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NON-DISCLOSURE OF MEDICAL RECORDS - AN AGGRAVATING FACTOR?

by Nur Syafinaz Vani

In *Nur Syarafina Sa'ari v Kerajaan Malaysia & Ors [2019] 9 CLJ 246*, the High Court held that the suppression of medical records and internal inquiry report coupled with the failure to comply with a consent judgment on production of the same constituted a conduct which fell way below the standards expected of a government hospital and physicians. As a result, the High Court went on to hold that such conduct is an aggravating factor which justifies the court to award the plaintiff a sum of RM200,000.00 as aggravated damages in addition to special and general damages..

Brief Facts of *Nurul Syarafina*'s Case

The plaintiff in *Nurul Syarafina*'s case filed a pre-action discovery under O. 24 r. 7A of the Rules of Court 2012 against the defendants for discovery of the plaintiff's medical records and the names of the doctors, nurses and medical staff who had attended to the plaintiff at the hospital. A consent judgment was entered between the parties for the defendants to disclose the records to the plaintiff.

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However, the defendants failed to comply with the consent judgment despite repeated reminders by the plaintiff. The defendants only produced piecemeal records without the internal inquiry report. In view of the statutory limitation period, the plaintiff proceeded to file a suit for medical negligence against the defendants.

Notwithstanding the findings in the defendants' own internal inquiry report which concluded that the plaintiff's condition stemmed from *"failure in diagnosing third/fourth degree perineal tear at delivery" and "lack of communication between doctor-doctor (inter/intra department) / doctor-patient"*, which at that time have not been disclosed to the plaintiff, the defendants filed a defence denying the plaintiff's claim. The defendants further pleaded that all the procedures and treatments provided to the plaintiff were done professionally in accordance with standard medical procedures.

The aggravating factor in this case is the suppression by the defendant of the plaintiff's medical records and the internal inquiry report in breach of the consent judgment entered by the parties in the pre-action discovery proceedings.

The defendants then finally disclosed the internal inquiry report to the plaintiff while still denying liability. Upon the disclosure of the internal inquiry report, the plaintiff filed an application seeking judgment on admission against the defendants based on the internal inquiry report. At a case management, the High Court was then informed that the defendants have decided to admit liability in respect of the plaintiff's claim for negligence. Thus, a judgment on liability was recorded against the defendants and the matter proceeded with assessment of damages where the plaintiff also seeks compensation in the form of aggravated damages.

In allowing the claim for aggravated damages, the High Court held that the aggravating factor in this case is the suppression by the defendants of the plaintiff's medical records and the internal inquiry report in breach of the consent judgment entered by the parties in the pre-action discovery proceedings.

The High Court held that the defendants' conduct had caused the plaintiff to incur avoidable costs and expenses and time in filing the pre-action discovery, the medical negligence suit itself and the application for judgment on admission thereafter. Additionally, the withholding of information also caused the plaintiff unnecessary distress. In a firm decision, the High Court ruled that the defendants' conduct was well below the standard expected of government hospitals and physicians in that the defendants had :

(i) deliberately ignored the advice given by the High Court to government hospitals and physicians in the case of *Nurul Husna Muhammad Hafiz & Anor v. Kerajaan Malaysia & Ors [2015] 1 CLJ 825*

(ii) deliberately refused to disclose the internal inquiry report and its findings and instead, filed a defence denying negligence; and

(iii) deliberately refused and/or failed to comply with the terms of the consent judgment.

In these circumstances, the High Court decided that it was reasonable and appropriate to award the plaintiff aggravated damages in the sum of RM200,000.

Reliance on *Nurul Husna*'s Case

An interesting point to note is that the essence of the award of aggravated damages by the High Court in *Nurul Syarafina*'s case relied on the earlier decision of the High Court in *Nurul Husna*'s case wherein Vazeer Alam J (as His Lordship then was) held inter alia as follows :

"[21] Based on the legal duties and rights that arise from the physician-patient fiducial relationship, and further having regard to the provisions in the guideline and the common law principles, the legal position in Malaysia vis-à-vis the patient's right of access to medical records can be summarised as follows:

(a) The ownership of a patient's medical record vests with the physician or hospital as the case may be. However, the physician or hospital must deal with the medical records in the best interest of the patient;

(b) The patient has an innominate and qualified right of access to his medical records and there is a corresponding general duty on the part of the physician or hospital to disclose the patient's medical records to the patient, his agents, medical advisers or legal advisers;

(c) The physician or hospital may refuse to disclose partly or wholly the medical records to the patient in certain limited circumstances, such as, but not limited to, situations when such disclosure would be detrimental or prejudicial to the patient's health in that the information is likely to cause serious harm to the physical or mental health of the patient or of any other individual contained in the medical records; or when such disclosure would divulge information relating to or provided by an individual, other than the patient, who could be identified from that information;

(d) When the circumstances giving rise to such qualification for refusal to disclose does not present itself, and when the request for disclosure is reasonable, having regard to all the circumstances, the physician or hospital shall give copies of the medical records to the patient upon payment of reasonable copying charges."

The Effect of *Nurul Husna*'s Case

In the perspective of government hospitals and physicians, it appears that in view of *Nurul Husna*'s case, patients or potential plaintiff need not necessarily obtain a court order to compel production of medical records by the hospitals or physicians. In the absence of any circumstances which gives rise to the need of refusal to produce the records, the hospitals and physicians shall provide the medical records to patients upon payment of reasonable charges.

Following *Nurul Husna*'s case, there is no requirement that the patient first obtains a court order to get access to his medical records. Doctors and hospitals should grant access to patient's medical records unless there were circumstances warranting the withholding of the same for reasons mentioned above.

In the purview of private healthcare regime, this will raise the question of the effect of Regulation 44(2) of the Private Healthcare Facilities and Services (Private Hospital and Other Private Healthcare Facilities) Regulations 2006 ("Regulation 44") which provides as follows :-

"No patient's medical record shall be taken out from the private healthcare facility or service except under a court order and when taken out from the private healthcare facility or service under a court order, a copy of the records shall be retained by the private healthcare facility or service and the original records shall be returned to the private healthcare facility or service at the end of the proceedings for which the records were directed to be procured."

In this regard, the High Court in *Nurul Husna*'s case opined that Regulation 44 does not primarily deal with the patient's right of access to medical records but only concerns the security of the original medical records. The court also was of the view that Regulation 44 does not impose the need of court order for patients to have access to their medical records. Thus, the reliance of private healthcare operators on Regulation 44 to withhold patient's access to medical records unless a court order is obtained by the patient is entirely misconceived.

Following *Nurul Husna*'s case, there is no requirement that the patient first obtains a court order to get access to his medical records. Doctors and hospitals should grant access to patient's medical records unless there were circumstances warranting the withholding of the same for reasons mentioned above.

Does Failure To Provide Medical Record Amount To Aggravating Factor?

While *Nurul Husna*'s case departed from the accepted procedure of the need of a court order to access medical records, *Nurul Syarafina*'s case goes further to award aggravated damages for failure to disclose medical reports without any justification causing unnecessary cost, expenses, delay and distress to the patient or plaintiff.

Whilst *Nurul Syarafina*'s case is an instance where the failure to disclose medical records is coupled with the failure to comply with the consent order for disclosure of the same, one must note the reliance placed by the High Court on *Nurul Husna*'s case which emphasises on the need for hospital and doctors to provide medical records of the patients when requested subject to circumstances warranting the withholding as mentioned above.

Conclusion

It remains to be seen how our courts especially the appellate courts will approach cases of failure to produce medical report as an aggravating factor to grant aggravated damages following the *Nurul Husna*'s case and the *Nur Syarafina*'s case. The present position appears that mere failure to produce medical records alone will not justify the granting of aggravated damages unless the failure is coupled with any other deliberate failure such as a failure to comply with order for production of the medical records.

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THINK BEFORE YOU LIST: FACTORS TO CONSIDER DURING THIS IPO UPTREND

by Lee Zai-Lii (Lily)

While the outbreak of the Covid-19 pandemic has caused stock markets worldwide to take a hiatus or move rather slowly in 2020, 2021 has been, and continues to be a promising year for Malaysian initial public offerings ("**IPO**"). With more than 20 companies being listed on the stock markets of Bursa Malaysia Securities Berhad ("**Bursa Securities**") in the first three quarters of 2021, it is anticipated that many more companies will be listing by end 2021.

Nonetheless, with the ongoing uncertainty of Covid-19 and the varying restrictions imposed by the government from time to time pursuant to the Movement Control Order ("**MCO**"), a key consideration for business owners prior to jumping onto the IPO bandwagon is the overall impact of the pandemic on their companies, which includes, among others:

1. Measures Imposed by Authorities

The measures imposed pursuant to the MCO such as:

(1) Travel distance restrictions;
(2) Restriction on public/private gatherings;
(3) Restriction on inter-state and inter-district travel; and
(4) Closure of premises providing non-essential services,

there is no doubt that the imposition of the MCO to reduce and control the spread of Covid-19 has created numerous obstacles for companies which are planning to undergo listing. Such restrictions will not only cause major disruption to the business operations and adversely affect the financial performance of companies, but also result in a more cumbersome due diligence process to be conducted by the IPO advisers due to reasons below:

Site-Visits

Inspections of the key premises from which a company operates its business must be conducted by the IPO advisers prior to listing and the inspection may require up to a full day or two, depending on the nature and complexity of business and the number of operating premises of the company. Under normal circumstances, the IPO advisers,

namely investment bankers, lawyers, auditors and independent market researchers would travel interstate or even internationally to visit such premises to verify the existence, understand their business operations and ensure their compliance with the relevant laws and regulations.

The travel restrictions imposed to close all international borders as well as the on-and-off restrictions on interstate travelling will impede IPO advisers from conducting site visits on the material properties of the company. As an alternative to physical site visits, the company may have to resort to providing IPO advisers with video recordings or host video conferences for virtual tours of their sites. This, however, is an interim measure to kick start the due diligence process. A physical inspection may still be expected at a later stage prior to submission.

Compliance With All Laws And Regulations

A key objective of the legal due diligence is to ensure that all entities within the group of companies embarking on the listing process comply with all laws and regulations imposed by the regulatory authorities prior to listing. All valid permits, certificates, licences and approvals in relation to their business operations must be in place.

In the course of the due diligence findings, if the company becomes aware that certain permits, certificates, licences and approvals which are required for its business have not been obtained or are due for renewal, companies would typically immediately proceed to apply for them as these are vital requirements prior to submitting their application for listing. In light of travel restrictions, mandatory orders and SOPs imposed, walk-ins and over the counter dealings with officers or site visits and physical investigations will not be feasible for the relevant officers, and therefore considerable delays for the approval process are expected. This may, in turn, affect and result in a deferment of the initial IPO timeline.

To prevent the foreseeable delays in the IPO process, it is advisable for companies to first obtain all relevant permits, certificates, licences and approvals and to ensure their validity at the earliest opportunity possible prior to the commencement of the IPO process. In some instances, companies may opt to have a pre-IPO legal due diligence on their businesses to be certain that all such licences and approvals are in place prior to kick-starting the IPO process.

Inspection of Documents

In the past, companies had the option of having their legal advisers review some of their confidential documents (to confirm the validity of such documents) at their business premises. However, with the restrictions imposed, companies now face the struggle of not being able to have their original and confidential documents inspected on-site. In

1 [2017] 4 MLJ 561

addition to relying on online-accessible servers, companies may opt for their advisers to sign off on non-disclosure agreements to ensure strict confidentiality.

In light of the restrictions imposed by the Government, in particular the travel restrictions, factors to be taken into consideration (depending on the nature of business of the company) would include the following due to Covid-19:

(a) its business operations both locally and overseas;

(b) its workforce; and

(c) its supply chain (such as raw material and inventories level), distribution networks or logistics of its products and services (whether its suppliers and customers are materially affected).

Although companies can choose to upload electronic copies of such documents to virtual data rooms to be reviewed remotely, this option remains a hassle and troublesome for certain companies with voluminous number of documents (e.g. construction company with more than 100 pages of construction contracts).

2. Nature of Business

In light of the restrictions imposed by the Government, in particular the travel restrictions, factors to be taken into consideration (depending on the nature of business of the company) would include the following due to Covid-19:

(a) its business operations both locally and overseas;

(b) its workforce; and

(c) its supply chain (such as raw material and inventories level), distribution networks or logistics of its products and services (whether its suppliers and customers are materially affected).

The financial ability of a company has always been a key consideration before going for IPO. Companies must now give additional thought as to how they can present their business model to the regulators and the public while factoring in all material changes and the impact of Covid-19 to their business. This includes its cash-flows, liquidity, financial position and financial performance. In Bursa Securities' Disclosure Guidance on Covid-19 Related Impacts and Investments[1], when making disclosures to the public on the financial position of the company, the company's (a) cash-flows and liquidity, (b) financial position and (c) financial performance due to the impact of the pandemic should be taken into consideration.

Moreover, while many are gaining a better understanding on the Covid-19 disease and its variants, there is still much uncertainty, especially in Malaysia, as to when the pandemic will come to an end. Companies will have to bear in mind that even after the necessary policies and procedures are introduced and imposed, chances of an employee being infected remains high. The facility or premises where the infected employee works may be required to be closed for a period and the fellow workers quarantined. When this happens, the business of the company will be interrupted and in turn, impact the financial ability of the company. As such, companies should also have in place robust business continuity plans to equip themselves for such eventualities.

1 Issuers Communication (ICN 1/2020) dated 10 June 2020.

3. Virtual Meetings, Roadshows And Ceremonies

In the past, most meetings involving the due diligence working group were conducted with parties being physically present at the company's or advisers' offices. With the travel restrictions imposed and the implementation of various SOP on social distancing, many are not able to attend face-to-face meetings, and even where possible, only a limited number of people are allowed to attend in person. That being said, companies should by now be comfortable in relying solely on technology to host virtual meetings.

It is industry practice for roadshows and book building exercises to be carried out for a period of two weeks. These roadshows are important for companies as series of presentations conducted by the bankers are a form of a sales pitch or promotion made to potential investors in relation to the business of the company prior to its listing. In light of the pandemic, all promotional activities which include meeting with prospective investors in person are now conducted virtually. While this has been a major change, it has been said that many companies as well as their advisers are in favour of the shift to virtual sessions with their prospective investors.[2]

In addition, Bursa Securities has introduced a new virtual listing service as an alternative to physical listing ceremonies. To enable flexibility for new issuers during this period whilst still ensuring that the celebration of a milestone could continue, the first-ever virtual listing ceremony was conducted by Bursa Securities on 15 October 2020.[3]

4. Additional Matters

*Main Market: Preliminary Application Pack ("**PAP**")*

On 21 July 2020, the Securities Commission Malaysia ("**SC**") introduced an enhanced IPO framework where one of its key features is the establishment of a PAP[4]. The PAP is required to be submitted to the SC at least 1 month prior to the submission of the IPO application for companies intending to list on the Main Market of Bursa Securities. In addition, a mandatory pre-submission holistic consultation with the SC would take place approximately 10 market days after the receipt of the PAP as well.

It is intended for the principal advisers to highlight and discuss all material issues and concerns along with the resolution or proposed resolution in relation to the proposed listing of a company in the PAP. In order to identify and provide adequate information on material issues in the PAP, it is vital for the due diligence conducted by the advisers to be substantially completed prior to the submission of the PAP. The preparation of the PAP should be accounted for when planning for the IPO timeline.

ACE Market: Proposed Mandatory Pre-Admission Consultation

Bursa Malaysia Berhad had on 3 August 2021 sought feedback from the public on its

2 https://www.straitstimes.com/business/invest/can-virtual-roadshows-bring-in-the-sales

3 https://www.bursamalaysia.com/about_bursa/media_centre/bursa-malaysia-successfully-conducts-its-first-virtual-listing-ceremony-to-offer-more-flexibilities-for-issuers

4 https://www.sc.com.my/resources/media/media-release/sc-introduces-enhanced-ipo-framework-for-main-market

proposed amendments to the ACE Market Listing Requirements via a consultation paper ("**CP**")[5]. One of its proposed amendments include a mandatory pre-admission consultation with Bursa Securities.

A pre-admission consultation had always been strongly encouraged but was not made mandatory for companies seeking to list on the ACE Market of Bursa Securities. However, the CP proposed for the pre-admission consultation to be made mandatory and carried out by a sponsor together with the applicant and other key advisers. A pre-admission consultation pack ("**PCP**"), which contains prescribed documents or information is required to be prepared for such purpose after due diligence on the applicant has been substantially completed.

It was proposed for the PCP to be submitted at least 1 month prior to the IPO application and if it has not been filed with Bursa Securities within 3 months from the date of submission of the PCP, a new PCP must be submitted. In addition, Bursa Securities has also suggested for a new IPO application to be resubmitted in respect of any application which has not been approved within 6 months. Similar to the PAP, if such amendments are made, the preparation of the PCP should be taken into account when considering the IPO timeline.

Conclusion

In an effort to invigorate the IPO market, SC and Bursa Securities are providing a 12-month waiver on listing-related fees for IPOs (effective from 17 March 2021) which entails a 100% waiver on processing fee for companies submitting application to list on the ACE and LEAP Market of Bursa Securities, and a 50% or 100% waiver on initial listing fee and annual listing fee for companies depending on their market capitalisation[6].

Whilst the incentives provided by the regulators is worth noting, in view of the various impacts the ongoing pandemic have across all industries, companies should particularly consider whether they have sufficient manpower to be allocated to the IPO exercise, whether the company can afford the distraction of an IPO and most importantly, whether the timing is right.

5 https://www.bursamalaysia.com/sites/5bb54be15f36ca0af339077a/assets/61092d4839fba21caf7b090e/CP2of2021_ACEOneStopCentre_.pdf

6 https://www.sc.com.my/resources/media/media-release/sc-and-bursa-malaysia-grant-waiver-for-companies-seeking-to-list

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PROTECTION OF TRADE SECRETS AND CONFIDENTIAL INFORMATION – AGAINST EX-EMPLOYEES, BUSINESS PARTNERS AND THIRD PARTIES

by Kenny Lam Kian Yip

Confidential information forms the foundation for all commercial decisions for all businesses, big or small. It is intangible, valuable, yet difficult to construct, and even harder to protect. This edition of Legal Insight focuses on the essentials of confidential information protection, and pitfalls business owners should be mindful of in carrying their businesses.

Landmark Cases

To understand the essence of confidential information and why it must be protected, one can do no better than quoting the following excerpts from the UK Court of Appeal case of **Saltman Engineering Co Ltd v Campbell Engineering Co Ltd [1963] 3 ALL ER 413**:

"... but what makes it confidential is the fact that the maker of the document has used his brain and thus produced a result which can only be produced by somebody who goes through the same process.

What the defendants did in this case was to dispense in certain material respects with the necessity of going through the process which had been gone through in compiling these drawings, and thereby to save themselves a great deal of labour and calculation and careful draughtsmanship."

One of the earliest landmark cases that defined the landscape for laws concerning the protection of confidential information came in 1968 where the UK High Court case of **Coco v A. N. Clark (Engineers) Ltd. [1969] RPC 41** laid down the basic test to determine an action for breach of confidence.

The case concerns 2 potential business partners where partner A had come up with a moped engine design and he sought the cooperation with partner B for its manufacture.

Unfortunately, after partner A had disclosed all the details of his design and proposals for its manufacture to partner B, talks failed and partner B decided to manufacture their own engine which closely resembled partner A's designs.

Partner A applied for an interlocutory injunction to restrain Partner B from misusing the confidential information disclosed immediately. Eventually, the High Court dismissed Partner A's application because Partner A failed to disclose a prima facie case and the evidence adduced failed to reveal that the similarities between the two engines were achieved by the use of the information, or that Partner B's engine had original qualities which would amount to confidential information.

Nevertheless, the Court went to set the following principles in stone to determine an action for breach of confidence:

a. the information was of a confidential nature;

b. that it was communicated in circumstances importing an obligation of confidence; and

c. that there was an unauthorised use of the information.

Approximately 17 years later in 1985, the UK Court of Appeal case of **Faccenda Chicken Ltd v Fowler and others** [1984] IRLR 61; **Fowler v Faccenda Chicken Ltd** expanded the confidentiality test into employer-employee situations. This is a classical scenario where former employees left their employment to set up a competing business. This is frequent and common in commerce in any part of the world. Their employment contracts did not prohibit them from setting up competing businesses. The employer sued its former employees in the High Court and the High Court ruled in favour of the former employees. The employer appealed to the Court of Appeal.

The issue before the Court of Appeal was whether the information obtained by the former employees during the course of their employment, i.e. sales information, amounts to 'confidential information' that was entitled to the protection of the law.

The Court of Appeal applied the following tests to determine whether the sales information could be regarded as trade secret or 'confidential information' so as to be entitled to protection:

a. whether the information was only handled by a restricted number of employees;

b. the nature of the information itself;

c. whether the employer had stressed the confidentiality of the information to the employee; and

1 499 U.S. 340 (1991)

2 (2012) 287 ALR 403

d. whether the relevant information could easily be isolated from other non-confidential information which was part of the same package of information.

Ultimately, the Court of Appeal decided against the employer and held that the sales information regarding the customers' names and addresses, the general limits of the routes, the quantity and quality of goods sold and the prices charged are not confidential because:

a. the sales information contained some material which the employer conceded was not confidential if looked at in isolation;

b. the information about the prices was not clearly severable from the rest of the sales information;

c. neither the sales information in general, nor the information about the prices in particular, though of some value to a competitor, could reasonably be regarded as plainly secret or sensitive;

d. the sales information, including the information about prices, was necessarily acquired by the former employees in order that they could do their work. Moreover, as the High Court judge observed in the course of his judgment, each salesman could quickly commit the whole of the sales information relating to his own area to memory;

e. the sales information was generally known among the van drivers who were employees, as were the secretaries, at quite junior level. This was not a case where the relevant information was restricted to senior management or to confidential staff; and

f. there was no evidence that the employer had ever given any express instructions that the sales information or the information about prices was to be treated as confidential.

Be that as it may, the Court went on to set out the duty of fidelity owed by employees to their former employers where after ceasing employment, employees could not utilize trade secrets or confidential information equivalent to trade secret obtained during the course of their employment. Failure to abide by such duty would amount to a breach of duty of fidelity.

Nevertheless, the Court went to set the following principles in stone to determine an action for breach of confidence:

a. the information was of a confidential nature;
b. that it was communicated in circumstances importing an obligation of confidence; and
c. that there was an unauthorised use of the information.

Application in Malaysia

Malaysia does not have statutes or written laws in governing the protection of trade secrets or confidential information. In general, the Malaysian courts has followed the general principles set out in the **Coco** case and the **Faccenda Chicken** case. However, Malaysian courts appeared to have taken more strict view of classifying trade secrets or confidential information.

In the High Court case of **Schidmt Scientific Sdn Bhd v Ong Han Suan [1997] 5 MLJ 632**, the Court had expanded the test for determining trade secret and held that regard must be given to the plaintiff's nature of business which dealt in selling specialized equipment to hospitals, research centres, universities and industries throughout Malaysia. Therefore, unlike the *Faccenda Chicken* case, the list of names and addresses of the customers and suppliers, specific questions sent to the customers, costs prices, specific needs and requirements of the customers and status of the ongoing negotiation with the customers would have the necessary quality of confidentiality in light of the plaintiff's nature of trade.

Further, what made it confidential was the compilation of lists of the names and addresses of customers and their budget and the costs and prices of the equipment obtained from the overseas principal/supplier. The defendants had saved themselves the time and trouble of having to go through laborious discussions and negotiations with the customers, the effort put in to compile the list of names and addresses of customers and suppliers and above all the costs and prices which were only available from the overseas principal/supplier, which is consistent with the pronouncement in the *Saltman Engineering* case.

In fact, in the High Court case of **Worldwide Rota Dies Sdn Bhd v Ronald Ong Cheow Joon [2010] 8 MLJ 297**, the Court applied the rule that a list of names of suppliers and customers and the individual contracts of the employers could be trade secrets and confidential information. So could a list of prices negotiated with and quoted to various customers, contents of various agreements, records of sales, requirements of customers.

Even if the information was in fact compiled and recorded by the former employees when they were employed by the company, they were still the property of the employers. Thus, whether information is considered as a trade secret / confidential information must necessarily be determined in accordance with the facts of each case.

Exceptions

There are 3 exceptions to the broad principles of breach of confidence as recognized in the **Worldwide Rota Dies** case:

a. the information is already in the public domain;

b. the information is trivial; and

c. there is a countervailing public interest which favours disclosure.

Whilst the first and second exceptions are quite straightforward and speak for themselves, the third exception is difficult to be applied and often, controversial.

Therefore, it is crucial that business owners recognize that their trade secrets could be accorded protection on their and take active steps must be taken to ensure that confidential information are managed properly to achieve legal protection.

The 3rd exception was considered and applied in the High Court case of **Toh See Wei v Teddric Jon Mohr & Anor [2017] 11 MLJ 67**. The information concerns the plaintiff's emails which contains information of suspected misconducts of wrongdoings of the plaintiff against the Penang Adventist Hospital (PAH) by exposing/ sharing the information to third parties outside the hospital; lowering and putting into disrepute the position of the President/Chief Executive officer by conspiring with people within and outside PAH with the intention to take over the administration of the PAH from the President/Chief Executive officer and spreading malicious information about the administration of PAH and it's President/Chief Executive Officer.

The Court found that the defendants had shown a compelling public interest justifying its disclosure to the board of trustees and used in court proceeding, and therefore it is in the public interest that the contents of the email be made known.

Further, the Court of Appeal case of **Ng Kim Fong v Menang Corporation (M) Berhad [2020] MLJU 644** had clarified the exception further by holding that the defence of public interest would involve, as an example, the disclosure of evidence concerning the commission of criminal offences and other serious unlawful/antisocial conduct, e.g. tax evasion.

Managing Trade Secrets / Confidential Information

Based on the above cases, it appears that the protection business information as trade secret or 'confidential information' is not straightforward. There are many business owners who seem to be lulled into a false sense of security by assuming business information and confidential information are, one and the same.

Therefore, it is crucial that business owners recognize that their trade secrets could be accorded protection on their and take active steps must be taken to ensure that confidential information are managed properly to achieve legal protection.

The following steps, which by no means exhaustive, may be considered as good practices to be taken by business owners to protect their trade secret / confidential information:

a. Include confidentiality clauses in employment contracts and correspondences to 3rd parties, especially in respect of communications of sensitive nature;

b. Apply proper confidentiality labels and classifications to all information within the organization;

c. Limit access of confidential information to a limited number of designated personnel only;

d. Invest in secured storage for trade secrets / confidential information and engage qualified professionals in managing the same;

e. In the event of departure of employees, proper diligence exercise should be conducted onto the employee during his/her notice period. This includes checking the employees' access, removal, duplication, and/or transfer of confidential information during his course of employment; and

f. When leakage of confidential information is detected:

   i. Inform IT personnel to take measures to limit and restrict outgoing communication in respect of confidential information;

   ii. Locate the source of leakage and destination of the information transfer, and capture the same as evidence;

   iii. Consult a lawyer immediately and to consider injunctive measures if necessary.

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THE PROPOSED RESIDENTIAL TENANCY ACT - AN ALL ENCOMPASSING ACT TO REGULATE LANDLORDS AND TENANTS IN MALAYSIA

by Venetia Wong

The Government had since the Budget 2018 proposed for the enactment of the Residential Tenancy Act to be implemented within two years, and even more so recently announced in January 30th 2021 by the then Housing and Local Government (KPKT), Minister Zuraida Kamaruddin that a new Residential Tenancy Act ("the Proposed Act") which was originally slated to be tabled this year, is expected to be tabled in Parliament in the first quarter of 2022 to have a distinct statutory framework to regulate and protect the relationship between tenants and owners.

What is this Residential Tenancy Act?

Malaysia, unlike other jurisdictions such as Australia, United Kingdom, New Zealand, and Canada, does not have specific legislation that governs the area of leases, tenancies, and the relationship between landlord and tenant.

Malaysia, unlike other jurisdictions such as Australia, United Kingdom, New Zealand, and Canada, does not have specific legislation that governs the area of leases, tenancies, and the relationship between landlord and tenant.

The earliest law in Malaysia on landlord and tenant and any other matters related to rent, the Rent Control Act 1966, was inherited from England to protect a tenant from eviction. The Act was however later repealed and abolished in 2000.

The law on tenancies in Malaysia are mainly governed by the law of contracts and common law and scattered in various legislations such as the National Land Code 1965 ("NLC"), Distress Act 1951 ("DA"), Civil Law Act 1956 ("CLA") and Specific Relief Act 1950 ("SRA"), albeit these legislations deal with specific issues on tenancies only on a piecemeal basis that leaves more room of ambiguities and uncertainties.

In this article, we will focus on the legal issues in a landlord and tenant relationship, examine the inadequacies of the existing legal framework with reported cases, and why the need for specific legislation in Malaysia with comparisons to the practices of other jurisdictions.

Why Do We Need a Residential Tenancy Act?

All tenancy agreements are well understood to be a contract between two parties: the landlord and the tenant. It contains all elements that are necessary to exist in formatting a valid contract as governed under the Contracts Act 1950.

A standard tenancy agreement should cover the basics such as the length of the tenancy, monthly rental amount, deposits, termination, renewal, repairs, the tenant's and landlord's covenants, rights, and obligations.

Stemming from the principle of freedom of contract, it may create a problem when the parties are not equal in bargaining power in terms of negotiating certain terms and conditions of the tenancy agreement, *ie*. a tenant in desperate need of renting a place would agree on any conditions imposed by a landlord even if it is unreasonable.

Imbalance in Bargaining Power

Stemming from the principle of freedom of contract, it may create a problem when the parties are not equal in bargaining power in terms of negotiating certain terms and conditions of the tenancy agreement, *ie*. a tenant in desperate need of renting a place would agree on any conditions imposed by a landlord even if it is unreasonable.

Without a specific law, issues on security, rental deposit, quality, and safety of the rented house, eviction, termination, and dispute settlement mechanisms will continue to pose as a problem to most landlords and tenants which will be discussed further.

1) No standard Terms and Conditions

Unlike the Housing Development Acts that govern Sale and Purchase Agreements with a statutorily prescribed form such as Schedule G, Schedule H, etc, tenancy agreements are left in the realm of contract law under the principle of freedom contract.

In the United Kingdom and Australia, there are specific legislations and a model tenancy agreement provided that incorporates most of the standard terms and conditions to ensure ample protection to both the landlord and tenant.

By having a standard form, all tenancy agreements will be uniform leaving no room for ambiguity that will potentially cause disputes and injustice. It also prevents parties from adding any additional unfair terms into the tenancy agreement which would be void, if added.

Taking reference from Scotland, the duties of the landlord and the tenants are listed in detail under the Housing (Scotland) Act 2006 whereby the landlord has a duty to provide a habitable and tenantable property, and similarly, the tenant must not make a false or fraudulent representation to rent the premises. The Proposed Act could perhaps provide a standard body and a clear stipulation of rights whereby any agreement that is not made under the Act will be subject to strict penalties.

Unlike the Housing Development Acts that govern Sale and Purchase Agreements with a statutorily prescribed form such as Schedule G, Schedule H, etc, tenancy agreements are left in the realm of contract law under the principle of freedom contract.

2) No Requirement for Registration

A tenancy agreement is any tenancy or sub-tenancy for a term not exceeding three years under Section 213 of the NLC and is also known as Tenancy Exempt from Registration ("TER") in which the law exempts the tenancy from being registered. Under the NLC, the law does not require the tenancy agreement to be a written contract, it may be an oral agreement or a handshake between the parties. Therefore, parties may potentially face even more difficulties in enforcing their rights and obligations where the tenancy agreement is concluded orally or is vaguely and poorly drafted.

Moreover, there is no requirement for a TER to be registered as well, which explains the meaning behind "Tenancy Exempt from Registration". However, for any person who wishes to enforce or protect their rights under the tenancy agreement, an endorsement must be made on the issue document of title as provided under Section 316 of the NLC.

It is however very common that a tenancy agreement in Malaysia is not registered or officially endorsed as it is based on mutual trust and consent. However, a non-endorsement or a non-registration will be a potential obstacle for parties to enforce their rights and that makes the parties' only recourse to protection under common law or contract law.

3) Recovery of rental arrears

Without specific legislation, the Landlord may recover the unpaid rent by way of a Writ of Distress under the Distress Act 1951, where the movable properties of the tenant shall be seized and sold to cover the rental arrears.[1]

This is the most common recourse sought by the landlord as this can be made *ex-parte (the landlord can alone go to court without the Tenant)*. The landlord only must serve a notice of demand before applying for the Writ of Distress.

However, this action is not automatic and does not terminate the tenancy and the tenant *may continue* to occupy the premises. Therefore, the landlord may not have an

1 *Section 5 of the Distress Act 1951*

effective recourse, and he may need to repeatedly get another writ of distress every time the tenant defaults.

In addition to the Writ of Distress, a landlord can also rely on Section 28(4)(a) of the Civil Law Act 1956 to charge double rent for the period the tenant holds over the premises after the expiration of the tenancy.

Under the Housing Act 1988 in the UK, a Notice to Quit (otherwise known as the Section 8 Notice) provides a straightforward procedure whereby the notice is served to a tenant who has breached the contract and therefore the landlord has grounds for possession. The most common ground for eviction is rent arrears whereby the landlord can at any time serve the notice to the tenant, depending on the rental arrangements. If the rent is to be paid monthly, the tenant must be at least 2 months in arrears. There is always a hearing in section 8 proceedings and no special court or tribunal is required for this purpose.

4) Eviction of Tenant

Similarly, if the tenant continues to default for some time, the landlord will face a problem of evicting a tenant who refuses to vacate the premises when the tenancy expires as under Malaysian law, the landlord is prohibited from evicting the tenant and/or recover possession without a court order, as stated in Section 7(2) of the Specific Relief Act 1950.

The landlord can obtain a Writ of Possession to evict the defaulting tenant. First, the landlord must initiate a proceeding to seek a declaratory order to terminate the tenancy agreement. Only after the order is successfully obtained, the landlord can with the Writ of Possession direct the court's bailiff or sheriff to enter the premises by using such force as may be necessary and to repossess the rented premises.

This approach is quite time-consuming and sometimes costly where the costs spent may not be in proportion to the rental arrears, a stark contrast with the UK and Australia where there is a summary procedure to enable a smooth and straightforward process for an eviction order.

Under Section 21 of the Housing Act 1988, a landlord in the UK can serve a Notice of Possession at the end of the tenancy where the tenant cannot defend against this action. If the application is valid, possession must be granted, and the tenant will be ordered to leave. However, the landlord can only serve this Notice at the end of the tenancy. This procedure is time and cost-efficient as it is mandatory, and the landlord does not have to give any reason for serving the notice to regain possession.

5) No Regulation And Control of Deposits

Under the tenancy agreement, it is a norm where deposits are required to be paid by a tenant to a landlord: security deposit, utilities deposit, and sometimes, an earnest

deposit. Both the security and utilities deposit act as a remedy for the landlord to set off any arrears in payment or to repair any damage to the premises caused by the tenant. A security deposit is usually the amount equal to two months' rent and a utilities deposit is equal to one month's rent. Another type of deposit is the earnest deposit. This deposit is paid by a tenant to secure the said property that in practice considered by the landlord as the advance rental for the first month.

Upon termination of the tenancy, the landlord will refund both the security and utilities deposit to the tenant after deducting any costs, expenses, and charges to be paid by the tenant under the agreement. Even if it is a norm, there are no statutory controls or by-laws over the regulation and control of the purpose and use of such deposits. For instance, some tenants would circumvent this by utilising the deposits as payment for the last 2 months of the tenancy and vacate the premises without notifying the landlord, thereby defeating the purpose of having a deposit in the first place! On the other hand, some landlords refuse or forfeit the deposits to the tenant without any legal basis too.

In the UK, The Tenant Fees Act 2019 caps the refundable tenancy deposit charged by landlords and letting agents at no more than 5 weeks' rent. Under their Model Tenancy Agreement, it is recommended to include a list of "Fair, wear and tear" properties which means that the landlord cannot withhold money from the deposit or seek money from the tenant to compensate for 'fair wear and tear' to the property.

6) No Specific Dispute Resolution Mechanism

Grievances are not uncommon between the landlord and tenant, and those who have a problem from their tenancy can refer or lodge a complaint to the Federation of Malaysia Consumer Association (commonly known as FOMCA) before pursuing the case before a court.

However, consumer associations are not akin to courts, and the only legal recourse is to ordinary civil courts since there is no specific court or tribunal or any alternate dispute resolution mechanism for matters relating to landlord and tenant. This can be both costly and time-consuming and sometimes rental arrears or deposits owing may be less than the legal fees incurred under disputes for such claims!

If the law is going to be passed, it is necessary to protect the interests and regulate tenancy practices of both landlords and tenants alike. The Proposed Act should provide a quasi-court system in the form of a Tenancy Tribunal akin to the Strata Management Tribunal in trivial disputes as an alternative dispute resolution to the current courts of law.

In New Zealand, a special tribunal is in place for the landlord and tenant as an alternative dispute resolution avenue before the dispute is even brought before trial. Likewise in Australia, the landlord and tenant issues falling within the consumer protection law and the dispute may be resolved by the Consumer Trading and Tenancy Tribunal.

7) Rent increase control

By having specific legislation, tenants are protected from landlords who arbitrarily increase rent without notice by imposing penalties.

A contention that Parliament might face is that whether the government should interfere with the rental amount for a tenancy agreement. As discussed earlier, a tenancy agreement is a contract formed between two parties based on a mutual understanding. By determining a certain rental amount, there is a risk where the people might have a negative reaction that the government is interfering with the concept of a free market.

In Australia, tenants in New South Wales and Victoria may apply to a Tribunal to review the rent payable if they think that the rental increase is excessive. Both the Acts in New South Wales and Victoria prohibit the landlords from arbitrarily increasing the rent by requiring the landlords to give the tenants at least 60 days of written notice of such rent increase.

The Model Tenancy Agreement in Scotland too made it clear that the rent cannot be increased more than once within a year and the landlord must give a 3 months' notice of any increase. Also, in Scotland under the Rent (Scotland) Act 1984, a right to fair rent to every tenant is stated in the legislation.

By adopting the above, the Proposed Act can provide a condition like the above by imposing an obligation to the Landlord to provide a notice to the tenant and where the tenant fails to give a reply or a termination notice, the tenant shall be deemed to have accepted the rental increase.

8) Non-discrimination of Tenants

There have been talks on whether the Proposed Act should provide a provision to prevent any discriminatory behaviour based on skin colour, race, or religion of the Landlord in choosing their tenants.

The National House Buyers Association (HBA) has voiced its concern that the Proposed Act should not take away the freedom of every house owner or landlord to select their choice of tenants. It is embedded in the National Land Code of the indefeasibility of rights of the property owners that includes the right to dispose of the property and often one cannot possibly predict the nature and character of a tenant from first sight.

Moreover, all tenancy agreements are purely contractual and based on the freedom to contract. Hence, it should not involve conditions imposed by a third party who does not have a direct interest in the agreement.

Therefore, it is prudent for the Proposed Act to draw a difference between what is acceptable

and discriminatory by balancing the interests of all parties involved to ensure clarity and prevent any discrimination.

9) Proper profile register of landlords and tenants

The Proposed Act could create a system or a registry profile of each landlord and tenant in Malaysia. By taking reference in Scotland, under the Antisocial Behaviour, etc (Scotland) Act 2004, whereby the local authorities are empowered under the Act to prepare and maintain a register of landlords, to keep proper records of the property, name, addresses of the landlord. The purpose behind such a requirement is to ensure all landlords are "fit and proper" to act as a landlord.

The existence of a statute where all the remedies set out in the National Land Code, Specific Relief Act 1950, Civil Law Act 1956, and the Distress Act 1951 consolidated in a single comprehensive and all-encompassing Act will be the panacea to all ills currently faced by the private residential tenancy sector.

In a similar vein, the Proposed Act can echo the same approach with a different purpose. By creating a profile registry, it can help to identify and monitor any rampant behaviour of any landlord or tenant to make such information available for potential parties who wish to enter into any tenancy agreements in the future.

Conclusion

By simply relying on the principles of common law and equity in absence of specific legislation, there is no effective and efficient recourse to safeguard the rights, duties, and remedies of both the landlord and the tenant.

The existence of a statute where all the remedies set out in the National Land Code, Specific Relief Act 1950, Civil Law Act 1956, and the Distress Act 1951 consolidated in a single comprehensive and all-encompassing Act will be the panacea to all ills currently faced by the private residential tenancy sector.

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UNLISTED LABUAN ENTITIES – TO BE TAXED UNDER THE LBATA 1990 OR THE ITA 1967?

by Datuk D.P. Naban, S. Saravana Kumar, Elani Mazlan

A. Introduction

The Federal Territory of Labuan was established as a financial centre by the Malaysian Government in October 1990. Initially designated as the Labuan International Offshore Financial Centre (IOFC), the IOFC was rebranded as the Labuan International Business and Financial Centre (IBFC) in 2008. Its inception over 30 years ago came hand in hand with the enactment of various legislations specifically for Labuan IBFC including the Labuan Business Activity Tax Act 1990 ("**LBATA**"), which was formerly known as the Labuan Offshore Business Activity Tax Act 1990. The IBFC offers a preferential tax regime and Labuan entities operating via the centre could avail itself to the preferential tax treatment on income derived from undertaking Labuan Business Activities as provided in the LBATA. In addition, a host of attractive tax exemptions and stamp duty exemption is accorded to Labuan Entities undertaking Labuan Business Activities in Labuan IBFC.

In the year 2019, arising from the recommendations as agreed by the Forum on Harmful Tax Practices ("**FHTP**") established by the Organisation for Economic Cooperation and Development ("**OECD**"), substantial changes were made to LBATA as well as other relevant laws of Labuan IBFC. (Note: Malaysia is not a member of OECD but is a member of the FHTP). The objective of FHTP was to remove harmful tax practices and ensure compliance with the internationally agreed tax standards and best practices. Member countries were encouraged to adopt the standards by making the necessary changes in the legislations and FHTP agreed to impose sanctions if countries fail to implement such standards. Sanctions could be in the form of non-recognition of treaty benefits under the Double Tax Agreements or listing as a non-compliant jurisdiction. The sanctions if imposed would erode the competitiveness of the financial centres.

One of the key amendment that was made in LBATA is the introduction of a new Section 2B(1). The new provision specifically provided that certain Labuan entities must satisfy substance requirements, namely operate via a physical office located in Labuan Island and incur operating expenditure in Labuan Island. On the other hand, 'Labuan Entities' was retained as *'those which are specified in the Schedule'* of the LBATA. These include, *inter alia*, any person declared by the Minister of Finance ("**Minister**") to be a Labuan entity under Section 2B(2) of the LBATA. It must be noted that Section 2 of the LBATA provides the definition of a 'Labuan entity' as *'the entity specified in the Schedule'*.

Labuan entities which are listed in the Schedule to the Labuan Business Activity Tax (Requirements for Labuan Business Activity) Regulations 2018 ("**Regulations 2018**") also have additional requirements to qualify as undertaking Labuan Business Activity prescribed by the Minister, by virtue of Section 2B(1) of the LBATA. Labuan entities undertaking business activities as listed in the Regulations 2018, which fail to comply with the said substance requirements face the consequence of not being able to enjoy the preferential tax treatment and will be taxed at a rate of 24% upon its chargeable profits[1]. These are new prominent features in LBATA in tandem with FHTP's recommendation, whereby entities which are accorded preferential tax treatment must have in place economic substance at the place where the incentives are offered. In other words, preferential tax should NOT be accorded to entities listed in the Schedule of the Regulations 2018 that do not meet the prescribed substance and expenditure requirements and the headline tax should apply.

Briefly, these additional requirements under Section 2B(1) are:

(i) in relation to a Labuan trading activity, the adequate number of employees and the adequate amount of annual operating expenditure in Labuan; and

(ii) in relation to a Labuan non-trading activity, the adequate number of employees, the adequate amount of annual operating expenditure in Labuan, and the prescribed conditions to be complied with in relation to control and management in Labuan.

A second glance at the current legislation raises the inevitable question: what of those Labuan entities which are not listed in the Schedule to the Regulations 2018 ("**Unlisted Labuan Entities**")? There may appear to be an uncertainty in respect of this. A number of questions then naturally follow suit: what are the consequences which the Unlisted Labuan Entities now face? Would these Unlisted Labuan Entities still be able to enjoy the perks of the LBATA in the form of lower tax rates? Or, would the Income Tax Act 1967 ("**ITA 1967**") then come into the picture to govern these Unlisted Labuan entities?

To shed light on the above, this article will determine the following questions:

(a) Whether an Unlisted Labuan Entity maintains its status as a Labuan entity notwithstanding that the Minister did not prescribe any substance and expenditure requirement as stipulated under Section 2B(1) of the LBATA; and

(b) Whether these Unlisted Labuan Entities are subject to tax under the ITA 1967 or the LBATA.

At the outset, it must be stated that there is much debate currently regarding these issues and in particular, the interpretation of Section 2B(1) of the LBATA and the Regulations 2018. The view adopted by the Inland Revenue Board of Malaysia ("**IRB**"), for instance, is that Unlisted Labuan Entities will not be entitled to the preferential tax treatment accorded by the LBATA. Instead, the IRB contends that these Unlisted Labuan Entities will be charged to tax under the ITA 1967.

1 Section 2B(1A) of the LBATA.

B1. Can an Unlisted Labuan entity maintain its status as a Labuan entity under the LBATA?

(i) The Statutory Provisions

While Section 2B imposes an additional requirement for certain Labuan Entities carrying out Labuan Business Activities, it is important to note that the prescription by the Minister by way of regulations made under the LBATA is not in respect of which entity should be regarded in law as a Labuan entity. As previously mentioned, what constitutes a Labuan entity is that which is clearly specified in the Schedule to the LBATA and this includes Unlisted Labuan Entities[2]. In the event that the Minister wishes to amend the Schedule to the LBATA to include any other person to be a Labuan entity, it is expressly provided that he shall do so on the recommendation of the Director General of Inland Revenue by way of an order published in the *Gazette*[3].

In clear and unambiguous terms, the LBATA provides the circumstances in which a Labuan entity falls under the jurisdiction of the ITA 1967 instead of the LBATA itself. This is found in Section 2(3) and Section 3A of the LBATA. In a similar clear and unambiguous manner, the ITA 1967 also provides the circumstance in which a Labuan entity will be governed by the ITA 1967 instead of the LBATA[6]. This is only when a Labuan company has made an irrevocable election to be taxed under the ITA 1967 in accordance with Section 3A of the LBATA.

A Labuan entity which is listed in the Schedule to the Regulations 2018 ("**Listed Labuan Entities**"), which does not comply with the requirements under the Regulations 2018 for a basis period shall be charged to tax at 24% upon chargeable profits for that year of assessment only[4]. It would be noted that despite the Labuan entity's failure to comply with the Regulations 2018, the status of the Labuan entity is not changed. Instead, it remains a Labuan entity and therefore, is taxed under the LBATA albeit at the rate of 24%. This is very different from being subjected to tax under the ITA 1967. The term *'chargeable profit'* is defined as the net profits as reflected in the audited accounts in respect of such Labuan trading activity of a Labuan entity for the basis period[5]. Alternatively, the ITA 1967 imposes a tax on *'chargeable income'* as ascertained under Section 5 of the ITA 1967.

In clear and unambiguous terms, the LBATA provides the circumstances in which a Labuan entity falls under the jurisdiction of the ITA 1967 instead of the LBATA itself. This is found in Section 2(3) and Section 3A of the LBATA. In a similar clear and unambiguous manner, the ITA 1967 also provides the circumstance in which a Labuan entity will be governed by the ITA 1967 instead of the LBATA[6]. This is only when a Labuan company has made an irrevocable election to be taxed under the ITA 1967 in accordance with Section 3A of the LBATA.

The charging section of the LBATA[7] stipulates that only a Labuan entity carrying on a Labuan business activity is chargeable to tax under the LBATA in respect of that Labuan business activity. Labuan Business Activity is defined under Section 2 of the LBATA as *'a*

2 *Section 2 and Section 2B(1) of the LBATA.*

3 *Section 2B(2) of the LBATA.*

4 *Section 2B(1A) of the LBATA.*

5 *Section 2B(1B) of the LBATA.*

6 *Section 3B of the ITA 1967.*

7 *Section 3 of the LBATA.*

Labuan trading or a Labuan non-trading activity carried on in, from or through Labuan, excluding any activity which is an offence under any written law'. The fact that the Labuan business activities being carried out by the Labuan entity are not prescribed whether for substance or expenditure under the Regulations 2018 is irrelevant. Section 2B of the LBATA does not mandate the Minister to prescribe a substance or expenditure requirement in respect of every Labuan entity set out in the Schedule to the LBATA.

As such, it can be reasonably concluded that an Unlisted Labuan Entity remains a Labuan entity notwithstanding that the Minister has not prescribed any substance and expenditure requirement as stipulated under Section 2B(1)(b) of the LBATA. In the authors' view, there is no doubt in this matter.

(ii) The Legal Arguments

In the event that it is suggested that there is any doubt or uncertainty whatsoever, the conclusion above is supported by the Parliamentary debates as contained in the Hansard when Section 2B(1A) of the LBATA was introduced via the Labuan Business Activity (Amendment) Act 2020 to which the insertion was deemed to be in force from 1 January 2019. This date is concurrent with the date when Section 2B(1) was first amended under the Finance Act 2018.

Where there is no ambiguity, the words of a statute must be interpreted according to their plain and ordinary meaning. It is trite law that taxing statutes should be interpreted strictly by looking merely at the plain wording. This is clearly established in the Supreme Court case of *National Land Finance Co-Operative Society Ltd v Director-General of Inland Revenue* [1993] 4 CLJ 339. Furthermore, the Federal Court in *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97 had held that the correct approach in interpreting a taxing statute is to give the words their ordinary meaning and to merely look at what is clearly said.

By applying the legal principles in *National Land Finance* (supra) and *Palm Oil Research* (supra), it is evident that the law states that Labuan entities as specified in the Schedule to the Regulations 2018 are required to comply with the substance and expenditure requirements under the Regulations 2018. On the other hand, the law is silent on the need for Unlisted Labuan Entities to comply with the substance and expenditure requirements. Further and more importantly, nowhere in the LBATA does it state that Unlisted Labuan Entities cease to be Labuan entities. In this regard, it is important to note that it is an established principle in law that words cannot be read into a statute[8].

Therefore, taking into account all of the above, it can be argued that the law states that only Listed Labuan Entities must comply with the substance and expenditure requirements. On the contrary, the Unlisted Labuan Entities are not required to comply

8 *Sri Bangunan Sdn Bhd v Majlis Perbandaran Pulau Pinang & Anor [2007] 6 MLJ 581; [2007] 2 MLRA 187.*

with the substance and expenditure requirements as set out in the Regulations 2018. These Unlisted Labuan Entities remain Labuan entities by virtue of the Schedule to the LBATA.

B2. Are Unlisted Labuan Entities subject to tax under the ITA 1967 or the LBATA?

(i) The Current Situation

We are now met with a situation in which the Minister had not prescribed the substance and expenditure requirements for Unlisted Labuan Entities. Nevertheless, as concluded above, these Unlisted Labuan Entities remain as Labuan entities.

In respect of the Labuan business activities which are chargeable to tax under the LBATA, it is stipulated as follows:

Type of Business Activity	Tax Rate
Labuan trading activity, which includes "banking, insurance, trading, management, licensing, shipping operations or any other activity which is not a Labuan non-trading activity".	3%[9]
Labuan non-trading activities, which is defined as activities "relating to the holding of investments in securities, stock, shares, loans, deposits or any other properties situated in Labuan by a Labuan entity on its own behalf".	0%[10]

This begs the question – what is the tax treatment for the Unlisted Labuan Entities?

(ii) The Statutory Provisions

In this respect, we can first refer to Section 2B(1A) of the LBATA, which was inserted by Labuan Business Activity Tax (Amendment) Act 2020. This provision, which came into force on 1 January 2019, states that a Labuan entity carrying on a Labuan business activity which fails to comply with regulations made under Section 2B(1) shall be charged at a rate of 24% upon its chargeable profits for that year of assessment. It is clear that Listed Labuan Entities carrying on Labuan business activities that fail to comply with such requirements continue to be taxed under the LBATA, albeit at 24% instead of 3% under Section 4 of the LBATA or 0% under Section 9 of the LBATA. As for the Unlisted Labuan Entities, they are not required to comply with the substance requirements and so, there is no 'failure' involved.

Furthermore, this provision can be compared and contrasted with the charging provision under the ITA 1967[11], which provides that the tax is chargeable on the *income* of a person. This differs from Section 2B(1A) which states that the 24% tax rate is to be imposed upon *chargeable profits*. Instead, this is similar to Section 4 of the LBATA, which states that tax is to be charged at the rate of 3% upon the chargeable profits.

On the other hand, any imposition of tax either pursuant to the LBATA or the ITA 1967 has been explicitly set out in the LBATA. As explained above, both the statutory provisions of the LBATA and the ITA 1967 have specified the circumstances in which a Labuan entity is to be charged under the ITA 1967[12]. In particular, Section 2(3) of the LBATA states the circumstances in which provisions of the ITA 1967 shall apply, which is in respect of an activity other than a Labuan business activity carried on by a Labuan entity and a Labuan business activity carried on by a Labuan entity which makes an election under Section 3A of the LBATA.

In addition to that, there is nothing in the LBATA to indicate that Labuan entities not included in the Schedule to the Regulations 2018 i.e. Unlisted Labuan Entities are subject to be charged under the ITA 1967.

9 *Section 4 of the LBATA.*

10 *Section 9 of the LBATA.*

11 *Section 3 of the ITA 1967.*

12 *Sections 2(3) and 3A of the LBATA; Section 3B of the ITA 1967.*

Based on the statutory provisions (or lack thereof) explained above, it then cannot be said that Unlisted Labuan Entities are to be charged under the ITA 1967, instead of the LBATA.

(iii) The Legal Arguments

The courts have refused to adopt a construction of a taxing Act which would impose liability when doubt exists, and which would impose tax without clear words present in the statute[13]. It is also trite law that where the meaning of the words in a statute is ambiguous, the taxpayer must be given the benefit of the doubt[14].

Consequently, in the event that the words of the provisions of the LBATA are unclear or ambiguous, we must apply the purposive approach in construing the statute in accordance with Section 17A of the Interpretation Acts 1948 and 1967. In *Andrew Lee Siew Ling v United Overseas Bank* [2013] 1 CLJ 24, the Federal Court stated that where the plain meaning of a piece of legislation is in doubt, the broad purpose of the legislation will then be sought out and the reading of the statute in support of such purpose may be adopted by the courts. This purposive approach should be applied in order to determine whether the Unlisted Labuan Entities remain subject to the LBATA or are subject to the ITA 1967 as it is now well established that taxing statutes like all other statutes must be given a purposive interpretation to fulfil the objective of the statute, unless the circumstances demand otherwise[15].

To ascertain the rationale, purpose or objective of the statute, it is permissible to resort to extrinsic evidence, such as the *Hansard*, as an aid to statutory interpretation[16]. The key extrinsic evidence in our case is the *Hansard*[17] wherein it was evident that the rationale behind the enactment of the LBATA is to set up a tax incentivised status for Labuan which came in the form of a preferred tax regime. Therefore, if the LBATA and the Regulations 2018 are construed to mean that the Unlisted Labuan Entities are subject to tax under the ITA 1967, this would defeat the intention of Parliament, that is to enable Labuan entities carrying out Labuan activities to enjoy the preferential tax treatment available under the LBATA.

We can also look to extrinsic evidence in the form of another *Hansard*[18] to interpret Section 2B(1A) of the LBATA. The contents of the said *Hansard* prove that the intention of the Parliament in enacting Section 2B(1A) is to enable Labuan entities to continue to be subject to tax under the LBATA, as opposed to the ITA 1967.

In summary, in both applications of the literal approach and the purposive approach in statutory interpretation, it can be reasonably concluded that the Unlisted Labuan Entities remain subject to tax under the LBATA and not the ITA 1967.

13 National Land Finance Co-Operative Society Ltd v Director-General of Inland Revenue [1993] 4 CLJ 339; Malaysian Co-operative Insurance Society Ltd v KPHDN (2000) MSTC 3792.

14 National Land Finance Co-Operative Society Ltd v Director-General of Inland Revenue [1993] 4 CLJ 339.

15 Lembaga Bangunan Industri Pembinaan Malaysia v Konsortium JGC Corp & Ors [2015] 6 MLJ 612.

16 Chor Phaik Har v Farlim Properties [1994] 3 MLJ 345.

17 Dewan Rakyat Hansard (Ministerial reading of the Labuan Offshore Business Activity Tax Bill 1990) of the Dewan Rakyat Parlimen Ketujuh Penggal Keempat Mesyuarat Pertama, Bil 24 (22 June 1990).

18 Dewan Rakyat Hansard (Ministerial reading of the Labuan Offshore Business Activity Tax Bill 2019) of the Dewan Rakyat Parlimen Keempat Belas Penggal Kedua Mesyuarat Ketiga, Bil 65 (2 December 2019).

The LBATA and the ITA 1967 must also be interpreted harmoniously. The harmonious approach states that if certain provisions in the statute appear to be conflict with each other, these provisions should be interpreted so as to give effect a reconciliation between them so that, if possible, effect could be given to all. The rule of harmonious construction was set out in ***Wee Nai Li v Sarawak Bank Employees Union*** **[2012] MLJU 1593**.

In the harmonious interpretation of the following, it renders that the Labuan entities carrying out Labuan business activities remain to be taxed under the LBATA only. This view is fortified further by the fact that:

(a) Section 2(3) of the LBATA stipulates that the ITA 1967 shall, *inter alia*, apply in respect of an activity other than a Labuan business activity carried on by a Labuan entity and a Labuan business activity carried on by a Labuan entity which makes an election under Section 3A of the LBATA;

(b) Section 3 of the LBATA states that a Labuan entity carrying on a Labuan business activity shall be charged to tax in accordance with the LBATA;

(c) Section 2 of the LBATA provides that Labuan business activity is defined as *'a Labuan trading or a Labuan non-trading activity carried on in, from or through Labuan, excluding any activity which is an offence under any written law'*; and

(d) Section 3B of the ITA 1967 states that tax shall not be charged in respect of an offshore business activity carried on by an offshore company, other than those which have made an election under Section 3A of the LBATA.

C. Conclusion

Based on the above analysis, the authors are of the view that the questions raised earlier in relation to the fate of Unlisted Labuan Entities following the prescription of substance and expenditure requirements pursuant to Section 2B(1) of the LBATA can be answered as follows:

(a) the Unlisted Labuan Entities remain Labuan entities within the meaning of the LBATA; and

(b) the Unlisted Labuan Entities are subject to tax under the LBATA, and not the ITA 1967, at the following tax rates of 0%[19] or 3%[20] accordingly.

Thus, it can be seen that the aforementioned presumed uncertainty surrounding the status and the tax treatment of Unlisted Labuan Entities is not uncertain after all. Upon legal analysis such as that made above, it is clear as day that Unlisted Labuan Entities continue to be ruled by the LBATA, despite the absence of substance and expenditure requirements under the Regulations 2018. This meets the objective of the Malaysian Government in allowing Labuan entities to enjoy the preferential tax treatment under the LBATA tax regime. Unlisted Labuan Entities should not have to bear the burden in the form of the tax rate of 24% under Section 2B(1A), just because they were never prescribed any substance and expenditure requirement by the Minister.

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19 Section 9 of the LBATA. 20 Section 4 of the LBATA.

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