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KDN: PP 19637/12/2020 (035236)

Printed by: Percetakan Jiwabaru Sdn Bhd
No. 2, Jalan P/8, Kawasan Miel Fasa 2,
43650 Bandar Baru Bangi, Selangor
(KDN: PQ1780/427)

Tax Deduction: Accrued Liability or Actual Disbursement Basis?

by Tan Jia Hua & S. Saravana Kumar

Section 33(1) of the Income Tax Act 1967 (“ITA”) governs the issues of tax deduction in Malaysia. Section 33(1) was referred to as the ‘basket provision’ by the Court of Appeal in the leading case of ***Aspac Lubricants (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2007] 5 CLJ 353***, where the tax deduction on promotional items with the company’s logo was allowed as it was incurred wholly and exclusively in the production of the taxpayer’s gross income. Despite the clarity of the said legal provision, it is not uncommon for general taxpayers to encounter difficulties when claiming a tax deduction for an expense incurred wholly and exclusively in the production of gross income but yet to be paid, by virtue of the dubious interpretation of the word ‘incurred’.

Prompted by the perception that future liabilities often generate ‘premature accruals’, it is a common practice of the Director General of Inland Revenue (“DGIR”) to insist on economic performance and to disallow the deductions for such claims. However, the disbursement method employed by the DGIR is neither commercially practical nor is it economically efficient. Therefore, this article aims to demystify the deduction rules for accrued liabilities and provide a clear guideline for the tax treatment of future liabilities on an accrual basis.

The Landmark Decision - *Exxon Chemical (Malaysia) Sdn Bhd*

Given the inconsistent judicial decisions and conflicting positions on the interpretation of the word ‘incurred’, the determination of the ‘proper taxable year’ has been an uncertain exercise. After a long-lasting debate, the dilemma has finally been settled by the Court of Appeal in ***Exxon Chemical (Malaysia) Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri [2005] 4 CLJ 810***. The authoritative judgment given by Gopal Sri Ram JCA (as he then was) is instructive and served as a proper guideline for the deduction rules.

Facts

The taxpayer set up a retirement and resignation benefits fund for its employees in accordance with the provisions of the National Employees Benefit Manual. The purpose of the scheme was to provide benefits to national employees upon their retirement and benefits for employees who resign or whose services have been terminated other than for cause. However, the entitlement to these retirement benefits is not unconditional. For instance, one must have served the taxpayer for at least 11 years and was not dismissed for misconduct.

For the years of assessment (“YAs”) 1986 to 1991, the taxpayer had set aside a total sum of RM881,270 and charged this amount as vesting benefits in its relevant accounting records and claimed the said amount as a deduction under Section 33(1) of the ITA. However, the DGIR disallowed the deduction (“**the Decision**”). The taxpayer filed an appeal to the Special Commissioner of Income Tax (“**SCIT**”) to challenge the deductibility of the accrued vesting benefits. However, the appeal was dismissed by the SCIT and subsequently by the learned High Court judge on a case-stated appeal. The taxpayer further appealed to the Court of Appeal where the decision was overturned.

Issues before the Court of Appeal

This case turns on the interpretation to be given to the opening words of Section 33(1) of the ITA, “expenses wholly and exclusively incurred”. The DGIR’s argument was that money actually has to be spent and the benefit plan was in respect of monies that were never “incurred” or in other words, monies that were not actually spent. The amount which could not be determined with exact or definite accuracy, and which relates to future expenses were prospective and were there to meet a mere contingency. The right which will arise and the exact amount due as retirement or resignation depends primarily on the final monthly basic salary of the employees and the years of accredited service at the time of such retirement or resignation. As such, any detailed breakdown figure prematurely prepared is only provisional in nature. In addition to that, it is almost impossible for the taxpayer to account for the amount accrued in respect of employees who may be terminated for cause. Hence, the sum cannot be taken as allowable expenses deserving deduction under Section 33(1) of the ITA.

The taxpayer on the other hand relied on the Privy Council’s decision in **Commissioner for Inland Revenue v. Lo & Lo [1984] 1 WLR 986**, which turns on the interpretation of Section 16(1) of the Inland Revenue Ordinance of Hong Kong. Learned counsel for the DGIR submitted that **Lo & Lo (supra)** was distinguishable because the Hong Kong law provides for “any period” while Section 33(1) of the ITA states “during that period”. It also submitted that Section 33(1) of the ITA, being a taxing statute, should be given a strict construction and hence the words “expenses wholly and exclusively incurred” should receive a narrow interpretation.

Findings of the Court of Appeal

The Court ruled in favour of the taxpayers and held that the word ‘incurred’ includes the sum which the taxpayer is under an obligation to pay and is not only confined to actual disbursement. In arriving at its decision, the Court referred to the famously discussed case of **Lo & Lo (supra)**. This case concerns the deductibility of the accrued liability of the firm to pay its staff under Section 16(1) of the Inland Revenue Ordinance of Hong Kong (“**IROHK**”). The relevant excerpts pronounced by Lord Brightman are reproduced herein:

“For reasons already given, ‘an expense incurred’ is not confined to a disbursement and must at least include a sum which there is an obligation to pay, that is to say an accrued liability which is undischarged...The employee had a choice whether

to receive payment of \$50,000 on 31 December 1977 or to defer receipt of such payment to a later date. The firm could not resist the obligation to make such payment on 31 December 1977 if the employee chose to take the appropriate steps to demand it...Their Lordships are therefore of the opinion that, on a proper construction of s. 16, the sum of \$770,000, being the amount which long service employees could at the close of the year 1977 have demanded on retirement, was an expense incurred during that year."

It is imperative to note that the fact that the employees did not actually receive the money in a given year is an irrelevant factor when claiming a tax deduction. Although retirement benefit was not payable to an employee who had completed 10 years' service until he left, he nevertheless had a vested right to his accrued lump sum payment.

Therefore, it would have been irresponsible for the taxpayer as a business entity to not claim the deductibility, especially when they are entitled to the benefits claimed. The fact that the employees thought it fit not to make a claim but to defer it does not make the obligation to pay non-existent. The expenses are wholly and exclusively incurred in the given year when the obligation to pay arises and hence, deductible under Section 33(1) of the ITA.

In furtherance to the above, the Court went further to highlight the principle that a provision in a taxing statute must be read strictly, and is to be applied against the DGIR and not in its favour. The maxim in the revenue law is trite- 'no clear provision; no tax'. If there is any doubt, it must also be resolved in the taxpayer's favour. Hence, the DGIR's contention does not hold water.

On this basis, it was held that the provision of accrued vesting benefits, in the form of retirement and resignation benefits by the taxpayer in Exxon Chemical, is deductible under Section 33(1) of the ITA.

Recent Legal Developments post Exxon Chemical (supra) - Mercedes Benz Malaysia Sdn Bhd

The trite principle established in **Exxon Chemical** (supra) was subsequently followed in **Mercedes Benz Malaysia Sdn Bhd v Ketua Pegarah Hasil Dalam Negeri [2012] MSTC 30-052**.

In **Mercedes Benz** (supra), the High Court allowed the taxpayer's appeal in relation to the deductibility of the holdback margins and target & standard margins ("**the Margins**") provided for the dealers who met their sales target. As the gross income of a taxpayer is always recognised on an accrual basis for the purpose of tax, expenditure should also be recognised once the legal obligation to pay sets in. Again, the Court reiterated that an actual disbursement is not a mandatory requirement for tax deduction under Section 33(1) of the ITA. The word 'incurred' also includes expenses as a sum of which there is an obligation to pay, or outgoings to which the taxpayer is definitely committed in the year of income. The pertinent question is whether the taxpayer is under a legal obligation to incur the expenditure.

It is evident that the taxpayer is bound by the terms contained in the Dealer Agreement and will not be able to resist the claim if the dealers make a demand for payment of the Margins. Hence, it cannot be denied that the taxpayer is under a contractual legal obligation to make the payment and thus the expenditure has been incurred following the decision of the Court of Appeal in **Exxon Chemical** (supra).

Conclusion

Undeniably, the authoritative decision in **Exxon Chemical** (supra) introduces a measure of economic sophistication into the deduction guidelines. Taxpayers are allowed to claim for deduction of the expenditure incurred wholly and exclusively in their production of gross income in the relevant year, irrespective of the fact that the sum has yet to be disbursed. The practical effect of this method is to provide a more comprehensive and more accurate view of the taxpayer's business finances. However, taxpayers adopting this method are advised to put in extra effort in maintaining their records and accounts to justify their tax computations and to safeguard their monetary interests.

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WHAT IS FAIRNESS IN THE COMMERCIAL WORLD?

by Stephanie Chong Keh Yin

In ***Ho Sue San @ David Ho Sue San v Hovid Berhad & 2 Ors*** [2024] MLJU 1358, the Court of Appeal considered the principle of commercial fairness in a minority oppression action.

The action was commenced by an individual shareholder pursuant to **Section 346(1)(b) of the Companies Act 2016** which provides that any member of a company may apply to the Court for an order on the ground that “some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself”.

By a majority of 2:1, the Court of Appeal affirmed the High Court’s decision that the oppression action could not be sustained.

Facts

The subject company, Hovid Berhad, is the 1st Respondent. The following parties hold interests therein:

- David Ho, the Appellant (the Plaintiff in the High Court), holds 33.99% interests;
- Fajar Astoria Sdn Bhd, the 3rd Respondent, holds 63.45% beneficial interests via the 2nd Respondent; and
- other minority shareholders hold 2.56% interests, who were not involved in the proceedings.

Hovid Berhad was founded by David Ho in 1980, which was then a private company known as Ho Yan Hor Medical Hall Sdn Bhd. By way of business expansion and rebranding, it was renamed Hovid Berhad and was listed on the second board of the stock exchange in 2005. Subsequently, in 2006, it was listed on the main board of the stock exchange. At all material times, David Ho controlled and managed the said company.

Sometime in October 2017, David Ho met with a private investment group known as TAEL Group. David Ho and TAEL entered into negotiations encompassing the following objectives:

- delist Hovid Berhad with a view to privatisation;
- TAEL would finance and fund the purchase of Hovid Berhad’s public shares; and
- TAEL would form a joint venture with David Ho in Hovid Berhad for a period of 5 years.

The 3rd Respondent was formed as a special vehicle to hold TAEI's interest in Hovid Berhad.

At the material time, David Ho and TAEI entered into an "Agreement on Voluntary General Offer ("VGO")" (VGO-1) and a second VGO (VGO-2) which amended and restated VGO-1. Amongst others, it was stipulated in VGO-2 that each party shall be entitled to nominate 2 directors to the Board of Hovid Berhad. Furthermore, with respect to certain identified "Key Reserved Issues", it was stated that "a resolution to transact any of the Key Reserved Issues shall be valid only if passed by the affirmative vote and approval of David and TAEI". One of the Key Reserved Issues related to:

"Any alteration to the Companies' Board composition and the maximum number of directors on the Board of the Companies and terms on tenure, eligibility and qualification of a director of any of the Companies."

Upon the delisting of Hovid Berhad in 2019, David Ho and his daughter were the directors of Hovid Berhad. The 3rd Respondent did not nominate any director to the board although it was entitled to do so. The parties also intended to finalise a shareholders' agreement in respect of their interests in Hovid Berhad. Notwithstanding protracted negotiations, the intended shareholders' agreement could not be finalised.

Upon the completion of the 5-year period, TAEI intended to exit Hovid Berhad, which was refused by David Ho. This was because David Ho did not have a first right of refusal over the interest of TAEI in Hovid Berhad. It is pertinent to note that the shareholding ratio in Hovid Berhad at the material time was as follows:

- David Ho – 33.99%
- TAEI's beneficial interest – 63.45%

Respondents' position

In response to David Ho's refusal, TAEI had caused the 2nd Respondent to issue a requisition notice to convene an EGM for the appointment of 6 additional directors. Such an appointment would enable the 2nd Respondent to pass a resolution allowing the trade sale of the 3rd Respondent's beneficial shares in the company.

The issuance of such notice was done pursuant to the constitution of Hovid Berhad, and the 2nd Respondent was entitled under Section 311 of the Companies Act 2016 to issue such notice as a member of Hovid Berhad.

Appellant's position

David Ho contended that the issuance of the requisition notice and its objective were oppressive against him. Particularly, this would be in breach of the "equitable bargain" between himself and TAEI, where it was agreed in the VGO-2 that each party was entitled to nominate only 2 directors to the Board of Hovid Berhad.

It was further contended that by virtue of this understanding, David Ho ought to have a legitimate expectation that the 3rd Respondent (via the 2nd Respondent) would not appoint more than 2 directors to the board of Hovid Berhad although it held a majority shareholding. Moreover, it was contended that he had a legitimate expectation based on the equitable bargain that the composition of the Board would not change even though the 3rd Respondent (via the 2nd Respondent) held majority shares in Hovid Berhad.

The Appellant, David Ho, sought to buy out the beneficial interest of the 3rd Respondent in Hovid Berhad.

High Court

The High Court dismissed David Ho's oppression action on the basis that there was no quasi-partnership between the parties, and that the equitable bargain could give rise to the alleged legitimate expectations.

The High Court considered the House of Lords' decision in *Ebrahimi v Westbourne Galleries Ltd*, which laid down 3 (albeit non-exhaustive) principles to consider whether a quasi-partnership existed as a basis for equitable considerations to be applied:

- an association formed or continued on the basis of a personal relationship, involving mutual confidence. This element will often be found where a pre-existing partnership has been converted into a limited company;
- an agreement, or understanding, that all, or some (for there may be "sleeping" members), of the shareholders shall participate in the conduct of the business; and
- restriction upon the transfer of the members' interests in the company, so that if confidence is lost, or one member is removed from management, he cannot take out his stake and go elsewhere.

It was found that the intention of the joint venture was profit-oriented and did not give rise to a personal relationship based on mutual trust and confidence.

Notwithstanding so, the High Court opined that whilst the conduct of TAEI and/or the 3rd Respondent (via the 2nd Respondent) may amount to a breach of VGO-2, this itself would not suffice to form the basis for an oppression action. In short, David Ho would not be entitled to the judicial remedy of minority buy-out that was particularly intended.

Court of Appeal

Majority

It was held that the applicable test in deciding an action commenced under **Section 346 of the Companies Act 2016** is the judicial application of the test of fairness, based upon rational principles in the context of a commercial relationship. In a commercial context, the articles of association are the terms which govern the relationship of the shareholders within the company and each other. As such,

keeping promises and honouring the articles of association is the most important element of commercial fairness.

If the relationship is one of quasi-partnership, the Court is entitled to have regard to equitable considerations and should not limit itself to the strict legal rules or contractual arrangement of a company, for there is an added element of good faith to each other.

The majority agreed with the High Court that the equitable bargain allegation could not be sustained based on the following reasons:

- there was no pre-existing relationship between the parties;
- the relationship between the parties was purely commercial;
- the terms of the VGOs did not refer to the participation of the parties in the conduct of Hovid Berhad's business;
- the 3rd Respondent, although held majority interests in Hovid Berhad, did not participate in the conduct of its business;
- the investment by TAEI was clearly a short-term investment of only 5 years;
- there was no restriction or prohibition against members exiting; and
- the joint venture was a business opportunity for both parties to proceed with an endeavour to delist Hovid Berhad.

Similarly, the majority held that the breach of VGO-2 was not a cause for an oppression action. It is purely a contractual breach which does not entitle the Appellant to a judicial remedy of a minority buy-out. David Ho's appeal was dismissed.

Dissenting

The short-term investment for 5 years is undisputed. Justice Lim Chong Fong, however, was of the view that David Ho had been discriminated against or unfairly prejudiced by TAEI's move to maximise its exit profitability by way of a trade sale which will give away management control of Hovid Berhad by David Ho. Justice Lim stressed that an oppression action based on **Section 346(1)(a) of the Companies Act 2016** where the alleged oppressive act must concern the affairs of the company and that based on **Section 346(1)(b)** (which was the basis of the present case) where the actual or threatened act/resolution of a member must be discriminating or prejudicial to another member who has been aggrieved, is vitally distinct.

As the present oppression action was commenced pursuant to **Section 346(1)(b) of the Companies Act 2016** which emphasizes on discrimination and prejudice against a member, Justice Lim gave regard to the fact that David Ho was the founder who has built up the business since 1980. It was found that the giving away of majority control was made on good faith with openness with the understanding that TAEI would not relinquish management control of David Ho in Hovid Berhad. For completeness, it was held:

[39] On the special facts of this case, I find it is the Appellant as founder of the First Respondent who has built up its business using his brain and brawn. The fruits of his efforts substantially reside in the trade secrets and intellectual property rights

of the pharmaceutical and health care products marketed by the First Respondent as well as in the confidential corporate financial information of the First Respondent. These have been safeguarded by him having tight management control and being personally involved in the management affairs of the First Respondent at all times.

[40] It is obvious that TTPL, which principally is in the corporate finance and investment business, must have researched and discovered that it is profitable to joint venture with the Appellant to delist and acquire substantial equity in the First Respondent with the plan to further expand the First Respondent's business but thereafter exit by selling off its equity investment in the First Respondent.

[41] Consequently, but critically, I find the entry of TTPL/Third Respondent into the joint venture is plainly subject to the Agreement that the Appellant shall maintain management control of the First Respondent, otherwise the First Respondent would never have been delisted and the Third Respondent/ TTPL becoming the majority shareholder. At the risk of repetition, the Agreement have been clearly captured in writing in VGO 1, VGO 2 and OD. The Appellant thus settled on the joint venture in good faith with openness that he would not relinquish management control of the First Respondent.

...

[47] With the benefit of hindsight acquired from the totality of the consecutive story of the First Respondent from 1980 to 2022, it is plain to me that the Third Respondent/ TTPL is a corporate opportunist. The Third Respondent has admitted that its "priority is to exit soonest possible at the highest price". However, I find that the Second and Third Respondents in their defense have only focused on the time slice from 2019 to 2022 in isolation. By the Third Respondent's move here, it is obvious the Third Respondent/TTPL are determined to profit themselves regardless of the detriment to the Appellant when they exit from the First Respondent. Furthermore, the Appellant who will thereafter be then left only as a minority shareholder without management control to shoulder the immense difficulty disposing his own shareholding in the First Respondent. The Resolutions which are tabled to facilitate the Third Respondent/ TTPLs' exit disregard fair play are hence oppressive."

Justice Lim also emphasised the pronouncement in **Ebrahimi** that equitable consideration may be invoked if one or more of the limbs cited in **Ebrahimi** (which are not exhaustive) had been established. Justice Lim referred to Rule 35 of the constitution of Hovid Berhad and held that it resonated with the second and/or third limb of the equitable considerations enunciated in **Ebrahimi**:

"35. The Board may decline to register any transfer of shares to a person whom they do not approve and may also decline to register any transfer of shares on which the Company has a lien. The decision of the Board shall be final and conclusive."

Finally, Justice Lim allowed David Ho's oppression action. It was further stressed that the availability of a cause of action for breach of the VGO-2 did not ipso facto preclude the right of an aggrieved party to pursue an oppression action, as damages for breach of contract may not be an appropriate and/or adequate remedy.

Commentary

There are three main principles to be deduced from the decision of the Court of Appeal in **Ho Sue San @ David Ho Sue San**.

Firstly, the general and primary rule for commercial fairness would be the adherence to the constitution and/or articles of association of a company.

Secondly, the constitution and/or articles of association of a company would prevail over private/commercial agreements entered into by shareholders. This, however, remains arguable as Justice Lim (dissenting) stated that, although it was held in **Tuan Haji Ishak Ismail v Leong Hup Holdings Bhd & Other Appeals** [1996] 1 CLJ 393 that private agreements was found not to override articles of association of a company, the facts in **Tuan Haji Ishak** are distinguishable.

Thirdly, it is only when the commercial relationship between the shareholders is one akin to a quasi-partnership would the court be permitted to take into account equitable considerations. When this comes into question, the circumstances giving rise to an action for oppression are fact-driven and by no means closed.

Furthermore, the split view between the majority and the minority also raises a question of whether the availability of alternative causes of action (in this case, based upon a breach of contract) would preclude the pursuit of an oppression action. In **Perak Integrated Network Services Sdn Bhd v Urban Domain Sdn Bhd & Anor** [2016] MLJU 1745, the Court of Appeal held that the availability of alternative remedies is a bar to the statutory derivative action therein. It is, however, pertinent to note that a statutory derivative action and a minority oppression action (which entitles a petitioner to statutory remedies) are inherently different, and the question remains arguable.

In Singapore, the Court of Appeal in **Ho Yew Kong v Sakae Holdings Ltd** [2018] SGCA 33 addressed the same issue in the following fashion:

*“173 We therefore conclude that a shareholder who complains of oppression may be precluded from seeking relief under s 216 **only where appropriate and adequate alternative remedies that would bring to an end the matters complained of are available to it.** This brings us to the question of whether, in the present case, cl 18 and/or cl 26 of the JVA constitute such remedies where Sakae is concerned.”*

This resonates with the pronouncement of Justice Lim in **Ho Sue San @ David Ho Sue San** that *“the availability of redress by the aggrieved party against the defaulting party based on breach of contract does not also ipso facto preclude the right of that aggrieved party pursuing an oppression action because damages for breach of contract therein may not be an appropriate and/or adequate remedy”*.

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THE DOCTRINE OF NON-DELEGABLE DUTY OF CARE – NAVIGATING THE IMPLICATIONS OF THE FEDERAL COURT RULING IN SIOW CHING YEE V COLUMBIA ASIA SDN BHD [2024] 4 CLJ 173

by Genevieve Vanniasingham

On 23rd February 2024, the Federal Court, in a 4:1 majority decision in *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 173¹, held that Columbia Asia Sdn Bhd ("the Hospital") is jointly liable with an anaesthetist to pay the judgment sum (including costs) of approximately 4.5 million to the patient.

This pivotal ruling in Malaysian medical negligence law addresses the contentious issue of whether a private hospital can be held liable for the negligence of a medical practitioner considered as "*an independent contractor*". The Federal Court examined whether the private hospital owes an independent, non-delegable duty to the patient, regardless of to whom the duty was delegated and who performed the act or omission in question.

The Majority Judgment of the Federal Court

The patient's appeal before the Federal Court concerned only the Hospital. The main issue in this appeal was whether the Hospital owes a non-delegable duty of care to the patient.

At the outset, it is important to note that the Federal Court, in the case of ***Dr Kok Choong Seng & Anor v Soo Cheng Lin*** and another appeal [2018] 1 MLJ 685², recognised and adopted the doctrine of non-delegable duty of care as established by the United Kingdom Supreme Court in *Woodland v Swimming Teachers Association & Others* [2014] AC 537³ ("Woodland"). Shortly after, the Federal Court revisited this issue in ***Dr Hari Krishnan & Anor v Megat Noor Ishak b Megat Ibrahim & Anor and another appeal*** [2018] 3 MLJ 281⁴.

In this regard, Lord Sumption in *Woodland* identified five defining features⁵ where a non-delegable duty of care will arise:

- the claimant is especially vulnerable and dependent on the defendant's protection from the risk of injury. Such claimants include, but are not limited to, patients and children;
- there is an antecedent relationship between the claimant and the defendant,

¹ *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 1732

² *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685

³ *Woodland v Swimming Teachers Association & Others* [2014] AC 537

⁴ *Dr Hari Krishnan & Anor v Megat Noor Ishak b Megat Ibrahim & Anor and another appeal* [2018] 3 MLJ 281

⁵ *Woodland v Swimming Teachers Association & Others* [2014] AC 537 at [23]

from which to impute an assumption of responsibility on the defendant to protect the claimant from harm. The relationship places the claimant in the defendant's actual custody, charge or care;

- the claimant has no control over how the defendant chooses to perform the duty assumed, whether personally or otherwise;
- the defendant has delegated to a third party a function which is an integral part of its positive duty towards the claimant, and also the custody and control incidental to that function; and
- the third party was negligent in the performance of the very function assumed by the defendant and delegated to him.

After analysing the relevant provisions of the Private Healthcare Facilities and Services Act 1998 and the related Regulations, Dato' Mary Lim Thiam Suan, FCJ, who delivered the majority decision in the present case, concluded that it is "clear as daylight" that the legislative scheme in Malaysia intends private hospitals to remain responsible for the treatment and care of the patients regardless to whom they may have employed, engaged or delegated that task or responsibility to, even if the hospital is rendering emergency care services⁶.

The Court emphasised that the legislative framework already incorporates elements of fairness, justice, and reasonableness, eliminating the need for separate consideration of these factors. Patients using these facilities should not have to worry about issues of responsibility or accountability, as negligence are not their concern.

Her Ladyship found that the statutory framework and factual circumstances satisfied the second Woodland feature of an antecedent relationship, establishing a non-delegable duty of care. The patient was treated in the Hospital's emergency facilities by its medical officer, who referred him to the attending surgeon and anaesthetist. These professionals were necessary for the Hospital to provide routine emergency services, and the negligent act occurred within the Hospital's premises using its facilities.

The Federal Court held that all five Woodland features were satisfied, affirming that the Hospital owed a non-delegable duty of care to the patient admitted to its emergency services. Thus, the defence of independent contractor was deemed unsustainable⁷.

Her Ladyship observed that the Federal Court in **Dr Kok Choong Seng & Anor v Soo Cheng Lin**⁸ and another appeal had "*refrained from making a broad pronouncement on the liability of all private hospitals in medical negligence cases on the basis of policy alone, as it would risk overgeneralizing the nuances of modern business relationships, and result in an unprincipled approach to liability*"⁹. Her Ladyship suggested that it might now be appropriate to reconsider or possibly refine the criteria or five features outlined in Woodland within their specific contexts.

Indemnity

The majority in the Federal Court dismissed the Hospital's claim for an indemnity

⁶ *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 173 at [79]

⁷ *ibid* at [86]

⁸ *Dr Kok Choong Seng & Anor v Soo Cheng Lin and another appeal* [2018] 1 MLJ 685

⁹ *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 173 at [39]

against the 2nd Defendant. On this issue, Dato' Mary Lim Thiam Suan, FCJ, declined to intervene. The Respondent had requested that the Federal Court order the 2nd Defendant to indemnify the respondent if it were found liable.

The Federal Court determined that this request was neither right nor available in law¹⁰, given that the 2nd Defendant was not a party to the appeal¹¹. Furthermore, the Federal Court emphasised that such an indemnity would contradict the earlier findings that the Hospital owes a non-delegable duty of care, making it liable regardless of whom it employed or engaged to fulfil that duty. The Court asserted that this principle imposes personal liability on the Respondent, exceeding that of the tortfeasor. The dissenting Judge, Dato' Zabariah binti Mohd Yusof, FCJ did not address the Hospital's claim for indemnity.

It is essential that this issue of indemnity be thoroughly examined in the future, as it bears significant implications for the legal responsibilities and financial liabilities of healthcare providers. Addressing this issue will provide much-needed clarity and ensure that healthcare institutions are adequately protected and informed of their potential liabilities, thereby fostering a more transparent and equitable medico-legal landscape.

The Dissenting Judgment

The dissenting Judge, Dato' Zabariah binti Mohd Yusof, FCJ, opined that this case presents a clear and straightforward instance of negligence by an independent contractor¹². She asserted that the relationship between the anaesthetist and the hospital as an independent contractor is unambiguous. Moreover, she found no issue with the patient being deprived of remedy or compensation for the negligence, and therefore, saw no necessity to invoke the doctrine of non-delegable duty to hold the private hospital liable¹³. Her Ladyship emphasised that the imposition of a non-delegable duty of care should always be highly fact-sensitive.

In her dissent, Dato' Zabariah FCJ cited Lord Sumption in *Woodland*, who cautioned against imposing unreasonable financial burdens on those providing critical public services¹⁴. The *Woodland* case involved the imposition of a non-delegable duty only so far as it would be fair, just, and reasonable. In this case, Dato' Zabariah FCJ argued, imposing such a duty on the hospital would not be fair, just, or reasonable in the circumstances and would present a grossly unfair burden imposed on health institutions providing critical health services, particularly in emergency situations¹⁵.

Dato' Zabariah, FCJ, further distinguished the doctrine of non-delegable duty of care from the doctrine of vicarious liability, which imposes secondary liability according to orthodox theory¹⁶. She noted that non-delegable duty remains an exception to the fault-based principle, and there is no need to impose liability on a non-tortfeasor based on this doctrine when remedy or compensation is available. The normal application of the principle of liability for independent contractors in tort law does not leave the patient without remedy or compensation, as evidenced by the award of damages granted by the Court of Appeal.

¹⁰ *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 173 at [94]

¹¹ *ibid* at [95]

¹² *ibid* at [236]

¹³ *Ibid*.

¹⁴ *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 173 at [234]

¹⁵ *ibid* at [236]

¹⁶ *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] 4 CLJ 173 at [130]

An “antecedent relationship,” a feature of the doctrine, refers to a pre-existing relationship between the hospital and the patient, placing the patient in the hospital's actual custody and assuming a positive duty to protect the claimant/patient from harm. In this case, Dato’ Zabariah, FCJ, noted that the patient was initially treated by another surgeon at Subang Jaya Medical Centre and was admitted to the hospital in an emergency. Therefore, Her Ladyship concluded there was no antecedent relationship between the hospital and the patient, and the hospital had not assumed a positive duty to protect the patient from harm or injury¹⁷.

Additionally, Dato’ Zabariah, FCJ, saw no evidence adduced to show that section 38 of the Act or the Regulations were not complied with. Further, she found no compelling policy justification for imposing a non-delegable duty of care on a private hospital. The regulations do not impose such a duty on private hospitals; they merely indicate that medical practitioners form part of the organization of private hospitals.

In this case, the hospital had ensured that the facilities were available for the patient's treatment by verifying that the surgeon and anaesthetist were registered and skilled. There was no finding of fact by the learned trial judge that the hospital was negligent in its selection of surgeon and anaesthetist, provision of facilities, or system of work. Therefore, in the absence of negligence by the hospital, it should not be held liable for the negligence of the anaesthetist, who is an independent contractor. Her ladyship opined that “to infer from the provisions of the Act and its Regulations on such *liability would be an overstretch*”¹⁸.

Practical Steps for Private Hospitals, Practitioners and GPs

Private hospitals would understandably be displeased with the Federal Court’s decision in the short term. However, those that prioritize patient safety and quality healthcare stand to benefit in the future. This landmark decision necessitates a comprehensive response from private hospitals across Malaysia to align their practices with the Court’s determinations. Here are a few practical steps that private hospitals and practitioners should consider to mitigate risk and ensure compliance:

Private Hospitals

Risk Assessment: Owners and management of private hospitals must promptly assess their potential risk exposure to medical negligence claims.

Credentialing: The credentialing (verification of professional qualifications) and privileging processes at private hospitals must be reinforced with thorough evaluations of specialists' calibre and experience.

Audit, Review and Quality Control: To mitigate negligence, immediate measures such as audits, reviews, and quality improvement initiatives should be implemented. Doctors' performance evaluations should shift away from financial contributions

¹⁷ *ibid* at [172]

¹⁸ *ibid* at [211]

to hospital income and instead be based on clinical processes, outcomes, and balanced metrics. For instance, efforts to reduce patients' length of stay should ensure that unscheduled returns to the operating theatre and readmission rates do not increase.

Good communication: Effective communication is crucial for rebuilding trust with patients and their families. Poor or absent communication can exacerbate injuries, leading to complaints and potential litigation.

Improve Relationships: Private hospitals should review and enhance their relationships with doctors, particularly following adverse events. Blaming doctors should not be an option; a cooperative approach between hospitals and doctors, rather than an adversarial one, is more productive and beneficial for both parties.

Adopting a cooperative approach can result in savings of time, money, and, most importantly, enhance the reputation of both hospitals and their doctors.

Private Specialists/ Physicians

Indemnity Premiums: Specialists should annually review their risks and secure appropriate indemnity coverage, as ignoring this responsibility is no longer viable. Although Court awards for medical negligence have increased in recent decades, inflation alone will significantly affect the amounts awarded. Specialists whose premiums do not accurately reflect their risk exposure, such as anaesthetists, neonatologists, and emergency specialists/physicians, should reassess their risks and ensure adequate coverage.

Defensive Medicine: Medical errors, adverse outcomes, or treatment complications frequently lead to patient complaints against healthcare providers and practitioners. In response, physicians may engage in defensive practices to prevent such complaints, and navigate the potential threats of lengthy trial processes. The term "defensive medicine" has been used in medical literature since the late 1960s, originating in the United States and evolving in meaning. The most commonly accepted definition describes defensive medicine as physicians deviating from sound medical practice due to fear of complaints and lawsuits¹⁹. The aim of this practice is to reduce adverse outcomes, deter patients from filing malpractice claims, and attempt to persuade the legal system that the standards of care were met.

A survey among doctors in the United Kingdom revealed that 78% reported practicing some form of defensive medicine²⁰. Such defensive medicine practices can carry risks, including potential harm to patients and the imposition of unnecessary costs on both patients and the healthcare system. In this regard, it is crucial for healthcare practitioners to be aware of the implications of defensive medicine, striving to balance the need for thorough patient care with adherence to ethical standards, while also considering the potential impact on patient safety and healthcare costs.

¹⁹ Studdert DM, Mello MM, Sage WM, et al, *Defensive medicine among high-risk specialist physicians in a volatile malpractice environment* JAMA 2005; 293(21):2609-17

²⁰ Ortashi O, Virdee J, Hassan R, Mutrynowski T, Abu-Zidan, F, *The practice of defensive medicine among hospital doctors in the United Kingdom*, BMC Med Ethics 2013; 14:42.

General Practitioners

General practitioners (GPs), who typically own and manage their own clinics, must take heed of the Federal Court's judgment. Similar to private specialists, GPs must annually assess their exposure to medical negligence claims and secure suitable indemnity coverage. Most GPs are unlikely to face significant increases in indemnity premiums, aside from those attributed to inflation. However, it is advisable for practitioners in the aesthetic industry to ensure their coverage adequately reflects their risks. Patient expectations in aesthetic care are notably high, and unmet expectations can lead to complaints and potential litigation.

Referrals: GPs must provide appropriate care, practice within the boundaries of their discipline, and recognize when to refer patients to a hospital or specialist. Any delays in referral, regardless of the reason, may result in adverse events, subsequently leading to complaints or litigation.

Locum Doctors: GPs must exercise greater discretion in appointing locum doctors, ensuring that the clinical skills of the locums are suitable for the specific requirements of the GP's practice. The aftermath of the Siow Ching Yee case highlights the necessity for clinic owners to ensure that all locum doctors are sufficiently insured, thereby safeguarding their practice and reputation. Additionally, it is paramount to thoroughly understand the intricacies of insurance policies, as coverage deemed sufficient today may prove inadequate in the face of evolving legal complexities.

Conclusion

The Federal Court's ruling in Siow Ching Yee marks a pivotal shift in Malaysian medical negligence law. By establishing a non-delegable duty of care for private hospitals, this decision reinforces the importance of patient safety and accountability in healthcare. Private hospitals, specialists, and general practitioners must now adapt to this evolving legal landscape, taking proactive steps to mitigate risks and ensure compliance with higher standards of care. The judgment also prompts a re-evaluation of relationships within healthcare facilities, emphasizing collaboration and transparency over an adversarial approach. As the implications of this ruling unfold, the medical community must stay vigilant and responsive, prioritizing the welfare of patients while navigating the complexities of modern healthcare law.

LIABILITIES ARISING FROM AIR CRASHES

by Kenny Lam Kian Yip & Caroline Kuan Ai Qing

General aviation in Malaysia consists of a wide range of aviation activities that are not part of commercial air transport conducted by commercial airlines such as Malaysia Airlines; AirAsia, Firefly etc. General aviation activities include private flying, flight training, agricultural aviation, and other non-scheduled air services.

In this regard, air crashes in the general aviation sector of Malaysia are on the rise, especially with respect to small engine and capacity aircrafts. From 2021 to 2023, there are 2 reported air crashes resulting in fatalities, including the infamous air crash at Subang Elmina where 8 passengers and 2 bystanders, consisting of state government officials, pilots and staff, perished.

In this edition of RDS' Legal Insight, we analyse liabilities arising from air crashes in Malaysia, and the legal problems arising therein in the general aviation sector of Malaysia. This means aviation liabilities arising from operations of commercial aircrafts and air carriers are excluded from discussion as a different set of laws and issues would come into play.

Laws and Regulations Governing Aviation Safety

The landmark law in respect of civil aviation safety started from the **Chicago Convention on International Civil Aviation 1944**, which established the core principles permitting international transport by air, and led to the creation of a specialised agency which has overseen it ever since – the **International Civil Aviation Organization (ICAO)**. Meanwhile, the **Montreal Convention 1999 (MC99)** establishes airlines' liability in the case of death or injury to passengers, as well as in cases of delay, damage or loss of baggage and cargo. Malaysia is a member state of both conventions and ratified the same.

The key legislations regulating aviation safety in Malaysia are the **Civil Aviation Act 1969 (CAA)** and the **Civil Aviation Regulations 2016**.

The regulator of aviation safety in Malaysia is the **Civil Aviation Authority of Malaysia (CAAM)**, formerly known as the **Department of Civil Aviation of Malaysia (DCA)** established under the exercise of powers by the Ministry of Transport and its Director General under the Civil Aviation Act 1969 (CAA).

Under the CAA, section 4(1) provides that dangerous flying is an offence punishable by fine, imprisonment or both. To this end, under section 3 CAA, the Director General has powers to create regulations governing aviation safety. Many regulations were created over the years and currently, CAAM has issued numerous directives

regulating aerodrome operations; air navigation services standards; air operations; and airworthiness of aircrafts, among others, thus establishing the basic standards of compliance in achieving aviation safety.

Be that as it may, air crashes are inevitable so long as human elements are introduced into the equation where more often than not, human errors including but not limited to pilots' inexperience; failure to maintain aircrafts properly and/or design faults has led to unforeseen and unfortunate fatalities in operating aircrafts.

Parties

Parties involved in air crashes are wide-ranging depending on the cause of the crash and this could include, but not limited to:

- aircraft manufacturers;
- pilots;
- crew;
- insurers;
- victims and/or deceased;
- flight instructors;
- flight schools;
- airport control tower operators;
- aircraft chartering companies; and
- ground handlers.

Causes of Action for Victims

When there are air crashes resulting in fatalities, victims and/or the estate of the deceased would generally have a cause of action in contract and/or tort against the parties who have caused the crash.

Contracts govern rights and obligations owed by carriers to passengers, whilst a general duty of care in tort is also owed by all parties facilitating flight operations to passengers.

Reported Decisions

There is a dearth in reported decisions on liability analysis in air crash incidents in the general aviation sector. However, a well-written judgment by Justice Vazeer Alam (as he then was) in *Nowran Begam binti Mohamed Saliff (Pentadbir Hart Pusaka Mohamed*

Ihsan bin Saiyed Abu Thahir, si mati) v Nantha Kumar Devar a/l Sangaran & Anor (CTRM Aviation Sdn Bhd, intervener) [2016] MLJU 226 provides clear and interesting guidance on legal issues arising from air crashes between a deceased student pilot, a flight instructor and the flight school.

In the ***Nowran*** case, a student pilot had met his untimely demise when the aircraft he piloted crashed into the jungle at Lembah Beringin, Perak during a solo-flight. The post-mortem report released found:

- the weather condition on the day of the air crash was not suitable for the deceased to continue with a Visual Flight Rules (VFR) flight, i.e. to fly without the aid of instruments;
- inexperience and logistical implications could have been factors in the deceased's decision to proceed with his planned destination despite the unfavourable weather conditions;
- fatigue could have had an effect on the deceased's judgment and decision making as the ill-fated flight was the deceased's second flight for the day; and
- the deceased was not trained to fly using instruments, i.e. Instrument Meteorological Conditions (IMC).

Based on the above, the deceased's estate filed dependency claims against the Defendants, i.e the deceased's flight instructor and flight school under sections 7 & 8 of the Civil Law Act 1956.

It was the Plaintiff's case that the 1st Defendant was not authorised to approve the deceased's solo cross country flight on 29.10.2009 as the weather conditions on the day of flight was unfavourable, and the deceased was not trained to fly in unfavourable weather conditions.

The Defendants however dispute that contention and blamed the deceased for entering adverse weather condition. It was the Defendants' case that, although the weather was unfavourable, the deceased did not do what he ought to have done, which was to turn back to Ipoh or alternatively to change the flight path and fly along the coastline. Further, SD-4 also suggested in evidence that the deceased "created his own problem" by deliberately flying into the clouds and that he ought

to have changed course to ensure his own safety. Learned counsel for the Plaintiff submitted that this suggestion was wholly unreasonable as such a course of action would have entailed the deceased having to go against the instructions of the flight control tower and deviate from the planned route (based on the approved flight plan).

The Court determined that the Defendants owed a duty of care to the deceased in providing a safe flying environment, notwithstanding that flying is intrinsically dangerous. The Defendants also owed a duty to the deceased to ensure the deceased was trained according to the DCA syllabus, including flying in adverse conditions. It is foreseeable that if a pilot is cleared to fly in adverse conditions, he must be properly trained before he could undertake such flight.

The Court found, among others, the Defendants were grossly negligent for clearing the deceased for take-off in a solo flight without obtaining a copy of an actual and/or forecast weather report before clearance is given. Further, the Defendants did not ensure that the deceased was properly trained before he could embark on a solo flight with potential and/or actual adverse weather conditions.

Another interesting observation is how the Court has applied the doctrine of *res ipsa loquitur* (i.e. "the thing speaks for itself"), to apply an evidentiary presumption that by virtue of the air crash caused by adverse weather conditions and yet the student pilot was cleared for take-off by the Defendants, the Defendants are presumed to be negligent and they had failed to negate such presumption.

Conclusion

It is no doubt that manned flying carries inherent risks and they are ultimately operated by men whom are susceptible to errors. Each mistake could be fatal.. Therefore, it is key to keep in mind that the standard of duties owed by flight operators, facilitators, pilots, are very high and all steps should be taken to ensure standards of aviation safety are complied with and adhered to at all times.

As the saying goes, make safety a reality, don't be a fatality.

THE SURPLUS CAR PARK CONUNDRUM – WHAT CAN BE DONE BY PROPERTY DEVELOPERS?

by Khoo Jia Hui

In recent years, the Malaysian Courts have been addressing the issue of surplus car parks, whether they belong to the parcel owner (in these cases, the property developer), or if they form part of the common property of the joint management body/management corporation.

This issue is key as it could significantly impact the ownership of these car parks, and whether that parcel owner is required to contribute to the maintenance charges and sinking fund based on the share unit of the car park lots.

Over the past years, we can see how the Courts have decided on this issue in these three cases,

- *Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara & Anor* [2020] 4 MLJ 93 (Court of Appeal)
- *Sri Keladi Sdn Bhd (in liquidation) v Bukit UOG Condominium Joint Management Body* [2023] 1 MLJ 34 (Court of Appeal)
- *Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd* [2023] CLJU 2442 (High Court)

This article discusses the 3 Court decisions and their implications.

***Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara & Anor* [2020] 4 MLJ 93 (Court of Appeal)**

Facts:

This case involves a residential, HDA governed housing development, whereby 394 car park lots were accessorised to 45 parcels owned by the Developer. The Developer sought to sell these 45 units, together with its 394 car parks.

Court of Appeal's decision

The Court of Appeal found that the intention of the purchase of the 394 car parks was not to use them in conjunction with the 45 parcels. The Purchaser had intended to deal with the car parks independently from the main parcel by renting it out to third parties, which was a breach of the Strata Titles Act.

It was further found that even though the strata titles to these 45 parcels were registered with the car parks as accessory parcels, the car parks were registered irregularly under the National Land Code. Therefore, the registration of the car parks as accessory parcels to the main parcels under the strata title were null and void, and not lawful.

The surplus car parks were found to be common property and could not be accessorised to the 45 parcels.

The leave to appeal against the Court of Appeal's decision to the Federal Court was dismissed.

Sri Keladi Sdn Bhd (in liquidation) v Bukit UOG Condominium Joint Management Body [2023] 1 MLJ 34 (Court of Appeal)

Facts:

This case involved a mixed development comprising of 1,536 residential parcels and 74 commercial parcels. There were 149 surplus and unaccounted car parks in the development. The developer subsequently wound up and a liquidator was appointed. To realise the assets of the developer, the liquidator sought to sell the 149 surplus car parks by way of tender submission.

The joint management body ("JMB") of the mixed development filed an action in court, claiming that the surplus car parks were the development's common property and asset, and as such, the liquidator had no right to sell the surplus car parks.

High Court's decision

The High Court ("HC") found that the surplus car parks formed part of the common property of the developer and were intended for the exclusive use and enjoyment of parcel owners.

On appeal before the Court of Appeal, it was argued by the Liquidator that the High Court had erred in its decision on the following reasons: -

- The High Court judge had referred to the definition of "common property" in the Building and Common Property (Maintenance and Management) Act 2007 (BCPA) though it was subsequently decided that it was not applicable.
- The High Court judge had failed to recognise that there were four different types of SPAs between the developer and purchasers showing that the car parks are not common property to the development.
- The JMB's claim that the surplus car parks are common property and thus belong to the JMB and cannot be sold by the liquidator is premature as the subdivision of the development into parcels and accessory parcels is incomplete.

On the other hand, the JMB argued that the HC was right in reaching its decision, claiming that: -

- The SPAs were signed prior to the coming into force of the BCPA, thus the terms in the SPA should prevail;
- The car parks fall within the meaning of "common property" under the Sale and Purchase Agreement ("SPA");
- The definition of "common property" in the Strata Titles Act 1985 ("STA") is consistent with the SPA's definition;
- The car parks are generally defined as 'accessory parcels' under the SPA – the STA does not allow for accessory parcels to be dealt with and disposed of independently of the main parcel.

Court of Appeal's decision

To ascertain whether the 194 surplus car parks were common property, the Court of Appeal relied on the terms stipulated in the SPA.

The Court of Appeal first noted that as this is a mixed development, there are separate Sale and Purchase Agreements catered for different property type. The Sale and Purchase Agreement is the binding contract between the developer and the purchasers.

For residential properties, it was stated in the SPA that each parcel shall have their own car park allocations. Whereas for commercial properties, the SPA stated clearly that the developer shall retain ownership of the car park lots, and that they were not intended to form part of the common property.

It was further found that the definition of "common property" in the SPAs (for both residential and commercial SPAs) was not intended to include the additional 149 car parks.

For residential properties, the Court of Appeal referred to Clause 31(2) and the Second Schedule of the Schedule H SPA, which read as follows,

"Common property" means so much of the land as is not comprised in any parcel (including any accessory parcel), or any provisional block and the fixtures and fittings, including lifts, refuse chutes, drains, sewers, pipes, wires, cables and ducts and all other facilities and installations used or capable of being used or enjoyed in common by all the purchasers".

Clause 31(2) of the SPA clearly states that the surplus car parks should not be considered as common property as they were not defined and listed as common facilities and services for the development. Furthermore, the residential parcel owners are not entitled to enjoying the surplus car parks as they were in excess of what was already catered for the parcel owners.

In respect of the SPA for commercial units, the Court found that Clause 32 of the SPA explicitly provided that the Developer shall retain the ownership of the car parks. Therefore, it was clear that the surplus car parks were never intended to form part of common property under the SPA.

Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd [2023] CLJU 2442 (High Court)

Facts:

This was a decision made by the Shah Alam High Court after the Federal Court remitted the matter to the High Court to determine whether there was contravention of the Strata Titles Act, 1985 ("STA"), particularly Sections 34(2) and 69 of the STA, which prohibits any dealing on the accessory parcel independent of a parcel.

There were two levels of car park lots that were accessorised to the Penthouse level of the mixed development. The Developer owned the Penthouse and operated a car park business from the two levels of car park lots and retained profits from the business.

It was alleged by the Management Corporation that the Developer had carried out a commercial business on the car park lots, rather than using the car park lots as accessory parcels to support the use of the main parcel, i.e. the Penthouse. By virtue of this, the Management Corporation has demanded that the Developer pay its share of maintenance charges and sinking fund for the car park parcels.

The issue to be decided by the High Court was whether the two levels of car park lots serve as an accessory parcel to the Developer's Penthouse and whether by carrying out a commercial business on the car park lots, the Developer is dealing with the accessory parcel, which is prohibited under the STA.

High Court's decision

The High Court found that the Developer's title to the ownership of the car park lots are not "open to challenge" and thus, the car park lots are accessorised to the Penthouse.

The Court upheld the Developer's contention that all the car park parcels were identified by parcel numbers as accessory parcels under the ownership of the Developer. This was not the case in *Ideal Advantage*, whereby the 394 car parks were identified by the Court of Appeal as common property as the strata plan was conclusive. If it was not indicated in the strata plan to be a parcel or accessory parcel, then the car park would be common property under the ownership of the management corporation.

The Court also took cognizance of Article 13 of the Federal Constitution – where no person can be deprived of his sacrosanct constitutional right to property save in accordance with the process designated by law. The Developer had always retained ownership of the land upon which the car park parcels stood. The land had, at all material times, belonged, and still belongs, to the Developer. By virtue of this, the Developer had merely applied for the subdivision of its own land, and did not take ownership of properties belonging to parcel owners in the development. It was not a contravention of the Strata Titles Act 1985 as it did not constitute a dealing.

On the issue on the illegality of the conduct by the Developer in operating a car park business from its accessory parcels, the High Court distinguished the facts with *Ideal Advantage*. Unlike in *Ideal Advantage*, the Penthouse was the backbone of the car park business operated by the Developer as a licensed private car park operator sanctioned under local council laws. Whereas in *Ideal Advantage*, the purpose and intention of the purchase of the car parks was not for use in conjunction with the residential unit, which was for inhabitation, not commercial activity.

Commentary

Despite what may seem to be differing views by the courts, the three decisions by various courts can be summarised in the table below,

Case	SPA Type	Court's Decision
<i>Ideal Advantage Sdn Bhd v Perbadanan Pengurusan Palm Spring @ Damansara & Anor</i> [2020] 4 MLJ 93 (Court of Appeal)	HDA governed	Car parks are common property.
<i>Sri Keladi Sdn Bhd (in liquidation) v Bukit UOG Condominium Joint Management Body</i> [2023] 1 MLJ 34 (Court of Appeal)	HDA & Non-HDA governed	Car parks are assets of the Developer as car park lots have been assigned to the residential parcels.
<i>Perbadanan Pengurusan 3 Two Square v 3 Two Square Sdn Bhd</i> [2023] CLJU 2442 (High Court)	Non-HDA governed	Car parks are assets of the Developer as car park it is not against the STA.

It may appear that the Courts are inclined to find that car park lots do not fall under common property in a development if it involves a non-residential development and that it has been explicitly stated in the Sale and Purchase Agreement. If the car parks are situated in a residential development, the surplus car parks may be regarded as common property if it was not intended to be used in conjunction with the main parcel.

However, the Court may find otherwise if each residential unit has been allocated sufficient car park lots as was decided by the Court of Appeal in *Sri Keladi*. Whereas in *Ideal Advantage*, the Court found that the excess car parks were common property as there was no assigned car park lots. This supports our Courts' inclination to protect homebuyers under the Housing Development (Control and Licensing) Act, 1966, which has been pronounced by the Courts on multiple occasions to be a social legislation.

Preparation is the Key to Success

As these cases have only been decided up till the Court of Appeal, there is still room for development in this area of law.

It is advisable for property developers to plan well ahead when drafting the Sale and Purchase Agreements or the Deed of Mutual Covenants for any development. It is wise to insert clearer and more concise terms stipulating the ownership and status of any excess car park lots in a development to avoid any untoward situation.

THE ARBITRATION AMENDMENT ACT 2024: MODERNISING MALAYSIAN ARBITRATION

by Vinayak Sri Ram

On 24 July 2024, the Arbitration Amendment Bill 2024 (**Amendment Bill**) was passed by Parliament's upper house, the Dewan Negara, and will come into force when it receives Royal Assent. It seeks to amend the Arbitration Act 2005 (**Arbitration Act**).

The Amendment Bill represents the most substantial reform to Malaysian arbitration law since the establishment of the Asian International Arbitration Centre (**AIAC**) 46 years ago. As the Deputy Minister in the Prime Minister's Department (Law and Institutional Reform), YBhg Tuan M Kulasegaran a/l V Murugeson, observed during the second reading of the Amendment Bill, these amendments are intended to strengthen Malaysia's position in international arbitration and to bring it in line with other major international arbitration centres in the region. While further legislation is required to make these reforms complete, the Amendment Bill sets out what are likely positive changes to arbitration regulation in Malaysia.

The AIAC Has Been Fundamentally Restructured

The AIAC is an arbitration institution founded and governed by a set of bilateral agreements between the Malaysian government and the Asian-African Legal Consultative Committee (AALCO), the first such agreement having been signed by Tun Hussein Onn on 17 April 1978.

Since its founding, the AIAC's leadership structure has consisted of a sole Director. Though assisted by an Advisory Board appointed by the Minister in the Prime Minister's Department in charge of legal affairs, the Director has substantial, if not untrammelled, control over the AIAC. This was arguably an effective structure during the AIAC's period of rapid growth into a leading regional arbitration centre.

With a Supplementary Agreement ratified on 20 February 2024, the Malaysian government and AALCO have agreed on a major structural change to the AIAC. Instead of a sole Director at the helm, the AIAC will now be governed by a Board of Directors of between 5 and 7 members, presided over by a Chairman and Deputy Chairman. This has several advantages.

- First, rather than a single individual shouldering the responsibility for decision-making, the management of the AIAC is now a collaborative effort.
- Second, it allows for a combination of local and international expertise in the AIAC's

leadership. This is immediately evident from the inaugural Board of Directors, which, in addition to leading Malaysian lawyers, includes the former chairperson of Bursa Malaysia, an English King's Counsel, and the former Secretary General of the International Chamber of Commerce International Court of Arbitration.

- Third, this is a governance structure tried and tested in similar forms in other major international arbitration centres such as the Singapore International Arbitration Centre and the Hong Kong International Arbitration Centre.

The Board of Directors has the authority to appoint a Chief Executive Officer (CEO) for the day-to-day running of the AIAC. Under the Supplementary Agreement, the CEO cannot serve for longer than 6 months at a time. This provides further improvements over the previous structure of the AIAC, devolving administrative power from the governing authority of the AIAC and preventing the entrenchment of an individual CEO. It remains to be seen whether a 6-month term for a senior administrative official is sufficient to maintain consistency in administration, but setting a term limit is important in principle.

AIAC Court of Arbitration

Of critical importance to the AIAC's dispute resolution process is the introduction in the Supplementary Agreement of the AIAC Court of Arbitration. Under the previous structure of the AIAC, a sole Director was responsible for the appointment of arbitrators, mediators, and adjudicators under the AIAC rules and the Arbitration Act. Under the Supplementary Agreement and the Amendment Bill, this role now falls to the AIAC Court of Arbitration, headed by a President and Vice President.

This has many of the same merits as replacing a single Director with the Board of Directors. It has the additional merit of providing a degree of confidence, independence, and transparency with respect to the appointment of arbitrators, mediators, and adjudicators. No single individual is now charged with such appointments. Appointments are decided by the AIAC Court of Arbitration as a whole, which should further increase confidence in the integrity of the process of AIAC appointments.

While the full AIAC Court of Arbitration has yet to be established, the government has appointed a Protem Committee, chaired by former Federal Court judge Dato' Mary Lim Thiam Suan, and comprising distinguished legal practitioners and academics from around the world, including Dato' Seri Mohd Hishamudin bin Md Yunus, a consultant at Rosli Dahlan Saravana Partnership.

Clarity on Seat of Arbitration

Though arbitration has been a feature of Malaysian dispute resolution for decades, far too many agreements still fail to distinguish between the law of the contract and the law of the arbitration agreement. As arbitration agreements are separate agreements from the rest of the contract, the law of the contract will not necessarily be the law of the arbitration agreement.

The latter is critical, as it can determine whether an arbitration agreement is valid

at all, whether the parties have agreed to arbitration at all or for specific disputes, and therefore whether a party can even commence arbitration proceedings. This can make all the difference in a dispute, and it is not safe for parties to assume that the law of other jurisdictions applies the same principles to arbitration agreements as the Malaysian courts.

What happens when a contract fails to state the law of the arbitration agreement? The Malaysian position was re-stated in the leading case of *Thai-Lao Lignite Co Ltd & Anor v Government of the Lao People's Democratic Republic* [2017] 9 CLJ 273, in which the Federal Court held that the law of the arbitration agreement does not necessarily follow the law of the contract or the law of the seat of the arbitration, i.e. the legal jurisdiction of the arbitration. Rather, it is determined by following standard conflict of law principles, which is to ascertain the law that has the closest and most real connection to the arbitration agreement. This uncertainty in determining the law of the arbitration agreement has been the source of numerous disputes, of which *Thai-Lao Lignite* is just one example.

The Amendment Bill resolves this uncertainty by amending the Arbitration Act to provide that in all cases, unless otherwise expressly agreed by the parties, the law of the arbitration agreement follows the law of the seat.

Streamlining Enforcement of Awards

Pursuant to subsection 38(1) of the Arbitration Act, an arbitration award is only recognised as binding and enforceable in Malaysia on an application to the High Court. While this is a relatively straightforward process, it results in additional costs and another opportunity for recalcitrant respondents to delay the enforcement of arbitration awards.

Clause 9 of the Amendment Bill proposes shortcutting this process by providing that all arbitration awards are automatically recognised as binding without requiring an application to court. However, as the Amendment Bill provides that an award "upon an application in writing to the High Court, shall be enforced", a written application to Court would still be required for its enforcement. This is consonant with Order 69 Rule 8(7) of the Rules of Court 2012, which requires a party seeking to enforce an award to serve a court order granting permission to enforce the award and gives respondents 14 days to set aside an award, during which period the award cannot be enforced.

Introduction of Third Party Funding in Malaysian Arbitration

The Amendment Bill seeks to make several other particular but important amendments to the Arbitration Act, such as the recognition of electronic signatures of awards. However, perhaps the most significant of all the amendments in the Arbitration Bill is the recognition of third-party funding (**TPF**) agreements. This is arguably a leap forward for parties' access to Malaysian arbitration.

In Malaysia, a stranger to a dispute cannot support, or agree to support the dispute, including by funding it. This is the tort of maintenance, that is, a stranger

to a dispute “*maintaining*” one or both of the parties to the dispute. It is also unlawful for a stranger to agree to support litigation in exchange for a share in the proceeds of that litigation. These agreements are “champertous agreements”, and a person who enters into such an agreement commits the tort of champerty.

The torts of maintenance and champerty apply equally to litigation before the Malaysian courts and in arbitration disputes in Malaysia. These torts were introduced to resolve ancient concerns of rich and powerful individuals, often nobles, abusing the court’s process by laying claim to property and bullying away rightful legal owners by financing litigation through surrogates in court.

Courts in other jurisdictions have recognised that these concerns have at least abated if not disappeared entirely. The English courts have said that the concerns which champerty and maintenance are designed to address “may be exaggerated” (Re Trepca Mines Ltd (No 2) [1963] Ch 199). India has long not even recognised these torts – see, for example, Bar Council of India v. A.K. Balaji and Ors [2018] 5 SCC 379, which specifically relates to TPF agreements.

Third party funding is now permitted in arbitration in multiple jurisdictions, and in India has been permitted in arbitration and litigation before the Indian courts (*AK Balaji*). The Amendment Bill brings Malaysia into the company of these jurisdictions by expressly providing that the torts of champerty and maintenance do not apply to arbitration disputes and arbitration-related court proceedings.

TPF is the funding by a third-party funder of part or all of a party’s costs of an arbitration in exchange for receiving a financial benefit if that party is successful in the arbitration. A third-party funder is a person who is party to a TPF agreement who does not have a recognised interest in the arbitration of the funded party.

With the introduction of TPF in the Arbitration Bill, a claimant or group of claimants can enter into a TPF agreement with a third-party funder, under which the third party funder agrees to bear some or all of the up-front costs of the arbitration claim, in exchange

for receiving a financial benefit if the claimant(s) are successful.

This has several benefits for claimants, particularly claimants with limited resources or who are seeking to defer or spread the risk of arbitration proceedings:

- TPF agreements can have the effect of outsourcing the costs of litigation to a third party funder, enabling the funded party to reallocate those resources towards revenue generation.
- TPF agreements can also operate in this way to mitigate financial inequality between parties, or enable groups of individual claimants to bring a claim which they would otherwise struggle to finance by deferring their costs.

However, there are important considerations for any party contemplating a TPF agreement:

- Once the Amendment Bill is passed, TPF agreements will only apply to arbitration agreements. They are impermissible in litigation before the Malaysian courts which is not arbitration related.
- The Amendment Bill imposes disclosure obligations on a party who has entered into a TPF agreement. A funded party must disclose or communicate to the other party to the arbitration and to the arbitral tribunal or the court before which arbitration-related proceedings are brought, both the existence of the TPF agreement and the name of the third party funder named in the TPF agreement. This is an important protection to ensure that third party funders are transparently involved in disputes.

To encourage TPF agreements in the face of these regulations, the Amendment Bill contains certain protections for third-party funders. Clause 46D(1) of the Amendment Bill provides that non-compliance with the disclosure obligations or any code of practice (more on this below) does not, in itself, render a third-party funder liable to any action or legal proceedings.

Looking forward, while the Bill will be a substantial step forward in modernising and expanding access to arbitration in Malaysia, it is likely that more regulation will be required. The Bill itself contemplates this by providing that the Minister responsible for arbitration regulation in Malaysia may issue a code of practice

setting out the practices and standards relating to TPF.

There is no firm indication of what that code of practice will include. However, it is likely that it will include features from other regulatory regimes. Examples will likely include:

- Imposing criteria on who may be a third-party funder. For example, section 4 of the Singapore Civil Law (Third-Party Funding) Regulations 2017 provides that a third-party funder must have a minimum paid-up share capital.
- TPF agreements often provide that, in exchange for bearing the up-front costs of an arbitration dispute, a third-party funder has a certain degree of control over the proceedings, which can extend to choosing which lawyers to engage and how the dispute is managed. It is possible that regulations will be introduced to control the extent to which a third-party funder may influence the proceedings or the funded party's legal representatives. Paragraph 2.9 of Hong Kong's Code of Practice for Third Party Funding of Arbitration 2018 (Hong Kong Code) contains provisions to this effect.
- Requiring third-party funders to manage any potential conflicts of interest. For example, paragraph 2.6 of the Hong Kong Code provides that a third-party funder must for the duration of the TPF agreement, maintain effective procedures for managing any conflict of interest that may arise in relation to the TPF agreement.
- Requiring third-party funders to make certain disclosures to funded parties, such as making funded parties aware that they have the right to seek independent legal advice on TPF agreements and requiring TPF agreements to clearly explain all the features of the TPF agreement. An example of such regulation is paragraph 2.3 of the Hong Kong Code. This is particularly relevant to a claimant who might not be able to afford to engage a lawyer at all without the assistance of a TPF agreement.
- While primarily relevant to practicing lawyers, it is likely that the laws and regulations applicable to legal practitioners will need to be updated to ensure that lawyers do not fall foul of the laws against champerty and maintenance.

Summary

While there is still further legislation and regulation which will likely be required, the Arbitration Bill represents a substantial step forward towards opening and modernising arbitration in Malaysia. With respect to the governance of the AIAC, the Malaysian government has taken important steps to reinforce the integrity of the governance of the AIAC and the appointment of arbitrators, mediators, and adjudicators.

The introduction of TPF has the potential to open the doors to arbitration to claimants who might not previously have been able to afford arbitration, and to give corporate claimants an option to defer or spread the risk of expensive arbitration disputes.

Nevertheless, it is likely that further regulations are on the horizon and there are regulatory pitfalls for parties seeking TPF even in mature TPF markets like the UK (see, for example, *Regina (PACCAR Inc and others) v Competition Appeal Tribunal & Ors* [2023] UKSC 28). Any party contemplating a TPF agreement should always seek legal advice on whether and when TPF agreements are appropriate and the applicable law and regulations.

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DATO' AZIZAN BIN ABD RAHMAN & ORS V CONCRETE PARADE SDN BHD & ORS: SHAREHOLDER RIGHTS AND CORPORATE GOVERNANCE UNDER THE COMPANIES ACT 2016

by Grace Lim & Shera Chuah

The balance between the pursuit of lawful entrepreneurial goals by the management of a company, by raising capital through the issuance of new shares, as against the pre-emptive rights of shareholders, is a legitimate concern in company law.²¹ Whilst a statutory requirement to grant existing shareholders pre-emptive right to purchase new shares could safeguard their interests, it may hinder the company's ability to raise capital efficiently, potentially resulting in missed opportunities in favorable market conditions.

In order to achieve an equilibrium between these legitimate competing concerns, the law must strike a delicate balance between the protection of existing shareholders, on the one hand, and the ability of the company to pursue its optimal financial goals, on the other²².

In the Federal Court's case of **Dato' Azizan bin Abd Rahman & Ors v Concrete Parade Sdn Bhd & Ors and other appeals** [2024] 3 MLJ 223, the Court carefully balanced shareholder rights and corporate autonomy while providing clarification on the requirements under Section 85 (pre-emptive rights to new shares) and Section 223 (shareholder approval for substantial acquisitions or disposals) of the Companies Act (CA) 2016.

Background

Concrete Parade Sdn Bhd (**Concrete Parade**), filed an originating summons (**OS**) in the High Court under Section 346 of the CA 2016 against amongst others Apex Equity Holdings Bhd (**Apex Equity**). The complaint of oppression and unfair discrimination emanated from two sets of transactions: firstly, the share buy-back transactions that had been conducted by Apex Equity between 2005 and 2017; and secondly, the proposed acquisition by Apex Equity of a stockbroking company, Mercury Securities Sdn Bhd (**Mercury**) and proposed merger of Mercury's business with that of Apex Equity's wholly-owned subsidiary, JF Apex Securities Bhd (JF Apex).

²¹ *Dato' Azizan bin Abd Rahman & Ors v Concrete Parade Sdn Bhd & Ors and other appeals* [2024] 3 MLJ 223.

²² *Ibid.*

In the second transaction, Apex Equity and JF Apex entered into a business merger agreement (**BMA**) with Mercury on 18 December 2018. Under the BMA, Mercury was to transfer its stockbroking business to JF Apex, and the consideration for this business transfer is as follows:

- RM48 million to be paid in cash, which is to be funded by the proceeds of a private placement of new shares to be issued and allotted by Apex Equity;
- RM92 million to be satisfied by the issuance of new shares in Apex Equity to Mercury.

In addition to the BMA, the relevant parties executed a heads of agreement (HOA) and eight subscription agreements for the private placements (Subscription Agreements), but all of these transaction documents were conditional upon the fulfillment of various conditions, including getting the approval of Apex Equity's shareholders on the proposed merger and the private placement.

The majority of the shareholders approved a resolution favouring the proposed merger and private placement at two extraordinary general meetings of the company. However, Concrete Parade filed the OS seeking to (a) render the share buy-back transactions a nullity and set aside the validation order and (b) invalidate the HOA, the BMA and the Subscription Agreements, for amongst others the reasons set out below:

- (a) the majority shareholders' approval for the proposed merger and private placement to proceed as planned had denied it of its pre-emptive right under s 85(1) of the CA 2016 to purchase the new shares that were proposed to be issued. Section 85 of the CA 2016 reads as follows:

“85. Pre-emptive rights to new shares

(1) Subject to the constitution, where a company issues shares which rank equally to existing shares as to voting or distribution rights, those shares shall first be offered to the holders of existing shares in a manner which would, if the offer were accepted, maintain the relative voting and distribution rights of those shareholders.”

- (b) the shareholder approval to the merger exercise had not been obtained in the manner stipulated in s 223 of the CA. Section 223 of the CA 2016 reads as follows:

“223. Approval of company required for disposal by directors of company's undertaking or property

(1) Notwithstanding anything in the constitution, the directors shall not enter or carry into effect any arrangement or transaction for—

- the acquisition of an undertaking or property of a substantial value; or

(b) the disposal of a substantial portion of the company's undertaking or property unless —

- (i) *the entering into the arrangement or transaction is made subject to the approval of the company by way of a resolution; or*
- (ii) *the carrying into effect of the arrangement or transaction has been approved by the company by way of a resolution."*

High Court

The High Court dismissed Concrete Parade's OS after holding that Sections 85 and 223 of the CA had not been breached and amongst others, that the proposed merger and private placement had been duly approved by the majority of the shareholders at a general meeting, on the following grounds:

(a) in respect of the share buy-back transaction: The High Court judge conceded that Concrete Parade may have been deprived of an opportunity to raise objections at the validation proceedings. However, the High Court reasoned that none of Concrete Parade's rights as shareholder of Apex Equity was materially prejudiced. Accordingly there was no basis to claim oppression under this head;

(b) in respect of alleged contravention of the pre-emptive rights of the shareholders of Apex Equity (Section 85 of the CA 2016): the High Court found that there was no contravention of Concrete Parade's rights of pre-emption as the proposed private placement had been approved by the shareholders of Apex Equity at an extraordinary general meeting. The High Court further held that it was not necessary for the circular to the shareholders of Apex Equity to expressly specify that approving the proposed acquisition of Mercury's business would amount to a waiver of the shareholders' right of pre-emption, because any reasonable incumbent shareholder would have understood that a private placement must necessarily have the effect of diluting that shareholder's interest in Apex Equity; and

(b) in respect of the alleged contravention of Section 223 of the CA 2016: an arrangement or transaction is only subject to shareholders' approval if it has the effect of creating enforceable obligations on a company to either acquire an asset of substantial value or to dispose a substantial portion of its assets. On the facts of the present case, even though the heads of agreement was expressed to be legally binding, it did not have the effect of committing the parties to the sale and purchase of the business, and was thus not subject to the requirement for shareholders' approval under Section 223(1) of the CA 2016.

Court of Appeal

On appeal, the Court of Appeal (COA) set aside the High Court's order and held that it was mandatory under Section 85(1) of the CA 2016 that any new shares issued under the proposed merger and private placement must first be offered for sale to the existing shareholders of Apex Equity and that the mere fact that the majority shareholders had voted on a resolution in favour of the proposed merger

and private placement did not in itself mean that they had relinquished their s 85(1) pre-emptive rights.

The COA also held that sub-clause (i) and (ii) of s 223(1)(b) of the CA — which were separated by the word ‘or’ — must be read conjunctively so that shareholder approval was sought not only when the initial decision to enter into the proposed merger was taken but also when the proposed merger was ready to be implemented or ‘carried into effect’.

Federal Court

The case was subsequently appealed to the Federal Court, where the Federal Court considered the following issues:

Key Legal Issues

- **Waiver of Pre-Emptive Rights (Section 85 (1) of the CA 2016)**

Pre-emptive rights are a statutory right accorded to existing shareholders by virtue of Section 85 (1) of the CA 2016, subject to the provisions outlined in the company’s constitution. It protects existing shareholders from the dilution of their ownership by granting them the opportunity to purchase new shares before they are offered to outsiders. Concrete Parade argued that the private placement had circumvented their right to preserve their proportional ownership in the company. The key issue before the Federal Court was whether the majority shareholders, by approving the private placement, could effectively waive the pre-emptive rights of all shareholders.

- **Proposed Merger (Section 223 of the CA 2016)**

Section 223 of the CA 2016 requires that certain transactions involving a company’s assets, must receive shareholder approval, either by a simple majority or, in some cases, a special resolution. Concrete Parade alleged that Apex Equity had failed to comply with this provision, particularly regarding how the approval was sought and obtained. This raised the issue on whether the process followed by Apex Equity met the statutory requirements for shareholder approval.

- **Share Buy-Back Transactions (Sections 123, 127, and 582 of CA 2016)**

Concrete Parade claimed that the share buy-back transactions, along with the issuance of new shares vide the private placement, were intended to dilute the minority shareholders’ stake in the company, thereby reducing their influence and value of their shareholding. They presented these transactions as evidence of oppression under Section 346 of the CA 2016, contending that the actions of the majority shareholders constituted oppressive conduct that unfairly prejudiced the interests of the minority shareholders.

- **Oppression (Section 346 of the CA 2016)**

Section 346 of the CA 2016 provides a remedy for shareholders who believe that the company's affairs are being conducted in a manner oppressive to them or in a way that disregards their interests. Concrete Parade argued that the private placement and the process by which shareholder approval was obtained were oppressive. The question before the Federal Court was whether the actions of the majority shareholders in Apex Equity constituted oppression under Section 346 of the CA 2016.

Decision of the Federal Court

The Federal Court unanimously allowed the appeal, overturning the Court of Appeal's²³ decision and reinstating the High Court's²⁴ ruling, for *inter alia* the following reasons:

- **Waiver of Pre-Emptive Rights (Section 85 (1) of the CA 2016)**

The Federal Court found that the "COA" had incorrectly interpreted Section 85 (1) of the CA 2016 in conjunction with Article 11 of Apex Equity's Articles of Association ("AA"). The COA's interpretation incorrectly imposes a mandatory duty and/or obligation on Apex Equity to offer any proposed issuance of new shares to existing shareholders before considering a private placement.

Article 11 of Apex Equity's AA reads as follows:

"Subject to any direction to the contrary that may be given by the Company in general meeting, all new shares or other convertible securities shall be offered to such persons as at the date of the offer are entitled to receive notices from the Company of general meetings in proportion, as nearly as the circumstances admit, to the amount of the existing shares to which they are entitled ..."

The CA 2016 does not impose an absolute mandatory pre-emptive right on shareholders for the issuance of new shares as Section 85 (1) of the CA 2016 specifies that it is "subject to the company's constitution". The enforcement of pre-emptive rights is therefore, governed by the company's AA (or constitution), as well as any agreements among shareholders or members.

The Federal Court further clarified that shareholders have the option to waive their pre-emptive rights to the proposed issuance of the new shares. This waiver can be made through a vote on the proposed resolution at a general meeting, as outlined in Article 11 of Apex Equity's AA. Shareholders can choose to assert their pre-emptive rights by voting against the resolution for the proposed merger and private placement. Conversely, by voting in favour of the resolution, the shareholders effectively waive their right to purchase shares from the private placement.

The COA failed to recognise that by approving the proposed merger and private placement, the majority shareholders either knew, or should have known that

²³ see *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2021] 9 CLJ 849

²⁴ see *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2020] 6 CLJ 684.

their approval would result in the dilution of their shareholding, thus waiving their pre-emptive rights.

- **Proposed Merger (Section 223 of the CA 2016)**

The Federal Court ruled that Section 223(1)(b)(i) and Section 223(1)(b)(ii) of the CA 2016 should be read disjunctively, disagreeing with the COA's interpretation that required these provisions to be read conjunctively.

The COA's interpretation required compliance with both sub-sections for any proposed corporate transaction. This would require shareholders to approve the transaction twice— first before entering into the proposed transaction and second, at the time of the actual transfer of the shares and consideration exchange, including for private placement.

The Federal Court found the COA's interpretation to be an unreasonable construction of Section 223 (1) of the CA 2016 and contrary to commercial sense. Requiring shareholder approvals at different stages of the same transaction could impede corporate transactions and potentially lead to the abandonment of such transactions.

Moreover, it was held that the COA had erred in concluding that the proposed merger would 'unfairly prejudice' Concrete Parade by diminishing the value of its investments in Apex Equity, and that the COA failed to account the fact that the majority of shareholders had approved the merger at the general meeting. Section 346, or the cry of oppression, could not be utilised in an attempt to circumvent a situation where majority rule prevailed bona fide, as was the case here.

- **Share Buy-Back Transactions (Sections 123, 127, and 582 of CA 2016)**

The Federal Court addressed the legality and propriety of the share buy-back transactions executed by Apex Equity and concluded that, when conducted in accordance with the law and with shareholders' consent, such transactions do not inherently constitute oppression.

It is evident that Section 127 of the CA 2016 explicitly permits such share buy-back transactions by public listed companies, provided that the requirements under Sections 127(2) (a), (b) and (c) are complied with. However, the key issue was whether the share buy-back transactions in question, which were alleged to be ultra vires the company's constitution, were indeed illegal.

Section 127 of the CA 2016 primarily addresses offences related to the purchase of its own shares by a public listed company where:

- the company is insolvent;
- the purchase is not conducted through the stock exchange (although there are further exceptions in the section); and
- where such purchases are not made in good faith or in the best interests of the company.

Therefore, it would be difficult to conclude with any degree of certainty that the fact of the share buy-back transactions being ultra vires is, in itself, an illegality. The fact that the said transactions being ultra vires Apex Equity's constitution does not automatically render them illegal.

Furthermore, Concrete Parade also failed to establish how the ultra vires nature of the share buy-back transactions unfairly prejudiced it as a minority shareholder. The Federal Court held that, since all shareholders of Apex Equity were equally affected by these transactions, Concrete Parade was not subjected to any undue prejudice or discrimination compared to the other shareholders. As a result, the transactions could not be considered oppressive under Section 346 of the CA 2016.

- **Oppression (Section 346 of the CA 2016)**

The Federal Court ruled that Concrete Parade's claim of oppression under Section 346 of the CA 2016 was an abuse of the provision. The grievance centred on the decisions made by the majority shareholders in approving the proposed merger and private placement. The Federal Court held that, based on the principle of majority rule, there were no grounds for an oppression action. Concrete Parade did not adequately demonstrate that it suffered unfair prejudice as a minority shareholder due to the proposed merger and alleged contraventions, any more than other shareholders did.

The Federal Court concluded that Concrete Parade failed to meet the high threshold required to prove oppression. This is particularly evident given the proper procedures for shareholder approval and the lack of evidence showing that Concrete Parade experienced any disproportionate harm compared to the other shareholders.

Analysis

The Federal Court's decision in ***Dato' Azizan bin Abd Rahman & Ors v Concrete Parade Sdn Bhd & Ors*** [2024] 3 MLJ 223 has significant implications for corporate governance, particularly in relation to the rights of minority shareholders and the interpretation of key provisions under the Companies Act 2016 in Malaysia.

The case reaffirms the principle of majority rule in corporate decision-making. It establishes that decisions by majority shareholders, even if it does not align with the interests of minority shareholders, will generally be upheld by the courts, as long as they comply with the legal parameters set by the law and the company's constitution. This highlights the predominance of majority power in directing corporate actions, including mergers, acquisitions, and the issuance of new shares.

Furthermore, the decision also brings to light the importance of transparency and communication between companies and shareholders, especially regarding transactions that might dilute existing ownership stakes. Although the majority holds ultimate decision-making authority, it is essential that the minority

shareholders are given a fair opportunity to participate in the process, ensuring their rights are considered and that decisions reflect all shareholders' interests.

While the case reinforces the power of the majority, it reveals the limitations of minority protections under Malaysian corporate law. Minority shareholders may need to be more vigilant in safeguarding their rights and possibly advocating for stronger protections in the company's constitution or in law. The ruling may prompt minority shareholders to seek more explicit protections in shareholder agreements or to push for amendments to the Companies Act 2016 to provide greater safeguards against potential abuses by the majority shareholders.

Conclusion

In conclusion, the Federal Court case provides significant clarity on the limits of minority rights and the scope of majority power within corporate governance in Malaysia. It emphasises the need for clear legal frameworks and strong corporate governance practices to balance the interests of all shareholders effectively.

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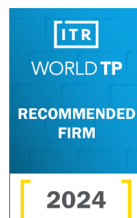
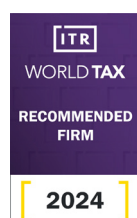
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