended following a dispute with a passenger on the loading capacity of her vehicle. The Claimant then lodged a representation of unfair dismissal against Grab, for removing her from the Grab platform. However, the Minister of Human Resources refused to refer the Claimant's representation of unfair dismissal to the Industrial Court. As such, the Claimant applied for judicial review against the Minister's decision. The Claimant requested the High Court to quash the Minister's decision, and for her representation to be referred to the Industrial Court.

In was worthwhile to note that Grab's position was that the Claimant was not an employee within the definition of the Industrial Relations Act 1967 ("IRA") and therefore could not claim unfair dismissal. The Claimant relied on the above-mentioned UK Supreme Court case of **Uber BV and Others v Aslam and Others**[3] which held that Uber drivers are workers. However, Grab claimed that the Uber case differs on the facts and argued that the New Zealand decision in **Arachchige v Rasier New Zealand Ltd & Uber BV**[4] (NZ Uber Case), which held e-hailing drivers are not employees, is applicable. Ultimately, the High Court agreed with Grab and dismissed the Claimant's application.

The High Court's written grounds for this case is not prepared yet. However, it can be surmised that the High Court agreed with Grab's position that e-hailing drivers do not fall within the definition of a "workman" under the Industrial Relations Act.

This High Court decision is a reminder that a claim of unfair dismissal is a right only available to workmen or employees. As the Claimant, in this case, was not deemed as an employee employed by Grab under a contract of employment, the Claimant's recourse for removal from the platform did not lie in unfair dismissal. That is not to say that the Malaysian Court disagreed with Uber. The statutory provisions involved are simply different. There is a misconception that Uber meant that Uber drivers in UK are employees.

Uber held that Uber drivers are "workers," not "employees." Section 230(3)(b) of the Employment Rights Act 1996 (UK) provides that a worker is a person who has "entered into or works under any other contract...whereby the Individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." This is very different from the definition of a workman under the Industrial Relations Act:

> *any person, including an apprentice, employed by an employer under a contract of employment to work for hire or reward...*

Under these circumstances, the decision in Uber is distinguishable because UK legislation affords protection to a larger scope of employees/workers, unlike in Malaysia.

As discussed above, in UK, work status is separated into three principal categories, which are employees, workers and independent contractors/self-employed in order of decreasing statutory protection. This is not the case under Malaysian employment law, which adopts a more binary approach: either you are a workman/employee, or you are not. As we do not have an equivalent intermediate category of 'workers' as in UK, Uber is not an apple-to-apple comparison. It may also be surmised that the High Court in Loh Guet Ching took the view that the facts therein are more consonant with the New Zealand case of Arachchige, which held that while there were aspects of the relationship between Uber and its e-hailing drivers that may point to employment, the intent of parties throughout their relationship was that the drivers would operate their own business how and when they wished. Their work was not controlled by Uber beyond some matters that might have already been expected by the parties.

As the Claimant, in this case, was not deemed as an employee employed by Grab under a contract of employment, the Claimant's recourse for removal from the platform did not lie in unfair dismissal. That is not to say that the Malaysian Court disagreed with Uber. The statutory provisions involved are simply different. There is a misconception that Uber meant that Uber drivers in UK are employees.

Conclusion

Without the written grounds, it remains to be seen what were the factors that made the High Court decide that the driver was not a workman. A written judgment would be welcome as guidance to other businesses (not limited to the e-hailing/transportation industry) who are operating on a similar model. In view of the rapid technological development and its wide-ranging implications, perhaps this is a topic that is more suited to be addressed by a comprehensive legislative framework rather than by the Court on a piecemeal basis.

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3 *[2021] UKSC 5*
4 *[2020] NZEmpC 230*

STAY OF EXECUTION – AN AUTOMATIC RIGHT?

by Lisa Yong

Litigation is inevitable in business. Of course, it would be great if the Court ordered in your favour. But what happens if you were the losing party, and you wish to appeal against the Court's decision? Are you obliged to immediately comply with the Court's Order, or do you have an automatic right in suspending the other party from executing the judgment pending the disposal of your appeal?

The short answer is no, and there is no automatic right in staying the execution of a judgment. However, one can make an application to the Court seeking the same. This can be further explored by studying the case of *Prudential*,[1] where our Senior Partner, Datuk D.P. Naban had successfully represented the Defendants in a stay application.

This article will examine the legal requirements, factors and the process involved in an application for a stay of execution of judgment.

Background Facts

The 1st Plaintiff, Prudential Corporation Holdings Ltd (**Prudential Corp**) and the 1st Defendant, Detik Ria Sdn Bhd (**Detik Ria**) were shareholders of Sri Han Suria Sdn Bhd (SHS), owning 50.99% and 49% shares respectively. SHS in turn wholly owns Prudential Assurance Malaysia Bhd (**PAMB**), a licensed insurer of Prudential pursuant to the Financial Services Act 2013.

On 27.2.2002, an Option Agreement was entered into between the 2nd Plaintiff, The Prudential Assurance Company Ltd (**Prudential Assurance**) and Detik Ria whereby parties agreed to grant various calls and put options to the shares in SHS. Almost 7 years later, on 15.12.2008, Detik Ria issued a notice to sell 49% in SHS (**2008 Option Notice**) to Prudential Assurance.

In order for Prudential Assurance to complete the purchase, the Finance Minister's consent is required[2]. On 9.9.2009, by way of a Supplemental Option Agreement, Prudential Assurance and Detik Ria agreed to defer the Completion Date *'until such date or dates without limit in point of time'* until Prudential Assurance is able to obtain the necessary consent (**2009 Supplemental Agreement**) (Both the 2002 Option Agreement and 2009 Supplemental Agreement are collectively referred to as "**Agreements**"). However, it was only in April 2018, more than 10 years after the 2008 Option Notice that Prudential Corp allegedly applied for Bank Negara Malaysia (**BNM**)'s approval.

By a letter dated 30.4.2018, Detik Ria informed that they are rescinding the 2008 Option Notice issued. On 10.6.2019, BNM informed that they have no objection to shares acquisition by Prudential Corp but requested parties to resolve the rescission issue and update BNM accordingly. On 16.9.2019, Prudential Assurance assigned all of its rights, and benefits under the Agreements to Prudential Corp, by way of a Deed of Assignment dated 16.9.2019.

The principles relating to the exercise of Court's discretion whether to allow or refuse stay of execution is settled. It is trite law that a stay is warranted if "special circumstances" are established. What constitutes special circumstances varies from case to case, depending on the facts.

On 18.9.2019, Prudential Corp and Prudential Assurance filed an originating summons against Detik Ria and Tan Sri Datuk Abdul Rahim bin Haji Din ("**TSDAR**"), a shareholder and director of Detik Ria and Detik Ria's nominee director on the board of SHS. On 18.8.2020, the High Court allowed the Plaintiffs' claim ("**Order**"). Consequently, Detik Ria and TSDAR immediately filed the notice of appeal ("**Appeal**") and applied for a stay of execution ("**Stay**").

Law on Stay of Execution

The principles relating to the exercise of Court's discretion whether to allow or refuse stay of execution is settled. It is trite law that a stay is warranted if "special circumstances" are established.[3] What constitutes special circumstances varies from case to case, depending on the facts. The onus is on the applicant to demonstrate the existence of special circumstances to justify the grant of a stay. There is a myriad of examples that constitute special circumstances, and they are not exhaustive.[4] However, one of the more commonly cited reasons is where an appeal would be rendered nugatory without a stay.

Defendants' Submissions

The Defendants raised that there were special circumstances warranting a stay of execution for the following reasons:

(a) Without a Stay, the Appeal would be rendered nugatory

The Order if executed and not stayed would be irreversible, in that the Defendants could not be restored to their original position, even if the Appeal was successful. The Defendants could not be compensated monetarily as they were concerned about the shares rather than how much the shares were worth.

1 *Prudential Corporation Holdings Ltd & Anor v Detik Ria Sdn Bhd & Anor (OS No.: WA-24NCC-479-09/2019)*

2 *S.67 of Insurance Act 1996*

3 *Kosma Palm Oil Sdn Bhd v Koperasi Serbausaha Makmur Bhd [2004] 1 MLJ 257; Citibank N.A. v Mrs N.D. Chandrasegaran Nee Mirmala Devi a/p P Ratnadurai [2007] 8 MLJ 149*

4 *Jagdis Singh a/l Banta Singh v Outlet Rank (M) Sdn Bhd [2013] 4 MLJ 213*

The Finance Minister retained wide discretion to prohibit the retransfer of the 49% shares back to Detik Ria – and there was nothing preventing the Finance Minister and BNM from doing so.[5] Additionally, there was a real danger that the Plaintiffs may have to divest a significant portion thereof (30%) to comply with BNM's directive limiting foreign ownership of local insurance company to 70%. In fact, the Plaintiffs' parent company even indicated that it might divest its interest by way of an initial public offering.

(b) In considering a stay application, the Court may balance the extent of prejudice between the parties and the balance of convenience

In this case, the Plaintiffs would not be prejudiced by the Stay, as their rights over the 49% stake were sufficiently secured and safeguarded by the Order, even without the actual transfer of the same. Evidently, there was no urgency for the transfer as the Plaintiffs did not apply for BNM's approval until 16 years after the 2002 Options Agreement. The Plaintiffs had been in control of SHS since 2009, and Prudential Assurance had been receiving dividends from Detik Ria's 49% stake since 2009.

(c) Whilst merits of the appeal are not a special circumstance by itself in a stay application, and it is nevertheless a relevant factor to complement other considerations that constitute special circumstances

The Appeal was meritorious because the 2002 Option Agreement was deemed void pursuant to s. 36(1) of the Contracts Act 1950. Clause 2.3 of the 2002 Option Agreement provided that if the regulatory approval *"is not fulfilled by the Cut-Off Date, this Agreement shall be deemed to be terminated and this Agreement shall be null and void and of no effect."* Based on the 2002 Option Agreement, the Cut-Off Date was on 28.5.2002. It was undisputed that no regulatory approval was obtained by the Cut-Off Date (which was never extended);

The 2002 Option Agreement is also void for illegality.[7] Even if the Plaintiffs deem it not an 'agreement' (which the Defendants deny), it is clearly an *'arrangement'* entered into without obtaining the prior written approval of the Finance Minister, in contravention of s. 67 of the Insurance Act 1996. An 'arrangement' had a broader definition than an 'agreement' and can be formed where 'there is a clear unity of purpose,' and parties incur at least a moral obligation to meet a certain expectation[8]. It is clear that the 2002 Option Agreement embodies a clear unity of purpose, namely for Detik Ria to dispose of the 49% shares and for Prudential Assurance to acquire the same shares of PAMB via SHS.

In any event, not only was the 2002 Option Agreement an '*arrangement*', it was also an '*agreement*'. The regulatory approval is a condition precedent to the performance of obligations and not precedent to the contract as a whole[9]. As such, an 'agreement' was formed on 27.2002 before obtaining the requisite approvals.

The Defendants did not seek to retain the payments received and are prepared to return the same. Since the beginning of the action, the Defendants had been consistent in their position that the entire transaction was void. As such, no inequity will arise, and s. 66 of the Contracts Act 1950 prevents any unjust enrichment from void arrangements. In any event, since the circumstances of the case are governed by ss. 36(1), 25 and 66 of the Contracts Act 1950, equitable principles are not applicable[10].

Plaintiffs' Submissions

In opposing the Stay, the Plaintiffs argued that the Stay application is yet another tool used by the Defendants to further deprive the Plaintiffs of their rightful entitlement to the shares.

(a) The Defendants failed to show the presence of any special circumstances justifying a stay of execution

The fact that the Order consists of injunctive/specific performance reliefs does not amount to special circumstances as the transfer of shares and the resignation of TSDAR is merely an administrative step, consequential upon the Order which is easily reversible in the unlikely event that the Defendants' Appeal was allowed.

The proposed divestment exercise of 30% shares in PAMB to local shareholders did not materialize, and more importantly, PAMB's shares are not the subject matter of this action. Additionally, the Defendants' concerns are purely monetary, i.e., on the value of the shares. Based on the Plaintiff's financial ability, there was no doubt that the Plaintiffs were capable of returning the shareholding and to compensate the Defendants' in the unlikely event the Defendants' Appeal was allowed.In short, the Appeal would not be rendered nugatory if the Stay is not granted.

(b) The Merits of the Appeal were irrelevant and ought not to be considered in the Stay application

In any event, the Defendants' Appeal was unmeritorious as Detik Ria had voluntarily issued the 2008 Option Notice, and to date, the Defendants have received the sum of RM109 million for the sale of shares. The Defendants were estopped from alleging that Detik Ria was also entitled to the dividends from SHS as they voluntarily executed and approved all board and shareholder resolutions of SHS from 2009 onwards for only the preference shareholder of SHS to be paid dividends. The transfer of shares from Detik Ria to Prudential Corp had also been approved by BNM.

5 *Ss. 67, 68 and 203 of Insurance Act 1996*

6 *Leong Chee Kong & anor v Tan Leng Kee [2000] MLJU 753*

7 *S. 24 of the Contracts Act 1950*

8 *Mui Plaza Sdn Bhd v Hong Leong Bank Bhd [1998] 6 MLJ 203*

9 *Arab Malaysian Finance Bhd v Kah Motor Co Sdn Bhd [2010] 5 MLJ 10*

10 *Siah Kwee Mow & Anor v Kulim Rubber Plantations Ltd [1979] 2 MLJ 190*

The Defendants' contentions that the Agreements were illegal as they were in breach of the repealed s. 67 of Insurance Act 1996 and in violation of a purported Bank Negara policy which forbade 100% foreign ownership at the time of the contract were misconceived as the Agreements were conditional contracts and did not take effect unless and until the conditions were fulfilled.

(c) The Stay is highly unfair and prejudicial to the Plaintiffs

The Stay, if granted, would deprive the Plaintiffs of the fruits of their litigation when they had been working for 12 years to complete the transfer of the shares with RM109 million of incurred costs. Further or alternatively, neither have the Defendants made any attempt to return the purchase sum of RM109 million (plus interest) to the Plaintiffs.

Conclusion

Given the timeline of the dispute, this Court ruled that on balance, justice is served if the stay order was granted. Further, given the absence of any factual reasons as to why the Order needs to be enforced immediately, the Court decided that the Plaintiff would not have been prejudiced if the matter is stayed until the disposal of the appeal.

Often, a court Order may not be final as it could potentially be overturned by the appellate courts. In some instances, parties will even be able to achieve a different settlement, despite the fact that a judgment/order was already given by the Court. Thus, stays of execution may be necessary in some cases, especially where (i) the consequences of enforcing or executing the said judgment/order are irreversible or (ii) to enable parties to continue negotiating to achieve a mutually beneficial outcome.

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DATA PRIVACY CONSIDERATIONS AMID COVID-19: A GUIDE TO EMPLOYERS

by Shera Chuah Tien Jing

In the effort to detect, contain and prevent the spread of the novel coronavirus during the COVID-19 outbreak in the workplace, employers are taking proactive steps to safeguard staff and employees from exposure to and infection with COVID-19. These include checking and/or recording body temperature of employees, monitoring the health status / COVID-19 symptoms of employees, collecting data relating to employees' vaccination status, and/or requiring employees to keep a list of their close contact which can be referred to in the event of any suspected or confirmed COVID-19 positive case.

The collection and handling of such personal data is legally regulated by, amongst others, the Personal Data Protection Act ("PDPA") 2010. The 2010 Act was enacted by the Malaysian government to regulate the processing of personal data in commercial transactions, thereby protecting the personal data involved therein from being misused. It received Royal Assent on 2 June 2010 and came into force on 15 November 2013.

This article elucidates key duties of employers who collect and process personal data for purpose of maintaining workplace safety as embodied in the PDPA 2010 and highlights several potential data protection issues that may arise in relation thereto.

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1. Applicability of PDPA 2010 in employer-employee relationships

The PDPA 2010 applies only to any person who processes, has control over or authorizes the processing of any personal data in respect of commercial transactions, and commercial transaction is defined as *"any transaction of a commercial nature, whether contractual or not, which includes the supply or exchange of goods or services, agency, investments, financing, banking and insurance, ..."* under section 4 of the PDPA 2010.

Arguably, an employer-employee relationship, being a transaction of a contractual nature, which relates to the supply or exchange of services, would fit within the definition of "commercial transaction" and thus would be governed by the PDPA 2010 with the employer being the "data user"[1] and employee being the "data subject"[2] .

Thus, employers are reminded to comply with all overarching principles of data processing as encapsulated in the PDPA 2010 when collecting and recording, holding, storing, altering, disclosing, correcting, erasing, retrieving, or carrying out any operation (collectively "**processing**") their employees' personal data through any measures implemented to prevent the spread of COVID-19 in their organisations.

2. Collection of personal data and sensitive personal data in the workplace

An employer is restricted from processing the personal data of an employee unless such employee has given his/her consent to the processing of personal data.[3] As for sensitive personal data (*e.g.*, information as to the physical or mental health of an employee including body temperature measurements and vaccination status), a more stringent requirement of explicit consent is imposed under the PDPA 2010.[4]

Consent or explicit consent from the employee must be obtained by the employer in any form that such consent or explicit consent can be recorded and maintained properly by the employer.

For instance, employers may first, inform their employees by way of a written personal data protection notice (in clear and plain language) of amongst others, the personal data which will be collected, the purpose for which such personal data is to be collected and the class of third parties to whom the employers may disclose such personal data to. Thereafter, employers may request for employees' consent by requiring each individual employee to affix his or her signature in a declaration of consent form incorporated at the last page of the aforesaid personal data protection notice, which states, *inter alia*, that the employee explicitly consents to the collecting, recording, storing, disclosing, and/or transferring of his personal data and sensitive personal data.

3. Legal Grounds for Collecting and Processing Personal Data

Employers may be faced with the question of whether the collection and processing of personal data and sensitive personal data is permitted if an employee withholds consent.

- **Protection of vital interest**

Arguably, the consent or explicit consent of an employee for the processing of his or her personal data and sensitive personal data may possibly be dispensed with in certain cases where the vital interest ground (matters relating to life, death or security of a data subject) is applicable.[5]

On this point, Article 9(2)(c) of the GDPR provides for vital interest as a legal basis for the process of personal information where the data subject is physically or legally incapable of giving consent, and Recital 46 expressly refers to the "monitoring of epidemics and their spread" as a possible ground of vital interest.

Although the foregoing is not stated in the PDPA 2010, in view of the high transmissibility of COVID-19 and several variants of concern (*e.g.* Omicron and Delta) and variants of interest (*e.g.* Lambda), it is arguable that during the pandemic, the processing of certain personal data / sensitive personal data of the employee (for instance, whether the employees exhibit any COVID-19 symptoms) may be necessary to protect the vital interest of the said employee or other staff working in the same area.

In view of the high transmissibility of COVID-19 and several variants of concern (*e.g.* Omicron and Delta) and variants of interest (*e.g.* Lambda), it is arguable that during the pandemic, the processing of certain personal data / sensitive personal data of the employee (for instance, whether the employees exhibit any COVID-19 symptoms) may be necessary to protect the vital interest of the said employee or other staff working in the same area.

- **Exercise of functions under any written law**

Additionally, it is also possible to invoke the exception to the requirement of consent if it is necessary *"for the exercise of any functions conferred on any person by or under any written law"*[6], for example, when the following laws apply: -

(a) pursuant to section 15 of the Occupational Safety and Health Act ("**OSHA**") 1994, employers have a general duty to ensure, so far as is practicable, the safety, health and welfare at work of all his employees. Such duty extends to the provision of information as is necessary to ensure, so far as is practicable, the safety and health at work of his employees; and

(b) by virtue of section 10(1) of the Prevention And Control Of Infectious Diseases Act ("**PCIDA**") 1988, *"... every person in charge of, or in the company of, and every person not being a medical practitioner attending on, any person suffering from or who has died of an infectious disease shall, upon becoming aware of the existence of such disease, with the least practicable delay notify the officer in charge of the nearest district health office or government health facility or police station or notify the nearest village head of the existence of such disease."*

Notwithstanding the possible invocation of the above legal basis for processing of employees' personal data and sensitive personal data where consent is withheld, employers are advised to obtain the consent of their employees where practicable. Employers also should not penalise an employee if he/she refuses to consent to his/her personal data being collected or further processed.

4. The principle of data minimisation

In accordance with the PDPA 2010, personal data collected should not be processed unless the processing of the personal data is necessary for or directly related to the purpose for which such data was collected and is not excessive in relation to that purpose.[7]

By way of an illustration, in the context of collection of personal data by business premises, the Personal Data Protection Department ("**PDP Department**") has stated in the 'Advisory on the Procedure for the Handling

1 *Data user" means any person who processes and has control over or authorizes the processing of any personal data in respect of commercial transactions.*

2 *"Data subject" means an individual who is the subject of personal data i.e., the owner of the personal data (whose data is being processed by the data user).*

3 *Section 6(1)(a) of the PDPA 2010.*

4 *Section 6(1)(b) and section 40(1)(a) of the PDPA 2010.*

5 *See Section 6(2)(d) and sections 40(1)(b)(ii) and (iii) of the PDPA 2010.*

6 *Section 6(2)(f) and section 40(1)(b)(ix) of the PDPA 2010.*

7 *Sections 6(3)(b) and (c) of the PDPA 2010.*

of Activities relating to the Collection, Processing and Storage of Personal Data by Business Premises during the Conditional Movement Control Order' ("**Advisory**") that for purpose of contact tracing, it will be sufficient for businesses to only collect the visitor's or customer's name, contact number, and date and time of visit, irrespective of whether such information is recorded manually or digitally.

Similarly, prior to collecting the personal data of their employees, employers should be mindful of the purpose for which they intend to collect such information and ensure that the information collected is strictly limited and proportionate to such purpose and not for any other unrelated purpose. For instance, in the event of a positive COVID-19 case in the workplace, employers may collect and process information such as history of close contact of COVID-19 patient and the COVID-19 symptoms and related test results of such close contacts (and not other unrelated sensitive information) for purposes of effective identification and screening of any close contact and to mitigate the risk of transmission of COVID-19 in the workplace.

5. Disclosure of employees' personal data and sensitive personal data by employers

Pursuant to the disclosure principle, employers shall not, without the consent of the employees, disclose their personal data and sensitive personal data for any purpose other than (i) the purpose for which the personal data was to be disclosed at the time of collection of the personal data or (ii) a purpose directly related to the aforementioned purpose.[8]

Therefore, depending on the purpose for which an employer intends to disclose the personal data of its employee, if such purpose is not set out in or directly related to the purpose set out in the personal data protection notice issued to the employee, an employer is not allowed to disclose the personal data, unless the circumstances stated in section 39 of the PDPA 2010 apply – for example, when: -

(a) The employee has given his/her consent to the disclosure;

(b) The disclosure was required or authorized by or under any law or by the order of a court; or

(c) The disclosure was justified as being in the public interest in circumstances as determined by the Minister.

- **Disclosure of personal data and sensitive personal data: government health authorities**

During the COVID-19 outbreak, where the consent of an employee has been previously recorded at the time of collection his or her personal data, employers are obliged to extend their co-operation and disclose the personal data to the health authorities to enable them to carry out contact tracing.

8 Section 8 of the PDPA 2010.

Nonetheless, the question may arise as to whether an employer can disclose personal data of its employee to the health authorities in the event such employee refuses to provide his / her consent in respect of such disclosure.

Arguably, under such circumstances, it is arguable that notwithstanding the employee's refusal, an employer may still be able to disclose personal data or sensitive personal data of his employee to the relevant health authorities pursuant to section 39(b)(ii) of the PDPA 2010, namely when the disclosure is required by law. Some examples of provision of law which may apply during the COVID-19 pandemic are: -

(a) Section 22(c) of the PCIDA 1988 which provides that any person who refuses to furnish any information required for the purposes of the PCIDA or any regulations made under the PCIDA commits an offence; and

(b) Regulation 15 of the Prevention And Control Of Infectious Diseases (Measures Within Infected Local Areas) (National Recovery Plan) Regulations 2021 ("**PCIDR 2021**") which states that an authorized officer may request for any information relating to the prevention and control of infectious disease from any person or body of persons.

- **Disclosure of personal data and sensitive personal data: staff and employees**

Further, when an employee is infected with COVID-19, it would be prudent for the employer to inform other employees in the workplace or close contacts of the said infected employee to enable such individuals to take requisite actions such as undergoing COVID-19 swab test and/or self quarantine and changing their health status on the MySejahtera Application, in compliance with the employer's obligations under OSHA 1994. Nevertheless, employers should only share such data as is necessary to safeguard the safety and health of their workforce.

Arguably, under such circumstances, it is arguable that notwithstanding the employee's refusal, an employer may still be able to disclose personal data or sensitive personal data of his employee to the relevant health authorities pursuant to section 39(b)(ii) of the PDPA 2010, namely when the disclosure is required by law.

In cases where it is unavoidable to disclose an employee's name in connection with COVID-19, employers should inform the individual in advance and treat him/her respectfully. It is also advisable for employers to issue a notice to all employees, warning against stigmatisation and discrimination of COVID-19 patients and recoverees.

6. Security of employees' personal data and sensitive personal data

The PDPA 2010 imposes a duty on employers to take practical steps in protecting the personal data and sensitive personal data collected from their employees from any loss, misuse, modification, unauthorized or accidental access or disclosure, alteration or destruction when processing those data.[9]

In this regard, employers are required to develop and implement a security policy and ensure that such security policy complies with the security standard set out by the Personal Data Protection Commissioner, including the following: -

(a) In respect of personal data processed electronically, employers should, amongst others, provide user ID and password for authorised employees to access any personal data and terminate the aforesaid user ID and password immediately when such authorised employee is no longer handling the data.

9 Section 9 of the PDPA 2010.

(b) In respect of personal data processed non-electronically, employers should, amongst others, store all personal data orderly in files, store all files containing personal data in a locked cabinet which is unexposed and safe from physical or natural threats, and keep all the related keys in a secured and safe place.[10]

7. Retention of employees' personal data and sensitive personal data

Failure to comply with the PDPA 2010 will attract a fine of not more than RM300,000 or to a term of imprisonment not exceeding 2 years, or both.

The PDPA 2010 prohibits personal data and sensitive personal data collected and processed from being kept longer than is necessary for the fulfilment of the purpose for which such data was collected.[11]

Unless required by law, employers should permanently destroy and delete all personal data and sensitive personal data collected in a manner appropriate to the data collection method when such data is no longer required the purpose for which it was to be processed.

8. Legal consequences of non-compliance with the PDPA 2010

Failure to comply with the PDPA 2010 will attract a fine of not more than RM300,000 or to a term of imprisonment not exceeding 2 years, or both. Further, the Personal Data Protection Regulations 2013 also impose penalty of a fine not exceeding RM250,000 or imprisonment for a term not exceeding 2 years or both to any data user who contravenes sub-regulation 3(1) and regulations 6, 7 and 8 thereof.

Conclusion

As Malaysia grapples with the COVID-19 pandemic, data protection law should not hinder measures taken to combat COVID-19 infection. However, it is essential for employers to implement additional measures when collecting and processing data during the pandemic to ensure that any preventive measures implemented to protect the safety and health of their workforce does not violate data protection laws, as failure to do so may attract hefty fines and adverse legal consequences.

10 Regulation 6 of the Personal Data Protection Regulations 2013 and Paragraphs 4 and 5 of the Personal Data Protection Standard 2015.

11 Section 10 of the PDPA 2010.

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LEGAL INSIGHT – DIRECTORS' LIABILITY IN RESPECT OF COMPANIES' TAX AFFAIRS

by Sophia Choy Cai Ying

In recent years, the legislative evolution in the Malaysian landscape has imposed more onerous duties and responsibilities on directors regarding the companies' tax affairs. The enactment of Section 75A of the Income Tax Act 1967 ("**ITA**") makes a director jointly and severally liable for the tax payable by a company. Although offering directorship to a person by virtue of the individual's experience and knowledge in a particular field may be lucrative, the imposition of liability in respect of the companies' tax affairs may hinder such individual from taking up the position.

Although the weight of such responsibility is heavy, the laws are not without their limits. Recently, the Federal Court denied leave to the Inland Revenue Board ("**IRB**") in an appeal against the Court of Appeal where the Court of Appeal dismissed the IRB's attempt to impose liability on an individual in respect of the company's tax affairs before the individual was a director of the company.

Section 75A of the ITA

This section describes the liability of a director in respect of the companies' tax affairs and reads as follow:

"(1) Notwithstanding anything contrary to this Act or any other written law-

(a) where any tax is due and payable under this Act by a company, any person who is a director of that company during the period in which that tax is liable to be paid by that company; or

(b) where any debt is due and payable from an employer under any rules made pursuant to section 107 and the employer is a company, any person who is a director of that company during the period in which the debt is liable to be paid by that company,

shall be jointly and severally liable for such tax or debt, as the case may be, that is due and payable and shall be recoverable under section 106 from that person."

The definition of a director in which he may be liable under Section 75A(1) of the ITA is limited to a director who fulfils both conditions as stated in Section 75A(2):

> "(a) is occupying the position of director (by whatever name called), including any person who is concerned in the management of the company's business; and
>
> (b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to control, not less than twenty per cent of the ordinary share capital of the company ("ordinary share capital" here having the same meaning as in the definition of "director" in section 2)."

The current reading of Section 75A was amended in 2014 with the enactment of the Finance Act 2014. The phrase under Section 75A(2)(b) previously read "more than fifty" but was amended to "not less than twenty" which widens the net ("**Amendment**").

It is unlikely that a director in a public listed company may be considered personally liable for the company's tax affairs as one of the conditions which the IRB would need to prove to impute liability is that the director holds 20% of the share capital of the company.

The risk of being personally liable in a private company is much greater, primarily where the individual fulfils both limbs under Section 75A(2) of the ITA. A subject of litigation in recent years has revolved around the interpretation of the words "during the period in which that tax is liable to be paid by that company". The IRB had issued Public Ruling No.2/2019 on 14 March 2019 ("**Public Ruling**") which, inter alia, states that the liability of a director as being "the date the notice of assessment is served or the notice of assessment is deemed to have been served on the company." In other words, a director is considered to be liable on the day that the notice of assessment was issued even if the notice of assessment relates to the period in which the individual was yet to be a director of the company.

However, the High Court in ***Kerajaan Malaysia v Rohana binti Abu*** **[2018] MLJU 161** have held otherwise in finding that the phrase *"during the period in which that tax is liable to be paid by that company"* is the years of assessment ("**YAs**") to which the tax relates and not the date in which the notices of assessment was raised.

Similarly, the High Court in ***Kerajaan Malaysia v Isqandar Dzulkarnaen Putra bin Salehudin & Anor*** **[2018] MLJU 1156** found in favour of the taxpayer and held that the amendment under the Finance Act 2014 does not have retrospective effect. The YAs in which the notices of assessment, in this case, relate to the YAs 2008 and 2009 although the notices of assessment were issued on 11.02.2014 and 17.02.2014 which before the enforcement of the amendment under the Finance Act 2014. The IRB had failed to prove that the individual held more than 50% shares in the company to be personally liable for the company's tax affairs.

Government of Malaysia v Mahawira Sdn Bhd & Anor [2021] 5 MLJ 283

The Court of Appeal's recent decision in ***Government of Malaysia v Mahawira Sdn Bhd & Anor*** **[2021] 5 MLJ 283** ("**Mahawira**") is the highest authority in this area which regards the interpretation of Section 75A(2)(b) of the ITA. The Court of Appeal found in favour of the taxpayer and the Government of Malaysia subsequently appealed to the Federal Court. However, leave to appeal to the Federal Court was not granted recently and hence the decision of the Court of Appeal is the final decision.

In ***Mahawira*** (supra), Teh Li Li ("**Director**") was the director of Mahawira Sdn Bhd ("**the Company**") from 19.12.2003. On 31.10.2014, the Government of Malaysia issued Notices of Assessment ("**Assessments**") for the YAs 2001 – 2004. The Company did not respond to the Assessments. The Government of Malaysia then filed a claim against the Company and the Director for taxes due and payable under the Assessments. Judgement in Default was entered against the Company but the Director resisted the claim by filing a judicial review contending the following matters:

1. Do the Assessments constituted tax "due and payable" under Section 75A of the ITA;
2. Whether the Director could be held liable in respect of the Assessments which were raised against the Director prior to the appointment of being a director of the Company; and
3. Whether or not the Assessments were defective because of serving the same only on the Company and not the taxpayer.

The High Court found in favour of the Director but held that the Director was liable for the outstanding taxes for the YA 2004. Aggrieved by the decision of the High Court, the Government appealed against the High Court's decision in disallowing the claim for taxes against the Director for the YA 2001 – 2003. The Director did not appeal against the High Court decision in holding that she was liable for the Company's taxes for the YA 2004.

Interpretation of Section 75A

It is worth noting that the timeline in this appeal is essential to understand the possible liabilities against the Director. The Director was a 20% shareholder and director of the Company from 19.12.2003. The Assessments that the Inland Revenue Board ("**IRB**") issued on 31.12.2014 were related to alleged taxes underpaid for the YAs 2001 – 2004. The Amendment which reduced the shareholding threshold for a director to be liable under Section 75A only applies from the YA 2013 onwards.

The Government submitted that taxes for the YAs 2001 – 2004 only became due and payable when the Assessments were issued. When the Assessments were issued, the Director was already a director of the Company and therefore could be jointly and severally liable for the Company's tax liabilities. Amongst others, the Government of Malaysia relied on the case of ***Kerajaan Malaysia v Mudek Sdn Bhd*** **[2017] 5 MLJ 133**, which held as follow:

> *"We hold that pursuant to s 21(1) of the said Act, once a notice of assessment has been served, the tax payable will be due and payable. If the respondent felt aggrieved by the issue of no chargeable gain arising, the respondent should have lodged an appeal to the Special Commissioners of Income Tax pursuant to s 18 of the said Act."*

Reliance was also made to the Court of Appeal decision in ***Ta Wu Realty Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri & Anor*** **[2009] 1 MLJ 555** in submitting that the Director ought to appeal to the Special Commissioners of Income Tax ("**SCIT**").

The Director's position was that she was not a director of the Company and hence she could not be liable for the Company's tax affairs for YA 2001 – 2003.

The Court of Appeal found that it was untenable, inappropriate and unfair as such a stretch interpretation of imposing the Company's tax liabilities on the Director when she was yet a director of the Company. This would mean that no matter at what point in time anyone becomes a director of a company, the individual would be held liable for the company's tax affairs for the YAs preceding the appointment as director. Holding the individual responsible, when they have not reached the stage to even ponder on the duties as a director, let alone actually undertake the post, can undoubtedly be harsh and unreasonable.

As such, the words "during the period" under Section 75A(1)(a) could only apply to an individual who was made a director in the year of assessment to which the assessment relates. In this case, the Director was only a director within Section 75A on 19.12.2003.

As such, the words "during the period" under Section 75A(1)(a) could only apply to an individual who was made a director in the year of assessment to which the assessment relates. In this case, the Director was only a director within Section 75A on 19.12.2003.

Furthermore, the Court of Appeal analysed Section 103(2) of the ITA in deciding whether the interpretation of the words "due and payable" under Section 103(2) is similar to Section 75A. The Court of Appeal distinguished ***Mudek*** (supra.) on the ground that it was regarding the Real Property Gains Tax Act 1976 and not the ITA. Furthermore, ***Mudek*** (supra.) and ***Ta Wu Realty*** (supra.) did not concern themselves with Section 75A of the ITA at all.

Whether the Director is a (director) under Section 75A

The Court of Appeal found that it was not disputed that the Director never owed more than 50% of the Company and that the reading of Section 75A(2)(b) at the time the Assessments were issued post-Amendment which reduced the threshold from 50% shareholding to 20% shareholding, which only took effect from 23.1.2014 onwards.

The Court of Appeal held that since the amendment only came into force in 2014, she could not have been considered as a director under Section 75A because the previous reading of Section 75A required a director to have more than 50% shareholding. The Court of Appeal relied on the earlier High Court decision of Rohana Abu (supra.) where the High Court held that that statute should not have retrospective effect in the absence of explicit words to that effect:

> *"There is a surfeit of Federal Court and Supreme Court cases, which all hold that an Act, particularly amending statutes shall not be construed retrospectively unless it is expressly provided for in the statute passed by Parliament. The Federal Court in Public Prosecutor v Datuk Haji Harun bin Haji Idris [1977] 1 MLJ 14; [1976] 1 LNS 96; held that the general rule is that statutes, particularly amending statutes, are prima facie prospective. It held that a statute is not to be construed retrospectively unless it is clear that such was the intention of Parliament from the language of the Act itself."*

Since the Parliament did not legislate Section 75A to have retrospective effect, the Director is not bound by the present reading of Section 75A. Further, reading Section 75A as having retrospective application would affect the Director's substantive rights. The Director had the right not to be considered as a director of the Company in the YAs to which the Assessments relate. The Court of Appeal in ***Sim Seoh Beng & Anor v Koperasi Tunas Muda Sungai Ara Bhd*** **[1995] 1 MLJ 292** held that if a law affected a person's substantive rights, then the law must be construed to have prospective effect only.

Whether service of the Assessments was defective

One of the arguments put forth by the Government was that the Director should not have commenced judicial review proceedings against the Government but that any redress should be ventilated by way of an appeal to the SCIT under Section 99(1) of the ITA whichreads as follow:

> *"(1) Subject to subsection (1A), a person aggrieved by an assessment made in respect of him may appeal to the Special Commissioners against the assessment by giving to the Director General within thirty* ***days after the service of the notice of assessment*** *or, in the case of an appeal against an assessment made under section 92, within the first three months of the year of assessment following the year of assessment for which the assessment was made (or within such extended period as regards those days or months as may be allowed under section 100) a written notice of appeal in the prescribed form stating the grounds of appeal and containing such other particulars as may be required by that form."*

Section 96(1) of the ITA also makes it a legal requirement for the IRB to serve the Assessments on the Director:

> *"(1) As soon as may be after an assessment, other than an assessment under subsections 90(1) and 91A(1), has been made, the Director General shall cause a notice of assessment to be served on the person in respect of whom the assessment was made."*

In this case, the IRB only served the Assessments on the Company and not on the taxpayer. Therefore, the Court of Appeal held that it was improper to require the Director to appeal to the SCIT as the prescribed time to appeal had lapsed through no fault of hers because the Assessments were not served on her.

The Government attempted to rely on a letter informing the IRB that the Company had been wound up and that the Director was not a director of the Company at the material time. The Court of Appeal held that there was a difference in knowing about the Assessments and being served by them. The service of the Assessments must come first before the Director could be liable.

Obiter comments by the Court of Appeal

The Court of Appeal opined that since the Director was not a director under Section 75A of the ITA and because of defective service of the Assessments, the Director could not be liable for the taxes claimed for YA 2004. However, as the Director did not appeal on this point, the Court of Appeal did not disturb the High Court's finding that the Director was liable for the Company's taxes for YA 2004.

Comments

In summary, the case of Mahawira (supra) encapsulates the following principles:

1. Laws are presumed to be prospective and not retrospective. In the absence of any express statement by the Parliament, laws affecting the substantive rights of the taxpayers are presumed to be interpreted prospectively; and
2. The potential liability of a director under Section 75A of the ITA only begins when he fulfils the requirements under Section 75A(2) to allow the IRB to attribute liability.

A recent Federal Court decision of ***Jack-In Pile (M) Sdn Bhd v Bauer (M) Sdn Bhd and another appeal*** **[2020] 1 MLJ 174** also advocated against the interpretation of an act to have a retrospective application where it is silent. In finding that the Construction Industry Payment and Adjudication Act 2012 ("**CIPAA**") would only apply to construction contracts that were entered after the CIPAA came into force, the Federal Court held as follow:

> "The outcome, as earlier indicated, is that both questions of law allowed by this court at the leave stage must be answered in the negative. In the upshot, the entire adjudication proceedings including the adjudication decision are rendered void. The glaring conclusion which emerges is that the appellant is unsuccessful in all of their contentions. Absent any express intention by Parliament that the CIPAA is to be applied retrospectively, the CIPAA can only be applied prospectively. The adjudication decision, therefore, ought to be set aside."

Directors of companies who meet the current conditions under Section 75A(2) are advised to be vigilant and prudent in handling the company's tax affairs. Although the company has a separate legal personality, the directors may be personally jointly and severally liable for the company's tax liabilities.

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BILL OF LADING – IS IT TIME FOR A CHANGE?

by Kuhan Manokaran

A bill of lading ("**B/L**") is a prominent piece of document that features extensively in the world of international trade, particularly where transport by ship is a fundamental feature. The use of the B/L, in it's original form, was intended to be a receipt - indicating receipt of cargo and its quantity[1]. However, over the years, through mercantile practice and for purposes of convenience, the B/L has been elevated to a document of title such that it's possession is deemed constructive possession of the goods.

Consecutively, with the elevation of the B/L to a document of title, it was also thought prudent that it ought to be governed by statue for various reasons. As such the Bill of Lading Act 1855 ("**BOLA**") was enacted in the UK to achieve that. However, due to poor drafting, BOLA was repealed in the UK, and in it's place, the Carriage of Goods by Sea Act 1992 ("**COGSA**") was enacted. Since then, COGSA has been adopted and incorporated in many jurisdictions, including Singapore. Malaysia however, remains beholden to the BOLA.

This article seeks to put forth a case that it is perhaps timely for Malaysia to join it's southernly neighbours and other Commonwealth jurisdictions in repealing the BOLA and adopting the UK's COGSA instead or, something more current, suiting present circumstances.

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BOLA and It's Issues

Prior to addressing the crux of the matter, it is important to first thoroughly comprehend how a piece of legislation from the British Isles came to be incorporated here in Malaysia.

Like most legislations governing carriers by sea in Malaysia, BOLA is applicable in Malaysia by virtue of Section 5(1) of the Civil Law Act 1956, which states as follows :-

1 *Indira Carr, International Trade Law, 5th Edition, Routledge, 2014*

"(1) In all questions or issues which arise or which have to be decided in the States of Peninsular Malaysia other than Malacca and Penang with respect to the law of partnerships, corporations, banks and banking, principals and agents, carriers by air, land and sea, marine insurance, average, life and fire insurance, and with respect to mercantile law generally, the law to be administered shall be the same as would be administered in England in the like case at the date of the coming into force of this Act, if such question or issue had arisen or had to be decided in England, unless in any case other provision is or shall be made by any written law."

One of the fundamental reasons the BOLA was enacted was to remedy the vexing issue of privity of contract. A B/L is - in it's primitive form - a contract between the carrier and the shipper. As such, the buyer(s) of the goods who obtains the B/L lacks the requisite locus standi to bring a suit in his/her name against the carrier, leaving him/her vulnerable and rife for exploitation. Further, a remedy in tort was considered unsatisfactory if the buyer did not have a proprietary interest or possessory title of the goods at the time when the goods were either damaged or lost.[2]

The reason for this problem lies in the very construction or wordings of section 1 of BOLA, which states :-

"Every consignee of goods named in a bill of lading, and every endorsee of a bill of lading to whom the property in the goods therein mentioned shall pass, upon ***or by reason of such consignment or endorsement*** *shall have transferred to and vested in him all rights of suit and be subject to the same liabilities in respect of such goods as if the contract contained in the bill of lading had been made with himself" (our emphasis)*

A scrutiny of the wording used in section 1 above reveals the inherency of the problem in regard to the right of suit. The wordings used reveal that the right of suit only arises where the property in the goods has passed to him upon or by reason of such consignment or endorsement[3]. As such, in order to reap the benefit of Section 1 to sue a carrier in contract, the buyer of the goods must establish[4] :-

a. That he is the consignee or endorsee named in the bill of lading; and

b. That property in the goods must have passed to him "upon or by reason of such consignment or endorsement."

Unfortunately, what this means is that the contractual rights vested in the shipper of the goods only pass to the buyer (or consignee/endorsee as they are commonly referred to) when the property in the goods has passed. Then and only then, does the right of suit rest with the buyer, enabling him to sue the shipper under the B/L. This was deemed to be unsatisfactory and wrought with problems, particularly when the property in the goods passes independently of the B/L and is not causative to the transfer of property. In the context of international trade on the other hand, the goods would arrive and be discharged and delivered before the documents had completed their progress down the chain of the intermediate buyers and sellers and their banks. The endorsement would thus cease to have any role in relation to the possession or legal ownership of the goods.

2 *Janil Bhandari, Section 1 Of The UK Bills Of Lading Act 1855:– A Crying Need For Reform https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/section-1-of-the-uk-bills-of-lading-act-1855-a-crying-need-for-reform-by-janil-bhandari*

3 *Ibid*

4 *Ibid*

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Other aspects of the passing of property further add to this issue, such as in s.19 of the Sale of Goods Act 1957, where a property under a contract of sale passes when the parties to that contract intend it to pass, and not by the endorsement of the B/L as espoused by BOLA. As such, the property in the good would thus pass at a different time. Also, section 18 of the Sale of Goods Act 1957 stipulates that unless the goods are ascertained, property in it cannot pass. This further adds to the conundrum of BOLA where bulk cargos are involved.

The case of **Enichem Anic S.P.A. And Others v.Ampelos Shipping Co. Ltd. (The "Delfini") (1990) 1 Lloyds Rep 252** illustrates the issue that arises with regard to endorsements in particular. In this case, the Plaintiffs bought part of a cargo carried in bulk. Per the contract, payment was to be made either against the shipping documents or a letter of indemnity in the event the B/L was unavailable at the date of payment. Additionally, the Seller also required a bank guarantee. On the date, the Plaintiff took delivery of the goods against the Letter of Indemnity, which the seller had issued to the ship with instructions to deliver without a B/L. Subsequent to the delivery and payment, the Plaintiff received the B/L. They sued the shipowner on the B/L for short delivery. The English Court of Appeal, in analysing the construction of s.1 of BOLA stated as follow: -

"Since 1952 there have been two rival approaches to the construction of the phrase "pass by reason of such consignment or endorsement" known respectively as "the wide construction", as advocated in the 9th and subsequent editions of "Carriage of Goods by Sea" by Thomas Gilbert Carver ("Carver"), and "the narrow construction" as advocated in "Charterparties and Bills of Lading" by Sir Thomas Edward Scrutton ("Scrutton"). A median approach was also suggested by Mr. Justice Mustill in his judgment in The Elafi, [1981] 2 Lloyd's Rep. 679. Mr. Justice Phillips, after careful and skillful analysis of the authorities, which I gratefully endorse, was tending to favour the narrow interpretation, but as a result of his decision in favour of the owners on an alternative submission found it unnecessary to give a definite ruling on the dichotomy. Nor has there been any other judgment directly in point, binding or otherwise, in favour of the wider interpretation. The view in The Elafi was obiter, as were the other expressions of opinion tending to support the wider view, which were considered by Mr. Justice Phillips (i.e. The San

Nicholas, [1976] 1 Lloyd's Rep. 8 at p. 13 per Lord Justice Roskill; The Sevonia Team, [1983] 2 Lloyd's Rep. 640 at p. 643 per Mr. Justice Lloyd). Lord Justice Bingham considered the application of the 1855 Act in The Aramis, [1989] 1 Lloyd's Rep. 213; but did not have to consider the wider interpretation based upon the speech of Lord Bramwell, The San Nicholas or The Elafi.

In the **Delfini** however, the Court of Appeal opted for the approach in the Elafi and in so doing, stated[5]:-

"The authorities being so thin, it is necessary to go back to the wording of s. 1 itself, read in the light of the preamble to the Act. I believe that the Act means what it says in this respect - if not, as more than one Judge has pointed out, in all respects. Section 1 presents two alternative situations in which the contract is transferred to the endorsee. The first is where the property passes "upon" the endorsement (and delivery of the document). This means that the passing of property is simultaneous with the endorsement and that the endorsement is the act which brings it about: albeit, as Sewell v. Burdick teaches, it will do so only if that is what the parties intend. The second is where the property passes "by reason of" the endorsement. This must signify something different since the expression is "upon or by reason of" not "upon and by reason of." In my judgment it means that although the endorsement of the bill is not the immediate occasion of the passing of property, nevertheless it plays an essential causal part in it.

In the passage from Carver which I have quoted, the author concludes that because Lord Bramwell in Sewell v. Burdick emphasizes that the property passes by the contract in pursuance of which the endorsement is made, it follows that so long as the bill of lading is transferred under a contract which also transfers the property, this is enough to satisfy the Act."

In the Malaysian case of **Pemunya Kargo atas Kapal 'Istana VI' v Pemilik Kapal atau Vesel 'Filma Satu' dari Pelabuhan Jakarta Indonesia and other actions [2011] 7 MLJ 145** the High Court, in applying The Delfini, approached the case as follows :-

"It follows from the foregoing that in order to enjoy title to sue under s 1 of the BOLA, the title to the property in the cargo must have passed to the plaintiff from KPB either 'upon' or 'by reason of' the endorsement on the bills of lading. If the property in the cargo passed from KPB to the plaintiff independently of such endorsement then the property in the cargo or title to the cargo did not pass on the endorsement of the bills of lading by KPB, nor as part of a chain of causal events linking or forming the link between the passing of property and the endorsement. It is therefore necessary to ascertain whether the passing of property from KPB to the plaintiff co-incided with the endorsement on the bills of lading or whether the endorsement formed a part of a causal chain of events 'by reason of' which property passed as stated."

5 *Enichem Anic S.P.A. And Others v.Ampelos Shipping Co. Ltd. (The "Delfini") (1990) 1 Lloyds Rep 252*

In any event, by the 1980s, the difficulties caused by BOLA had become sufficiently serious and problematic to the mercantile community. To add to the existing problem, the pattern in international trade had drastically changed. For one, some trades have modernized their practices and were no longer resorting to paper B/L but have moved to electronic B/L instead and BOLA was no longer an aide to mercantile practices but rather an impediment[6].

COGSA

Conversely, the wordings of the UK's COGSA in regard to the right of suit is different. Section 2 of COGSA states as follows :-

"(1) Subject to the following provisions of this section, a person who becomes: -

(a) The lawful holder of a bill of lading;

(b) The person who (without being an original party to the contract of carriage) is the person to whom delivery of the goods to which sea waybill is to be made by the carrier in accordance with that contract; or

(c) The person to whom delivery of the goods to which the ship's delivery order relates is to be made in accordance with the undertaking contained in the order shall (by virtue of becoming the holder of the bill or, as the case may be, the person to whom delivery is made) have transferred to and vested in him all rights of suit under the contract of carriage as if he had been a party to the contract.

(2) Where, when a person becomes the lawful holder of a bill of lading, possession *of the bill no longer gives a right (as against the carrier) to possession of the goods to* which the bill relates, that person shall not have any rights transferred to him by virtue of subsection (1) unless he becomes the holder of the bill —

(a) by virtue of a transaction effected in pursuance of any contractual or other arrangements made before the time when such a right to possession ceased to attach to possession of the bill; or

(b) as a result of the rejection to that person by another person of goods or documents delivered to the other person in pursuance of any such arrangements."

The wordings used in COGSA, unlike BOLA, separate contractual rights from the passing of property. This legislation enables the lawful holder of a B/L to sue the carrier in contract irrespective of the question of passage of property by reason of consignment or endorsement[7]. Further, under the above-mentioned provision, the

6 *The Law Commission and The Scottish Law Commission (LAW COM No 196) (SCOT LAW COM No 130) "Rights of Suit In Respect Of Carriage Of Goods By Sea" 19 March 1991*

7 *Indira Carr, International Trade Law, 5th Edition, Routledge, 2014*

issue as highlighted in **The Delfini** above and a host of other cases (such as **The Aliakmon [1986] AC 785** and **The Aramis (1989) 1 Lloyds Law Reports 213**, to name a few) ought to no longer arise.

Where a B/L is used as a document of security, the significance of this provision and its application can be seen in the recent Singapore case of the "**Yue You 902" and Another Matter[2019] SGHC 106; [2020] 3 SLR 573** ("**The Yue You**") where the Singaporean High Court applied Singapore Bills of Lading Act[8] ("**Singaporean Act**"), which incorporated the UK's COGSA, in deciding the case.

The case of The Yue You

Facts-
The events surrounding the Yue You is one that is similar to the Delfini – in fact, it is also quite common in the world of international trade.

On 11.3.2016, FGV Trading Sdn Bhd ("**FGV**"), the sellers of a cargo of 10,000 metric tonnes of refined, bleached and deodorised palm oil (**the** "**Cargo**") had entered a charterparty with the Defendant shipowner for the charter of the vessel, The Yue You 902 (the Defendant). The charterparty was entered on 11.3.2016. The Cargo was sold to Avanti Industries Pte Ltd ("**Avanti**") who then sold it to Ruchi Soya Industries Ltd ("**Ruchi**"), the final receivers, following a contract signed between both parties on 4.4.2016.

On 12.4.2016, the Defendant received instructions for the Cargo to be transported to New Mangalore, India. Upon loading the Cargo, 14 B/L were issued on behalf of the Defendant for the Cargo. The B/L's identified the consignee as "To Order". The B/L was released to FGV on 19.4.2016 following payment of freight to the Defendant.

On 22.4.2016, FGV issued an LOI to the Defendant for the delivery of the cargo to Ruchi without the production of the B/L. Similarly, on the same day, Avanti issued a back-to-back LOI to FGV requesting the FGV to deliver the Cargo to Ruchi without the B/L. Thus at this stage, there was a chain of back-to-back LOI's from the ultimate Ruchi, to the sub seller, Aavanti, and then to the ultimate seller, FGV and lastly, the Defendant.

On 24.4.2016, The Yue You arrived at New Mangalore and began to discharge the Cargo on 27.4.2016. The Cargo was completely discharged at 8.55am local time (11.25am Singapore time).

In the meantime, OCBC (the Plaintiff) received 14 B/L from FGV through Maybank on 26.4.2021 under cover of documents against payment to the collection schedule.

8 *Bills of Lading Act (Chapter 384)*

The Plaintiff then proceeded to inform Avanti of the arrival of the documents and requested payment instructions. Avanti replied by requesting financing from the Plaintiff for the entire purchase price i.e. USD7,454,973.16, by way of trust receipt loan. In return, Avanti pledged the B/L's as security. OCBC granted the loan on 29.4.2016 and payment was affected by OCBC at 8.32 pm on the same day. However, by this point, the Cargo had been completely discharged from The Yue You for about 8 hours.

At the end of the repayment period i.e., 21 days, Avanti sought and obtained an extension but nevertheless failed to repay the loan. Upon the default, OCBC proceeded on 14.6.2021 to enforce its security over the B/L by demanding delivery of the cargo from the Defendant, which it failed to do. Subsequently, the Plaintiff initiated legal proceedings against the Defendant, for amongst others, breach of contract of carriage, breach of contract of bailment, conversion and detinue.

In defence of the claims brought, the Defendant raised several defences such as: the Plaintiff had not acquired a right to sue under the Singapore's Bill of Lading Act (which ("**Singaporean Act**") on the basis that the Cargo had been discharged prior to the Plaintiff becoming valid holders of the B/L. Thus, argued the Defendant, the B/L had become spent prior to the Plaintiff acquiring it. The Defendant also argued that the Plaintiff were not holders of the B/L in good faith under the Singaporean Act as the Plaintiff had particular knowledge of Avanti's commercial practices and thus knew that the Cargo would be delivered without the production of the B/L.

Decision in the Yue You

In regard to issue of right to suit, the Court interestingly found that the B/L had not become spent. In reaching this conclusion, the Court relied on **BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties) [2003] 3 SLR(R) 611**[9] and stated as follows:

> *"Ang J could not have been clearer at [30] of BNP Paribas that she was making a definitive finding. The sentence "I also find that the cargo was delivered ... to persons who were not entitled to possession so much so that BNP is not a holder of spent bills of lading" could only mean that Ang J found that delivery to persons not entitled does not cause a bill of lading to be spent. The point 3 made at is merely an "even if" point to fully address all possibilities. It is not the language used by a judge who wishes to leave a point open."*

The above finding by the Court reflects the traditional common law position as the Cargo was not delivered to the person entitled to the possession of it under the B/L.

9 *BNP Paribas v Bandung Shipping Pte Ltd (Shweta International Pte Ltd and another, third parties) [2003] 3 SLR(R) 611*

Conclusion

The decision in The Yue You highlights the intricacies faced by not just banks but any end-holder of a B/L. Under the Singaporean Act, the outcome had been acceptable, the same cannot be said conversely if the decision was made under Malaysia's BOLA. The contractual right would not have transferred to the Plaintiff as the B/L would have been spent prior to the delivery of the B/L to the Plaintiff as security for the loan provided. This is because under the BOLA , the right of suit is transferred only when property in the goods is passed "upon or by reason of endorsement". Where there had been no causal connection between the passage of property and the endorsement, the endorsees would be unable to enjoy the statutory rights of suit. Hence, at this stage, considering the B/L has already been spent and with it - goes the right of suit against the Defendant. Thus, in the present context, the Plaintiff would lose its right in the property and the right of suit under the B/L. The Plaintiff is thus left with no alternative but to pursue a remedy under the facility agreement. However, as seen here, Avanti had already gone insolvent. Consequently, this leaves the Plaintiff and entities like it in Malaysia, who rely on the B/L as a means of security for the loans provided in a vulnerable position.

There have been calls for the Malaysia's BOLA be amended or repealed to reflect modern practice, but we are yet to see this happen. It is inconceivable that in this modern age, merchants and banks alike, be left vulnerable - unable to assert their rights against carriers when their goods are lost and damaged. The adoption of a more progressive piece of legislation such as COGSA, would not only alleviate much of the concerns of many in the commercial and financial industry but potentially allow for greater confidence in Malaysia, as a player in the arena of international trade.

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