



Legal Herald

In this issue

Unravelling Practical Issues Surrounding Thin Capitalisation Law in Malaysia	1
Moving towards Competition or Antitrust Regulation in Malaysia	4
Disciplinary Procedures in a Domestic Inquiry	8
What is 'Local Jurisdiction'?	12
Case Commentary <i>McLaren International Limited v Lim Yat Meen</i> [2009] 4 CLJ 749 (FC)	17
Lifting the Corporate Veil of Groups of Companies	21
Legislative Update Central Bank of Malaysia Act 2009: A Comparison Between Old and New	25
Partner Profile	30

© 2009. LEE HISHAMMUDDIN ALLEN & GLEDHILL. ALL RIGHTS RESERVED.

DISCLAIMER: The views and opinions attributable to the authors or editors of this publication are not to be imputed to the firm, Lee Hishammuddin Allen & Gledhill. The contents are intended for general information only, and should not be construed as legal advice or legal opinion.

The firm bears no responsibility for any loss that might occur from reliance on information contained in this publication. It is sent to you as a client of or a person with whom Lee Hishammuddin Allen & Gledhill has professional dealings. Please do not reproduce, transmit or distribute the contents therein in any form, or by any means, without prior permission from the firm.

KDN PP 12853/07/2010 (024797)

Unravelling Practical Issues Surrounding Thin Capitalisation Law in Malaysia*

by S Saravana Kumar

It has been several months since the legislation of thin capitalisation law in Malaysia¹. The announcement on the introduction of thin capitalisation law was first made in August 2008 by then prime minister Tun Abdullah Ahmad Badawi in his Budget 2009 speech.

Although the government did not initiate any public discourse on this matter, the announcement did not come as a surprise. The local tax industry was abuzz with the government's intention to introduce thin capitalisation law. Unfortunately, there was no explanation from the authorities as to the need for such law in Malaysia. This is all the more necessary as other trading nations in the Association of Southeast Asian Nations (or Asean) region such as Singapore, Vietnam, Thailand and Indonesia do not have or intend to introduce such legislation in the near future. Both the Budget 2009 speech and Hansard (i.e. minutes of Parliamentary proceedings) are silent in this respect.

Further, it is also very disappointing that the government did not openly engage the public or local tax industry

in a dialogue prior to the introduction of that law. Shortly after the announcement, some respectable quarters within the industry questioned the government's wisdom of introducing thin capitalisation.

This article is not devoted to questioning whether Malaysia requires thin capitalisation law or not. Instead, the focus is on practical issues that remain unresolved in relation to thin capitalisation law in Malaysia. To the best of the author's knowledge, neither the government nor the Inland Revenue Board of Malaysia ("IRB") has made an attempt to address these issues.

Relevant rules yet to be issued

Firstly, the thin capitalisation provision came into effect on 1 January 2009. That means, legally speaking, the Director General of the Inland Revenue ("DGIR") may disallow the deduction of "excessive" interest payment as revenue expenditure from 1 January 2009 onwards. That said, the rules or regulations pertaining to the implementation of thin capitalisation law have yet to be issued by the government.

1 The thin capitalisation provision was inserted via the Finance Act 2009 [Act 693]. The newly inserted s.140A(4) to the Income Tax Act 1967 [Act 53] reads:

"Where the Director General, having regard to the circumstances of the case, is of the opinion that in the basis period for a year of assessment the value or aggregate of all financial assistance granted by a person to an associated person who is a resident, is excessive in relation to the fixed capital of such person, any interest, finance charge, other consideration payable for or losses suffered in respect of the financial assistance shall, to the extent to which it relates to the amount which is excessive, be disallowed as a deduction for the purposes of this Act."

The first and foremost question is, “What is the acceptable debt and equity ratio?”

The ratio adopted by other jurisdictions is 3:1. Will Malaysia adopt the same ratio or would it opt to be different?

It is likely that details such as this will be contained in the regulations. Eventually, when the thin capitalisation rules are issued, when will they take effect? Will they take effect retrospectively from 1 January 2009?

Since s.140A(4) of the Income Tax Act 1967 [Act 53] (“the ITA”) is already in force, taxpayers are anxious and seeking advice from tax practitioners, despite the fact that thin capitalisation rules have yet to be issued. This puts tax practitioners in a dilemma as the advice or proposal that they suggest may be contrary to the thin capitalisation rules.

This is all the more evident in instances where the taxpayer is subject to higher taxes if the thin capitalisation rules are followed. In such a case, the taxpayer may be subjected to additional taxes and penalty if the IRB decides to apply the thin capitalisation rules retrospectively.

Furthermore, the tax practitioners are also exposing themselves to a possible action under s.114(1A) of the ITA as their advice can be construed by the IRB to have resulted in the understatement of the taxpayer’s tax liability. In light of these potential problems, it would be welcomed if the government does not implement the thin capitalisation rules retrospectively from 1 January 2009.

The IRB has also yet to issue any guidelines or public ruling to guide taxpayers on how it intends to

implement the thin capitalisation law. Such guidelines or public rulings are necessary as it provides an insight to the taxpayer on the approach taken by the IRB in enforcing the law.

The self-assessment system, which was introduced in Malaysia in 2001, requires taxpayers to determine their taxable income, compute their tax liability and submit their tax returns. In principle, the self-assessment system has shifted a substantial burden of responsibility from the IRB to the taxpayers. In that regard, it will be helpful if the IRB issues a Guideline or a Public Ruling on thin capitalisation before the thin capitalisation rules are issued.

Blowing hot and cold on ‘interest’

The key words in the thin capitalisation law, namely, “interest”, “Financial assistance” and “fixed capital”, are not defined. These words are not interpreted in s.2 of the ITA. Recently, at a tax seminar organised by the IRB, the participants were advised that the term “interest” for thin capitalisation law includes guarantee fees, commitment fees, representation fees, commission and borrowing bond fees. However, this definition of the IRB contradicts its policy as these types of payments are not recognised as interest for the purposes of business deduction.

Businesses are only allowed deduction for actual interest payment and not other expenditure that are akin or incidental to interest. It is certainly unfair to taxpayers as the IRB seems to be blowing hot and cold on the definition of interest. When it suits the IRB, a wide interpretation is given to the word “interest”. Such an approach is certainly not professional and the IRB must be professional by being consistent with its views. If interest is treated to

include guarantee fees for thin capitalisation rules, then it is only appropriate that the IRB allows the taxpayers to deduct guarantee fees paid in the course of business as business expenditure.

Interest paid by a Malaysian taxpayer to a non-resident is subject to withholding tax in Malaysia. If the IRB decided to disallow the Malaysian taxpayer from claiming deduction for the “excessive” interest paid to the non-resident, would the IRB refund the withholding tax on the excessive interest portion to the non-resident?

Otherwise, the IRB will be “benefiting” twice in the sense that the Malaysian taxpayer is not allowed to deduct the “excessive” interest paid to the non-resident but nevertheless, the IRB gets to tax the excessive interest by imposing withholding tax on it. It is only appropriate in circumstances where the excessive interest is disallowed that the IRB refunds the withholding tax on that portion back to the non-resident.

Further, since s.140A reads “... in the basis period for a year of assessment [YA] the value or aggregate of all financial assistance granted by a person to an associated person who is a resident ...”, the question arises as to whether s.140A(4) applies to financial assistance that was rendered before 1 January 2009.

The author’s view is that if a loan was made in 2008, it will mean the financial assistance was granted in YA 2008 and not in YA 2009. In that regard, the IRB should not disallow the excessive interest (if any) that is payable in YA 2009 and subsequent years of assessment as the financial assistance was granted before s.140A(4) took effect. Any attempt by the IRB to invoke s.140A(4) on financial assistance that was granted before 1 January 2009 would be ultra vires and against the principles of natural justice. In such circumstances, the taxpayer should consider challenging the IRB’s decision by way of judicial review.

Interestingly, s.140A(4) states that the DGIR may disallow the deduction in cases where he is of the opinion that the financial assistance rendered is excessive. The language used is different from that used for s.140A(3), which is the transfer pricing provision. Section 140A(3) states that the DGIR may adjust a transaction between associated persons where he has reason to believe that the transaction is not at arm’s length.

Notwithstanding the difference in the phraseology used for sections 140A(3) and 140A(4), the author opines that the DGIR must state the grounds that influenced him to invoke s.140A(4) against the taxpayer. This will surely enable the taxpayer to understand better why s.140A(4) was invoked and assist the taxpayer in preparing his defence.

Conclusion

The foundation for thin capitalisation rules in Malaysia is weak and it is disappointing that deep thought was not given to this area before legislation was enacted. There are too many questions that remain unanswered and if they are not resolved soon, it will just create confusion among taxpayers, which is clearly not healthy under the self-assessment system.

LH-AG

* This article was first featured in *TaxViews Asia* (July 2009), a tax magazine published by CCH Singapore

About the author

S Saravana Kumar (sks@lh-ag.com) is an associate in the Tax Practice Group and holds an LLM in Taxation from the London School of Economics.

Moving towards Competition or Antitrust Regulation in Malaysia

by Fatimatul Zahra Mustapha

Recent developments pursuant to the liberalisation of the services sector by our prime minister have highlighted the importance of embracing competition law, or antitrust, to encourage healthier competition and boost the consumer market as well as the economy through foreign direct investments.

Open and vigorous competition is good for consumers as it can bring about lower prices, new and improved products and more choices. It also encourages fair-priced businesses which will flourish when markets are competitive.

Currently, the US and some European countries have established comprehensive and effective legislation governing anti-competitive behaviour. In the UK, for example, anti-competitive behaviour is prohibited under Chapters I and II of the Competition Act 1998 (“the Competition Act”) and by Articles 81 and 82 of the European Commission Treaty (“the EC Treaty”). In the US, competition regulation can be found in the Sherman Antitrust Act. These laws prohibit anti-competitive agreements between businesses and the abuse of dominance in a market¹.

Cartels

Cartels are the most serious form of anti-competitive behaviour. A cartel is essentially an agreement between businesses not to compete with each other for example on price, discount levels, credit terms or in respect of particular customers or in particular areas. Generally, cartels are entered into for the purpose of maintaining prices by removing or reducing competition.

As a result, they directly affect the purchasers of the goods or services, whether they are public or private businesses or individuals, leaving consumers with limited choices and goods of poorer quality.

Cartels can also have a damaging effect on the wider economy as they remove the incentive for businesses to operate efficiently and innovatively. One difficulty with curbing cartels is that cartel agreements can often be verbal and can be hard to uncover unless or until a member of a cartel agreement confesses.

Abuse of dominant position

Another type of anti-competitive behaviour is the abuse of a dominant market position. This is governed by Chapter II of the Competition Act and Article 82 of the EC Treaty.

A dominant position in a particular market essentially means that a business is generally able to behave independently of competitive pressures, such as other competitors in that market.

Conduct that may be considered an abuse by a business of a dominant position includes:

- Charging excessively high prices
- Limiting production
- Refusing to supply an existing longstanding customer without good reason
- Charging different customers different prices where there is no difference in what is being supplied
- Making a contract conditional on factors that have nothing to do with the subject of the contract.

Addressing anti-competitive behaviour

Typically, cartel members may agree on:

- (a) price fixing;
- (b) bid rigging;
- (c) output quotas/restrictions;
- (d) market sharing.

¹ Source: Office of Fair Trading (www.offt.gov.uk/shared_offt/business_leaflets/ca98_mini_guides/oft447.pdf)

Price fixing²

Price fixing is an agreement among competitors to raise, fix or otherwise maintain the price at which their goods or services are sold. It is not necessary for competitors to agree to charge exactly the same price, or that every competitor in a given industry join the conspiracy.

Price fixing can take many forms, for example, when participants:

- establish or adhere to a price discount
- hold prices firm
- eliminate or reduce discount
- adopt a standard formula for computing price
- maintain certain price differentials between different types, sizes or quantities of products
- adhere to a minimum fee or price schedule
- fix credit terms
- not advertise prices.

Bid rigging

Bid rigging is the way that conspiring competitors effectively raise prices where purchasers (often federal, state or local governments) acquire goods or services by soliciting competing bids. Competitors will agree in advance who will submit the winning bid on a contract being let through the competitive bidding process.

Categories of bid rigging

- **Bid suppression**
One or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor's bid will be accepted.

- **Complementary bidding**

Also known as “cover” or “courtesy” bidding. Competitors usually submit bids that are either too high or contain special terms that will not be acceptable to the buyer. The bids are not intended to secure the buyer's acceptance, but merely to paint the appearance of genuine competitive bidding.

- **Bid rotation**

This occurs when all of the conspirators submit bids but take turns at being the low bidder.

- **Subcontracting**

This type of arrangement is often classified as part of bid-rigging although it is a commonly accepted practice in Malaysia.

Market division

A market division or allocation scheme is an agreement in which competitors divide the market among themselves. Normally, competing firms will allocate specific customers or types of customers, products or territories among themselves.

Malaysia

Currently, Malaysia lacks comprehensive legislation regulating anti-competitive behaviour. Such regulation where it exists is sectoral in that provisions are made to address only certain industries such as the distributive trade where the price of essential goods is regulated, road transportation, railways, ports, airports and in communications and multimedia³.

The Communications and Multimedia Act 1998 [Act 588] (“the CMA”) is perhaps the first piece of legislation that identifies specific anti-competitive conduct such as collusion, price fixing, market sharing and collective boycott. The regulatory regime under the CMA is far more sophisticated than that available in other sectors.

2 “Price Fixing, Bid Rigging and Market Allocation Schemes: What They Are and What to Look For”, a primer by the US Department of Justice (www.usdoj.gov/atr/public/guidelines/211578.htm or www.usdoj.gov/atr/public/guidelines/211578.pdf)

3 “Implementing Competition Policy in Malaysia” by Cassey Lee Hong Kim (www.iseas.edu.sg/142003.pdf)

The Malaysian Communications and Multimedia Commission (“MCMC”) is responsible for promoting and regulating the communications and multimedia industry and to enforce the communications and multimedia laws in Malaysia.

To date, it has published three documents that serve as guidelines on competition regulation in the sector⁴:

- (a) Guidelines on Substantial Lessening of Competition (CMC 2000a)
- (b) Guidelines on Dominant Position in a Communication Market (CMC 2000b)
- (c) Process for Assessing Allegations of Anti-Competitive Conduct: An Information Paper (2000c).

However, there are some difficulties in regulating anti-competitive behaviour sectorally as it will require amendments to existing legislation and the setting up of a specific regulating authority within a particular sector. Therefore, there should be a regulation on universal competition to address this shortcoming.

Fair Trade Practices Bill

Malaysia established its Fair Trade Practices Policy in 2005 to:

- Promote and protect competition in the market;
- Create dynamic and competitive entrepreneurs;
- Provide fair and competitive market opportunities for business;
- Prohibit anti-competitive practices including those originating from outside the Malaysian territory and affecting the domestic territory;

- Prohibit unfair trade practices in the economy;
- Promote the right of small and medium-sized enterprises to participate in the marketplace;
- Promote consumer welfare; and
- Encourage socio-economic growth, generate efficiency and equity⁵.

There has been discussion on a Fair Trade Practices Bill, which it is thought will cover a wider range of anti-competitive conduct similar to those practised by the Europeans and Americans, such as collusion to fix prices, market allocation and bid rigging.

In fulfilling the objectives of such a Bill, there should be in place a cohesive framework for an enforcement system made up of commissioners who are government officials and other members with the relevant experience and knowledge of matters relating to business, industry, commerce, law, economics, fair trade, competition or any other relevant qualification.

It is essential that a Fair Trade Practices Appeal Tribunal be set up, which will be responsible for reviewing decisions taken by the MCMC if the parties so refer to it, as well as a judicial review process in the High Court.

However, several issues first need to be addressed before such a Bill can be passed to ensure proper regulation and enforcement. Currently, some aspects of the proposed legislation seem to be at odds with existing national policy — for example, the safeguards conferred on national car manufacturer Proton. With regard to this, the question is: How can the government ensure the sustainability and profitability of Proton and, at the same time, allow healthy and fair competition with other automobile

⁴ *Ibid*

⁵ Source: Ministry of Domestic Trade, Co-operatives and Consumerism (www.kpdnkk.gov.my/index.php?option=com_content&task=view&id=12128&Itemid=453&lang=en)

manufacturers, while giving consumers the freedom of choice?

The inclusion of a blanket provision empowering the Minister concerned in allowing anti-competitive behaviour in the name of “national interest” is open to abuse and will hinder the efficacy of competition regulation in Malaysia.

Conclusion

In order to successfully implement and regulate competition law in Malaysia, it is important to first strike a balance between protecting national interests and promoting fair competition so that we are able to attract foreign investments into the country. No doubt there are certain sectors that require some level of protection from the government in order to encourage local business participation, but this

should not be used as an excuse to allow monopolisation or an oligopolistic economy.

Hence, the move by the government to liberalise the services sector is a commendable effort to increase the country’s level of competitiveness. However, this alone is insufficient to attract foreign investors unless and until a proper legal framework and regulatory regime prohibiting anti-competitive conduct is established and enforced.

LH-AG

About the author

Fatimatul Zahra Mustapha (fzm@lh-ag.com) is an associate with the Financial Services Practice Group.

Disciplinary Procedures in a Domestic Inquiry

by Elizabeth Loo Mui Yuen

There are possibly few things more dreaded by a human resource practitioner than dealing with employee misconduct and what usually follows thereafter — a domestic inquiry. For many, conducting a domestic inquiry seems a daunting, tedious, time consuming and thankless task.

This is because the human resource practitioner must not only deal with the technicalities associated with a domestic inquiry, he or she also has to be the bearer of “bad news” when informing the affected employee to appear at a domestic inquiry.

Given that a domestic inquiry is an unavoidable task, it may help the human resource practitioner to have some guidance on the procedures in conducting the same in accordance to the rules of natural justice.

PROCEDURE LEADING TO A DOMESTIC INQUIRY

Step 1: Investigation team

The first step is to investigate the allegations made against the employee concerned. An investigation team is appointed to investigate the complaint by interviewing witnesses involved and ensuring that all documentation and witness statements are in order. Depending on the circumstances, this function can be performed by one person.

Step 2: Investigation report

The investigation team submits a report to management. If management is satisfied that there are sufficient grounds for the allegation to warrant an explanation from the employee, the next step is to issue a show cause and suspension letter.

Step 3: Show cause letter

The employee needs to know the nature of the allegation against him. It is essential that the show cause letter (and the allegation therein) be as detailed as possible — i.e. it contains a description of the time, date and place of the alleged offence¹. It must further state clearly that the employee has been given a time frame to respond to the allegations and submit his response in writing to the company.

Step 4: Whether or not to proceed with a domestic inquiry

If the explanation is satisfactory, the complaint is resolved and that should be the end of the matter. If the explanation is not satisfactory, it would be prudent for the Company to proceed to hold a domestic inquiry.

Step 5: The domestic inquiry

In preparation for the domestic inquiry, the human resource practitioner will be entrusted with the task of selecting the domestic inquiry panel members. The panel should consist of three employees of a higher rank than the employee. It is preferable for the highest ranking employee among the three to be the chairman of the domestic inquiry panel.

In selecting the panel, the human resource practitioner must also consider the following:

- The selected panel members must not have had any prior involvement in the case; and
- They must not be closely acquainted with the presenting officer or the employee.

Step 6: Panel findings

The panel may deliver its finding at the end of the proceedings. One finding must be made for each

¹ See *Colgate-Palmolive (M) Sdn Bhd v Yap Shyan Meng* [2007] 2 ILR 313 and *Esso Production (M) Inc v Maimunah bte Ahmad* [2002] 2 MLJ 458

charge² separately by each panel member. If the findings of the panel are not unanimous, then the findings of the majority shall prevail.

The panel should not recommend the punishment to be imposed on the employee. This must be left to management.

Step 7: Management's decision

In making a decision, management must take into account:

- The charges against the employee;
- The evidence submitted during the domestic inquiry;
- The findings of the panel;
- The relevant mitigation factors; that is, the employee's length of service, performance, mitigating circumstances and so on.
- The employee's past misconduct; that is, warning letters, previous findings of misconduct and so on.

Depending on the facts of the case, management may also wish to consider other types of sanction short of dismissal. These include issuing a warning, counselling, transfer, demotion, withholding of increments, withholding of bonus or a suspension.

An opportunity for the employee to mitigate his case should always be provided before a decision is made on the sanction to be imposed.

Apart from the employee under investigation, there are three main roles involved in a domestic inquiry:

- The presenting officer
- The chairman and other panel members
- The recording secretary.

i. The presenting officer

Before the domestic inquiry

- Preparing the charge or list of charges and preparing the case against the employee.
- Ensuring that there is sufficient, relevant, cogent and adequate evidence to support each charge.
- Determine the witnesses to be produced with each charge.
- Determine the documentary evidence to be produced with each charge.

During the domestic inquiry

- The presenting officer must read, and, should the case require, explain and clarify the particulars of each charge.
- If the employee does not admit guilt, the presenting officer at the domestic inquiry must present each charge, the supporting evidence and witnesses to the panel.
- Order of examination:
 - (i) examination in chief — the presenting officer questions the witness;
 - (ii) cross-examination — the employee may cross-examine the witness if he so chooses³; and
 - (iii) re-examination — the presenting officer may re-examine the witness, but this is only confined to matters raised in cross-examination.

The presenting officer will usually cross-examine the employee and/or the employee's witnesses to challenge the case put forward by them.

² Before issuance of notice of a domestic inquiry, this is referred to as "allegation". Once a decision to conduct the inquiry is made, this is no longer an allegation but a charge.

³ *Alliance Bank Malaysia Berhad v Tan Kim Keat* [2007] 2 LNS 2278

At the end of the employee's case, both parties may give their respective submissions by outlining the salient points of the case. The presenting officer must ensure his closing submission covers all the charges (namely, the elements of each charge) and it refers to all material evidence put before the panel.

ii. The chairman and other panel members

During the domestic inquiry
At the commencement of the domestic inquiry, the chairman is to introduce himself, the panel members and others present at the domestic inquiry to the employee. The chairman must explain the procedures in conducting the domestic inquiry to all present.

Once the charge(s) have been read out by the presenting officer, the chairman must ensure that the employee understands those charges. If he does not, the chairman must instruct the presenting officer to provide an explanation or clarification (or, in extreme cases, rephrase them) to the employee.

If the employee admits guilt, the chairman must ensure that the admission is unconditional and un-

equivocal. The employee must be invited by the chairman to make his plea of mitigation.

If the employee does not admit to the charges, the chairman shall direct the presenting officer to adduce evidence to prove the charges.

The chairman may, to some extent, have to "guide"

the employee during the proceedings, that is, ask the employee whether he wants to proceed with the cross-examination of the company's witnesses, produce witnesses of his own and re-examine his witnesses as the proceedings go along.

At the close of the employee's case, the chairman shall call each of the parties to make submissions to

close their case.

At all times, the chairman and the other panel members are neutral parties and must conduct themselves in a manner in which no allegation of bias can be made against them. The questions posed by the chairman or the other panel members must be for the pur-

At the end of the employee's case, both parties may give their respective submissions by outlining the salient points of the case. The presenting officer must ensure his closing submission covers all the charges (namely, the elements of each charge) and it refers to all material evidence put before the panel.

poses of clarifying the testimony of the witness, and cannot be interpreted as either helping the case of the company or the employee.

After the domestic inquiry

The chairman and the other panel members shall deliberate on the case and record their findings. The chairman is to prepare a report on such a finding for the management's consideration.

iii. The recording secretary

During and after the domestic inquiry

The recording secretary must ensure that the statements made by all parties at the domestic inquiry are recorded verbatim. If the statements were recorded by handwritten notes, these are to be converted into typewritten form as soon as possible.

The notes should be presented to the panel members for their reference before making their deliberation.

CONCLUSION

The court is not bound to follow the findings of the domestic inquiry. The best approach is to act with transparency and to document the proceedings and the findings properly, in particular the reasons for believing or disbelieving any testimony and for coming to their conclusions.

LH-AG

About the author

Elizabeth Loo Mui Yuen (myl@lh-ag.com) is a senior associate in the firm's Employment Practice Group.

What is ‘Local Jurisdiction’?

by Halina Jael Abu Bakar

Prior to the formation of Malaysia in 1963, the judicial system in Southeast Asia consisted of the Supreme Court of the Federation of Malaya, the Supreme Court of Singapore, and the Supreme Court of Sarawak, North Borneo and Brunei. Each Supreme Court in turn was made up of a High Court and a Court of Appeal, headed by a Chief Justice.

In 1963, the remaining British territories in Southeast Asia, with the exception of Brunei, were incorporated into an enlarged federation of Malaysia. The 1963 Federal Constitution replaced the various Courts of Appeal with one Federal Court of Malaysia, headed by a Lord President. Under this were three High Courts, each headed by a Chief Justice:

- The High Court in Malaya
- The High Court in Borneo
- The High Court in Singapore.

Brunei set up its own Supreme Court of Judicature.

In August 1965, consequent to the departure of Singapore from the Federation and the renaming of Borneo, Malaysia retained the remaining two High Courts in its judicial system: the High Court in Malaya and the High Court in Sabah and Sarawak (Article 121(1) of the Federal Constitution).

Although the powers of the High Court in Malaya and the High Court in Sabah and Sarawak are the same and are governed by the Federal Constitution and the Courts of Judicature Act 1964 [Act 91] (“the CJA”), each High Court may only hear a case within its “local jurisdiction” (s.23 of the CJA).

It is pertinent to note that the jurisdiction of the Magistrates’ Court and the Sessions Court is dependent on the jurisdiction of its respective High Court, as provided by sections 76 and 59 of the Subordinate Courts Act 1948 [Act 92] (“the SCA”) respectively.

Definition

The term “local jurisdiction” is defined in s.3 of the CJA. In essence, the “local jurisdiction” of the High Court in Malaya refers to the states of Peninsular Malaysia and the Federal Territory of Kuala Lumpur while the “local jurisdiction” of the High Court in Sabah and Sarawak encompasses the states of Sabah and Sarawak as well as the Federal Territory of Labuan.

It is submitted that the term “local jurisdiction” is in reference to the territorial jurisdiction over different geographical areas of Malaysia. It was not the intention of legislature that any court in Malaya would assume jurisdiction of a matter arising in or which should be filed in Sabah and Sarawak, and vice versa.

In determining whether a High Court has “local jurisdiction” to try civil proceedings, s.23 of the CJA lays down the relevant factors, namely in reference to where:

- (a) the cause of action arose;
- (b) the defendant or one of several defendants resides or has his place of business;
- (c) the facts on which the proceedings are based exist or are alleged to have occurred; or
- (d) any land the ownership of which is disputed is situated.

The court in *Sova Sdn Bhd v Kasih Sayang Realty Sdn Bhd* [1988] 2 MLJ 268 held that each sitting of the High Court in Malaya located in any of the 11 states have concurrent jurisdiction to entertain any civil proceedings, regardless of whether the cause of action arose in another state. Thus, notwithstanding that the cause of action arose in Selangor, the High Court in Malaya at Kuala Lumpur has the jurisdiction to hear civil proceedings.

Importance of getting it right

Irrespective of the strength of the plaintiff’s case, filing an action in the wrong High Court can have far-reaching consequences, potentially preventing the plaintiff from having his day in court.

In the event a civil proceeding was commenced in a High Court that does not have jurisdiction, the effects and consequences are as follows:

Effect	Consequence
(a) The filing of the civil proceeding in the wrong High Court does not preserve time.	(a) The plaintiff may be barred from re-filing his claim in the correct High Court due to limitation period.
(b) A civil proceeding was not validly initiated.	(b) The plaintiff must re-file his claim at the correct High Court.
(c) Any order, judgment, finding and decision made by the High Court have no effect and can be set aside.	(c) The plaintiff would not be entitled to enforce any order or judgment granted by the High Court.

Forum non conveniens

Although the plaintiff can file a civil proceeding in any sitting of the High Court in Malaya or the High Court in Sabah and Sarawak on the assumption that the said High Court has the jurisdiction under s.23 of the CJA, this is subject to the discretion of the High Court hearing the dispute which can, under certain circumstances, decline jurisdiction.

As mentioned earlier, the High Court in Malaya has sittings in each state of Peninsular Malaysia including the Federal Territory of Kuala Lumpur, while the High Court in Sabah and Sarawak has sittings in Sabah, Sarawak and the Federal Territory of Labuan.

The purpose behind creating numerous sittings of the High Court in Malaya and in the High Court in Sabah and Sarawak (*Sova Sdn Bhd*) is to:

- (a) enable parties of a civil suit to have easy access to a branch of the High Court in a state where either party resides; and

- (b) facilitate the disposal of cases in Malaya and Sabah and Sarawak and to reduce (and not increase) the backlog of cases.

In some instances, if a civil action was commenced in a particular sitting of the High Court in Malaya or Sabah and Sarawak when it could have been more suitably or appropriately commenced in another sitting of the High Court, this was found to be oppressive and vexatious (*Malacca Securities Sdn Bhd v Loke Yu* [1998] 3 CLJ 22).

Under such circumstances, the said High Court hearing the case would decline to exercise its jurisdiction on the basis of the suitability or appropriateness of another tribunal in the interests of all parties and for the ends of justice. Flowing from this, the plaintiff has two remedies. He can:

- (a) withdraw the initiated legal action with liberty to file afresh at the appropriate branch of the High Court; or

- (b) apply to the Chief Judge for directions pursuant to s.20 of the CJA.

However, a sitting of the High Court, upon the direction of the Chief Judge, may only transfer a suit before it to another court under Paragraph 12 of the Schedule to the CJA; it does not confer jurisdiction in the opposite direction (*Lian Mong Yee v Abdul Rashid Maidin & Others* [2001] 3 CLJ 905).

Transfer from the High Court in Malaya to the High Court in Sabah and Sarawak?

What would happen if a plaintiff files a legal action in the High Court in Malaya when he should have done so in the High Court in Sabah and Sarawak? Can the High Court in Malaya then transfer the proceeding to the High Court in Sabah and Sarawak, and vice versa?

An argument in favour of a transfer between the two High Courts under Paragraph 12 of the Schedule is that “Court” as defined under the CJA means “the Federal Court, the Court of Appeal or the High Court”. The term “High Court” is defined as “the High Court in Malaya and the High Court in Sabah and Sarawak or either of them, as the case may require”.

Accordingly, the “Power to transfer any proceedings to any other Court or to or from any subordinate court, and in the case of transfer to or from a subordinate court to give any directions as to the further conduct thereof”, as set out in Paragraph 12, must include the power of the High Court in Malaya to transfer proceedings to the High Court in Sabah and Sarawak, and vice versa.

However, the courts in *Dayasar Corp Sdn Bhd v CP Ng & Co Sdn Bhd* [1990] 2 CLJ (Rep) 11 and *Fung Beng Tiat v Marid Construction Co* [1997] 2 CLJ 1 held that a High Court in Malaya cannot transfer a proceeding to the High Court in Sabah and Sarawak due to the absence of Federal legislation conferring the jurisdiction for one High Court to transfer proceedings to the other.

The courts did not elaborate on the basis for such decision but the possible basis is that:

- (a) under s.20 of the CJA, the Chief Judge shall distribute the business among the Judges of the High Court;
- (b) “Chief Judge” is defined under the CJA as “Chief Judge of the High Court in Malaya or of the High Court in Sabah and Sarawak”;
- (c) this would mean the Chief Judge of the High Court in Malaya will determine the distribution of business for the Judges in the High Court in Malaya, and similarly the Chief Judge of the High Court in Sabah and Sarawak will determine the distribution for the Judges in the High Court in Sabah and Sarawak; and
- (d) there is no provision in the Federal Constitution or the CJA that allows any person to determine the distribution of business for the Judges in the High Court in Malaya and the High Court in Sabah and Sarawak.

In *Dayasar Corp Sdn Bhd* and *Fung Beng Tiat*, the courts struck off the cases as legal action had been filed in the wrong High Court.

Effect of a High Court order

If a legal action was commenced in a High Court that did not have jurisdiction to hear the dispute, any order, judgment or finding made by the High Court would be set aside and would not be effective throughout the Federation (*Fung Beng Tiat*).

If a legal suit was properly initiated in a High Court, any order granted by the said High Court would be effective throughout the Federation. This was recently confirmed by the Federal Court in *Pantai Bayu Emas Sdn Bhd & Others v Southern Bank Bhd* [2009] 2 CLJ 630.

In that case, the Federal Court ruled that s.23 of the CJA does not affect the efficacy of an order granted by the High Court. This is enhanced by s.7(2) of the CJA and Article 121(3) of the Federal Constitution. These two provisions clearly provide that any orders made by the courts shall be effective throughout the Federation and may be executed or enforced in any part of the Federation.

For example, where a defendant is resident in Terengganu, the High Court in Malaya at Kuala Terengganu would have the jurisdiction to hear the case. An order obtained from the High Court in Malaya at Kuala Terengganu would be effective throughout the Federation, which includes Sabah and Sarawak.

The rationale behind these provisions is to avoid the inconvenience of unnecessary difficulties which will arise in the process of the courts within Malaysia. It is clear that without s.7(2) of the CJA and Article 121(3) of the Federal Constitution, an order granted by the High Court in Malaya at Kuala Lumpur may not be recognised in Sabah and Sarawak.

Accordingly, the successful party who seeks to enforce an order granted by the High Court in Malaya at Kuala Lumpur would probably need to file an application in the High Court in Sabah and Sarawak to register and recognise the said order, similar to a foreign judgment.

It has been held that the enactment of s.7(2) of the CJA shows that the draftsman of the CJA recognised the distinctive territorial jurisdiction of the two High Courts in Malaysia (*Syarikat Nip Kui Cheong Timber Contractor v Safety Life and General Insurance Co Sdn Bhd* [1975] 2 MLJ 115).

Another take on 'local jurisdiction' in the RHC

While the term "local jurisdiction" can also be found in Order 12 rule 4(a) of the Rules of the High Court 1980 ("the RHC"), the RHC does not offer a definition of this term.

The term in the RHC appears to be used in a context different from that in the CJA, which is not the local jurisdiction of the High Court in Malaya or the High Court in Sabah and Sarawak. It is submitted that "local jurisdiction" in Order 12 rule 4(a) of the RHC does not, and should not, bear the same meaning as in Article 121(1) of the Federal Constitution and sections 3 and 23 of the CJA.

The intended meaning of "local jurisdiction" in the RHC appears to be in reference to the administrative area of each sitting of the High Court. The usage of "local jurisdiction" in this context does not refer to territorial jurisdiction of the High Court in Malaya (*Bumiputera-Commerce Leasing Bhd v Nethaven Pacific Sdn Bhd & Others* [2008] 5 CLJ 69).

Applying Order 12 rule 4(a) of the RHC, where a writ of summons is filed and issued by the High Court in Malaya at Kuala Lumpur but is served on a defendant in Kelantan, it is submitted that the said defendant should have 12 days after service of the writ to file his or her appearance. In this regard, with respect, it is submitted that the decision in *Wong Yok Moi v Yong You Min* [2001] 7 CLJ 296 should not be followed.

In *Wong Yok Moi*, the High Court held that although the writ of summons was “received and filed” by the registry of the High Court at Kuala Lumpur and the defendant resided in Selangor, the time limited for appearing would be the same, i.e. eight days.

However, as “local jurisdiction” is not defined in the RHC, it is unclear what is the extent of the local jurisdiction conferred on each sitting of the High Court. This would be problematic in circumstances where a state has more than one sitting of the High Court. For example, if a civil proceeding is initiated in the High Court in Malaya at Johor Bahru but the defendant resides in Muar, would the defendant have eight or 12 days to file his appearance in the High Court in Malaya at Johor Bahru?

It is submitted that in such circumstances, the defendant should have eight days to file his appearance as the “local jurisdiction” of the High Court in Malaya at Johor Bahru would include Muar, since it is part of the state of Johor.

Conclusion

We have seen that the courts have declined jurisdiction where an action was filed in the wrong High Court and also in the wrong sitting of the High Court. While the main consequence of the latter is wastage of time spent in transferring the civil proceeding to the appropriate sitting of the High Court, the consequence of filing a civil proceeding in the wrong High Court is much more far-reaching to the extent that the dispute may never be heard if limitation has set in.

To prevent the defendant from succeeding on a technicality without going to the merits of the dispute, it is essential that the plaintiff identify the correct High Court before he or she commences any legal action.

LH-AG

About the author

Halina Jael Abu Bakar (hj@lh-ag.com) is an associate who was with the Litigation Department for three years and is currently with the Mergers & Acquisitions Practice Group.

Case Commentary *McLaren International Limited v Lim Yat Meen* [2009] 4 CLJ 749 (FC)

by Bahari Yeow

Lim Yat Meen (“Lim”) had been the registered proprietor of the trade mark “McLaren” since 11 April 1992 in respect of “articles of clothing, including boots, shoes and slippers” in Class 25.

More than seven years later, on 11 August 1999, McLaren International (a company claiming to be the bona fide proprietor of that same trade mark) filed for registration of the mark in respect of “articles of clothing, footwear and headgear” in Class 25, but this was rejected by the Registrar of Trade Marks, on the grounds that McLaren International’s mark was identical to Lim’s mark, or so similar to the latter that it would likely cause confusion.

In March 2003, McLaren International sought to expunge Lim’s mark from the Register of Trade Marks pursuant to sections 14, 25, 45 and 46(1) of the Trade Marks Act 1976 [*Act 175*] (“the Act”). Under the Act, any “person aggrieved” by an entry in the Register of Trade Marks may apply to the High Court to expunge the mark:

- (i) under s.45, on the ground that the entry is without sufficient cause or the entry is wrongful; or
- (ii) under s.46, on the ground of non-use; namely, the mark was registered without intention in good faith to use it.

However, McLaren International failed to prove before both the High Court and the Court of Appeal that it was a person aggrieved and that it had a case under either s.45(1)(a) or s.46(1) of the Act. Subsequently, McLaren International’s appeal to the Federal Court was also dismissed.

Locus standi

Prior to the Federal Court’s decision in *McLaren International*, there were two schools of thought on

what constitutes an “aggrieved person” under sections 45 and 46 of the Act.

In the more liberal and simplistic view, the phrase “aggrieved person” meant any person whose own application is obstructed by the other party or any person who is alleged to have infringed the registered mark: *Fazaruddin bin Ibrahim v Parkson Corporation Sdn Bhd* [1997] 4 MLJ 360 (HC).

In the other, stricter and more restrictive approach, “substantial grievance” needs to be shown: *Service Master (M) Sdn Bhd v MHL Service Master Sdn Bhd & Anor* [1998] 1 CLJ 459 (HC).

The Court of Appeal appears to have taken the middle ground, as per Suriyadi Halim Omar JCA:

“... **the best approach** to arrive at a correct decision whether an applicant is an aggrieved person **is by bringing all the available evidence to bear before the judge, rather than debating whether the terminology of ‘an aggrieved person’ should be given a wide or restricted interpretation.** ... the appellant... did not qualify as an aggrieved person and hence had no locus standi to initiate the action, be it pursuant to sections 45 or 46 of the Trade Marks Act 1976.”

But the Federal Court, in disagreeing with the Court of Appeal on this aspect, seems to be inclined towards the restrictive approach. Abdul Aziz Mohamad FCJ held that:

“A person whose application for registration of his trade mark is jeopardised by section 19(1) cannot, without more, qualify as a person aggrieved, because he could be a mere busy-body.”

In the light of the Federal Court decision, it may now be said that, in order to be qualified to apply for the removal of a registered trade mark, the applicant:

- (i) must have used his mark as a trade mark; or
- (ii) has a genuine and present intention to use his mark as a trade mark — in the course of a trade which is the same as or similar to the trade of the proprietor of the registered trade mark.

Non-use

McLaren International also relied on s.46(1)(b) of the Act to expunge Lim's registered trade mark. To succeed on this ground, it had to show that there was no use in good faith of that registered trade mark in relation to those goods or services by the registered proprietor or by the registered user of the trade mark for a continuous period of three years until 3 February 2003, one month before the date of McLaren International's motion, 3 March 2003. In other words, the continuous period of non-use ran from 3 February 2000 to 3 February 2003.

Lim admitted that his registered trade mark had been used only in respect of executive men's shoes since it was registered. The court was therefore empowered to order that his trade mark be removed in respect of such articles of clothing — in other words, it could grant McLaren International's alternative prayer for an order of deletion of the words "articles of clothing, including" from the description of the goods to which Lim's trade mark related.

However, the Federal Court dismissed this aspect of the appeal also because McLaren International had failed on the question of locus standi.

In relation to executive men's shoes during the three years in question, the issue was whether the use by two entities that had contractual relationships with Lim, but were not registered users, constituted sufficient use under s.46(1) of the Act.

Pursuant to s.48(1), a registered proprietor who by lawful contract grants any person to use a trade mark may enter on the Register such person as a registered user. The Court of Appeal held that it was not mandatory to enter those two entities as registered users since s.48(1) of the Act uses the word "may", which is permissive. The use by the two entities under contract was sufficient to show use of the registered trade mark by Lim in respect of the executive men's shoes.

The Federal Court disagreed with the Court of Appeal in this regard, and further held:

"So that **the ground for removal** of the trade mark **under s.46(1)(b)** in respect of those goods **may be avoided** or prevented from arising, **the use must be use by the respondent himself as the registered proprietor or by the registered user** of the trade mark, besides the use having to be in good faith. ...

"Although, as the Court of Appeal said, s.48 did not make it mandatory for them [contract manufacturers Stonefly and United Summary] to be registered as such, **their not being so registered has the consequence** that for the purposes of s.46(1)(b) **the use of the respondent's trade mark** by them **was not use by a registered user.**"

However, the Federal Court did not make any finding in respect of the use of the executive men's shoes because that was not a question for determination, given the decision on locus standi.

The author submits that the view taken by the Court of Appeal in respect of the interpretation of "aggrieved person" is the preferred approach for a restrictive approach would mean substantial evidence must be considered. A decision will be more beneficial if greater weight is placed on the merits of the case rather than on whether the applicant is "an aggrieved person".

While an applicant under sections 45 and 46 of the Act must satisfy on prima facie evidence that his legal right is affected, this pre-qualification of locus standi ought not, with the greatest respect, be used to disqualify applicants prematurely.

Powell's case

The Federal Court in *McLaren International* also made reference to the Singapore case of *Re Arnold D Palmer* [1987] 2 MLJ 681, which considered the House of Lords' decision in *Powell's Trade Mark* [1894] 11 RPC 7.

With great respect, the author submits that the House of Lords in *Powell's* did not take too restrictive a view of the phrase "persons aggrieved". In considering who is an "aggrieved person", Lord Herschell LC held:

"Whenever it can be shewn... that the applicant is in the same **trade** as the person who registered the **trade mark**, and wherever the **trade mark**, if remaining on the register, would, or might, limit the legal rights of the applicant, so

that by reason of the existence of the entry on the register he could not lawfully do that which, but for the existence of the **mark** upon the register, he could lawfully do, it appears to me he has a locus standi to be heard as a person aggrieved."

The Kodiak case

In *Re Kodiak Trade* [1987] RPC 269, Kodak Limited registered its trade mark "KODAK" in Class 38, which extended to articles of clothing. Warrington Incorporated, a Canadian manufacturer of boots and shoes, used the mark "KODIAK" in relation to its boots.

Warrington applied to register "KODIAK" in the UK, which was resisted due to the "KODAK" mark. Warrington then applied to have the "KODAK" mark removed.

Kodak took a preliminary point that Warrington had no locus standi as it did not fall within the category of persons aggrieved. The assistant registrar rejected this submission.

Kodak then filed an appeal to the High Court, which allowed it on the basis that Warrington was not an "aggrieved person". The English Court of Appeal allowed Warrington's appeal and remitted the matter back to the High Court to decide on the substantive matters.

The UK Court of Appeal in *Kodiak* interpreted "person aggrieved" widely and, after much careful consideration, held that those words should not be construed in the restrictive sense.

Conclusion

While the debate on who is an “aggrieved person” may initially appear to be an academic one, the Federal Court in *McLaren International* has clearly demonstrated that:

“Question (b) is clearly a question that is looking at the appellants’ alternative prayer. An affirmative answer... can only sensibly and logically result in the granting of the alternative prayer. Therefore, **were the appellants to succeed in this appeal on the question of locus standi, we would allow the appeal but only to the extent of granting the alternative prayer.** But since the appellants fail on the question of locus standi, we dismiss the appeal with costs and order that the deposit be paid to the respondent to account of his taxed costs.”

On the issue of use, namely whether the use by a contractual party (not being a registered proprietor or registered user) constitutes sufficient use under s.46 of the Act, the author submits that the Federal Court’s decision on this point is correct.

While it is not mandatory for the user of a mark to be registered under s.48 of the Act, s.46(1) only recognises use by a “registered proprietor” or “registered user”. Thus, it is prudent to file an application as “registered user” if the registered proprietor does not intend to use the registered trade mark on its own to avoid the mark from being expunged on the ground of non-use.

LH-AG

About the author

Bahari Yeow (ybh@lh-ag.com) is a partner and heads the firm’s Intellectual Property Practice Group.

Lifting the Corporate Veil of Groups of Companies

by S M Shanmugam

In modern company structure, groups of companies have become a common feature. The formation of such companies may be due to commercial reasons or legal sanctity. In his book *Companies and Securities Law: Commentary and Materials* (3rd Ed), Paul Redmond sets out some other reasons:

- (i) To achieve organisational efficiencies by segregating different businesses or functions into separate companies;
- (ii) To maximise the benefits of limited liability by isolating the risk of business failure in a single entity;
- (iii) In the case of partly owned subsidiaries, to obtain control of another entity and access to its resources without the cost of acquiring all of its capital.

Corporate veil

The general rule is that each company within a group of companies is treated as a separate legal entity, with its own legal rights and liabilities. This doctrine harks back to *Salomon v Salomon*¹.

Cohen LJ in *Ebbw Vale Urban District Council v South Wales Traffic Area Licensing Authority*² held as follows:

“Under the ordinary rules of law, a parent company and subsidiary company even a hundred percent subsidiary company, are distinct legal entities, and in the absence of a contract of agency between the two companies one cannot be said to be the agent of the other.”

The difficulty involving a group of companies can be traced back to *Smith, Stone & Knight Ltd v Birmingham Corp*³, in which the court considered six

factors in determining whether a subsidiary company was an agent to the parent company:

- (i) Were the profits of the subsidiary those of the parent company?
- (ii) Were the persons conducting the business of the subsidiary appointed by the parent company?
- (iii) Was the parent company the “head and brains” of the trading venture?
- (iv) Did the parent company govern the adventure?
- (v) Were the profits made by the subsidiary company made by the skill and direction of the parent company?
- (vi) Was the parent company in effective and constant control of the subsidiary?

The liberal approach

In reality, it may be difficult to determine a corporate structure due to the intertwined affairs within a group of companies. This point arose in *DHN Food Distributors v London Borough of Tower Hamlets*⁴, which concerned a group of companies in the groceries business.

Lord Denning illustrated the difficulty in defining companies of this nature:

“This case might be called the ‘three in one’, three companies in one. Alternatively, the ‘one in three’, one group of three companies.”

The decision in *DHN Food Distributors*, while viewed as the liberal approach in piercing the veil where groups of companies are concerned⁵, met with criticism from the House of Lords in *Woolfsion v Strathclyde Regional Council*⁶.

1 [1897] AC 22 (HL)

2 [1951] 2 KB 366

3 [1939] 4 All ER 116. Atkinson J held that the subsidiary was the “agent or employee; or tool or simulacrum of the parent”. It would appear that the factors could also be used to determine the corporate veil with respect to a group of companies.

4 [1976] 1 WLR 852

5 *DHN Food Distributors* was approved by the UK Court of Appeal in *Amalgamated Investment and Property Co Ltd (in liq) v Texas Commerce International Bank Ltd* [1983] QB 84 and *Lewis Trusts v Bambers Stores* [1983] FSR 54

6 [1978] SLT 15

In that case, Lord Keith expressed his reservations:

“I have some doubts whether... the Court of Appeal properly applied the principle that is appropriate to pierce the corporate veil only where special circumstances exist indicating that it is a mere façade concealing the true facts.”

DHN Food Distributors was rejected by the Court of Appeal in *Adams v Cape Industries plc*⁷:

“... the court is not free to disregard the principle of *Salomon v A Salomon & Co Ltd* merely because it considers that justice so requires. Our law, for better or worse, recognizes the creation of subsidiary companies which though in one sense the creatures of their parent companies, will nevertheless under the general law fall to be treated as separate legal entities with all the rights and liabilities which would normally attach to separate legal entities.”

The principle enunciated in *Adams v Cape Industries* may be seen as a restatement of the conservative English position in its strict adherence of the *Salomon* principle.

Australian courts have been inclined to respect the corporate veil with regard to a group of companies, as indicated by the High Court in *Walker v Wimborne*⁸ per Mason CJ:

“... the fundamental principles that each company [company within a group is] a separate and independent legal entity, and that it was the duty of directors of [each company] to consult its interest and its interests alone in deciding whether payments should be made to other companies.”

The judicial trend in Malaysia

On the local front, the watershed decision on the issue was *Hotel Jaya Puri Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor*⁹. In that case, the employees’ salaries, Employees Provident Fund and Socso contributions were paid by the restaurant, and not the hotel. Nonetheless, Salleh Abbas FJ was of the view that this did not detract from the fact that the employees in question were in fact working in a “group enterprise”.

This decision appears to be in line with the liberal approach taken in *DHN Food Distributors*. It is of the view that the narrow legalistic view may have been disregarded in *Hotel Jaya Puri* since the case involved an industrial relations matter where the general rules of technicality were disregarded and decisions are based on equity and good conscience¹⁰.

In *Tiu Shi Kian & Anor v Red Rose Restaurant Sdn Bhd*¹¹, the High Court continued to follow the liberal approach of the doctrine of separate legal personality with respect to a group of companies. The fact that the directors of Hotel Berjaya were also directors of Red Rose Restaurant was deemed sufficient ground to lift the veil.

The liberal trend continued in *Sunrise Sdn Bhd v First Profile (M) Sdn Bhd & Anor*¹², in which Saga Prestige Sdn Bhd (“the subsidiary”) was a wholly owned subsidiary of First Profile (M) Sdn Bhd (“the holding company”). The trial judge, among others, held that the holding company, being a shareholder of the subsidiary, had no right to dispose of or to deal with the land of the subsidiary. On appeal to the Supreme Court, it was held:

7 [1990] 2 WLR 657

8 (1976) 137 CLR 1

9 [1980] 1 MLJ 109

10 See s.30(5) of the Industrial Relations Act 1967 [Act 177]

11 [1984] 2 MLJ 313

12 [1996] 3 MLJ 533

“In our instant case, it was undisputed fact that the subsidiary was wholly owned by the holding company, and it had not been challenged that the holding company, by proxy though its nominees managed the subsidiary... the development of the law has seen numerous deviations from the strict rule of the separate legal entity of the company through cases where the courts, on the particular facts and circumstances of those cases, found it appropriate and necessary to depart. Thus, in contractual obligations or duties, the court would disregard the notional separateness of the companies.”

In *Uniphoenix Corporation Bhd v Raymond Leong Ah Kat*¹³, the Sessions Court held that the plaintiff was an employee of the defendant and, therefore, liable to pay retirement benefits upon resignation. The defendant appealed. The High Court held as follows:

“... whilst it may be true that Flexipak Sdn Bhd may be a separate legal entity from Uniphoenix Corporation Berhad, the evidence shows otherwise. It makes it clear the intention of the parties, that the Defendant was the employer of the Plaintiff... it is observed that the letter of promotion issued by the Defendant... constitutes the employment contract between the Plaintiff and the Defendant. I think the notion of the Defendant being a separate and distinct entity from its subsidiaries falls within the ambit of the Companies Act 1965 and comes within the ambit of the company law.”

*Edmund Charles Liebenberg v ICB-Griffin Manufacturing Sdn Bhd & Ors*¹⁴ was a case involving a petition filed under s.181 of the Companies Act 1965 [Act 125] against, among others, ICB-Griffin Manu-

facturing Sdn Bhd (“Manufacturing”), Instantgreen Corporation Bhd (“Instantgreen”), ICB-Machineries Sdn Bhd (“Machineries”) and ICB-Griffin Marketing Sdn Bhd (“Marketing”).

The directors of Manufacturing were also the directors of Marketing. The majority shares in Manufacturing and Marketing were held by Machineries, a subsidiary of Instantgreen. Among others, the petitioner submitted that Manufacturing and Marketing were collectively the alter ego of Instantgreen through Machineries, which was therefore also its alter ego, and thus the court should lift the veil of incorporation of these companies to make Instantgreen liable for the harm done to the petitioner. The High Court decided in favour of the petitioner.

In the recent case of *Kwan Chew Holdings Sdn Bhd v Kwong Yik Bank Bhd*¹⁵, the plaintiff was the developer of a housing project financed by the defendant bank. The plaintiff was a member of a group of companies, all of which were the defendant’s customers. At all material times, the defendant conducted itself towards all these companies as if they were one and the same entity with the defendant looking to the plaintiff as the “flagship” entity to settle any and all monies owed to the defendant by the other companies in the group.

The plaintiff commenced an action against the defendant bank for damages for breach of contract on the grounds the latter had failed to make available funds to complete the project resulting in losses to the plaintiff. One of the points raised by the defendant was that even if there was a breach by the defendant, the plaintiff could recover nothing as it was another company in the group and not the plaintiff that was the developer.

13 [2004] 6 MLJ 90

14 [2005] 3 CLJ 613

15 [2007] 2 CLJ 127

The Court of Appeal held as follows:

“... throughout their business relationship the defendant regarded the plaintiff and the group of companies to which it belonged as one and the same entity. That is why the defendant... required the plaintiff to utilise all sums received in excess of the redemption monies to pay and settle the monies owing from other companies in the group. Having conducted itself in this fashion towards the plaintiff it is... not open to the defendant to change its stance now and choose to treat each company in the group as a different entity... It is merely an example of equity acting in personam whereby the defendant is estopped from asserting that each company in the plaintiff’s group of companies is a distinct and separate entity because it would be unjust for it to do so.”

It appears from the decided cases in Malaysia that the local courts have adopted the liberal approach (some might argue a little too liberal — for instance, as with the case of *Kwan Chew Holdings*, where the court held that the plaintiff was estopped from asserting that each company in the group of companies was distinct and treated them as a single enter-

prise all along) in line with *DHN Food Distributors*. The corporate veil with respect to a group of companies is lifted where it can be shown that there is functional integrity, special circumstances exist or where justice of the case requires.

Conclusion

While an extremely strict or narrow legalistic approach would uphold the *Salomon* principle (said to be the foundation of modern company law), this may, in certain instances, result in grave injustice. Conversely, an excessively liberal approach to the exception of the *Salomon* principle would promote fraud or manipulation with respect to a group of companies.

The current structure of many companies today is that of “group enterprise”. As such, the courts ought to look into the business realities of the situation and/or the functional integrity of the companies in such arrangements.

LH-AG

About the author

S M Shanmugam (ssm@lh-ag.com) is a senior associate with the Banking & Insolvency Practice Group.

Legislative Update

Central Bank of Malaysia Act 2009: A Comparison Between Old and New

by Choo Dee Wei

The Central Bank of Malaysia Act 2009 (“the new Act”) was gazetted in September 2009. It repeals the Central Bank of Malaysia Act 1958 [Act 519] (“the repealed Act”), and is expected to come into force in November 2009.

Highlighted below are some aspects that were missing from the repealed Act.

In relation to the definition of terms, the new Act has incorporated some new entries (“payment systems”, “officer” and “prescribed”) and dropped others (“bank”, “investment account liabilities” and “savings account liabilities”, among them). Also, the Central Bank of Malaysia’s (“the Bank”) capital has now been halved to RM100 million: s.6(1).

Board of Directors

- *Appointment and disqualification*

As with the repealed Act, the new Act provides for a Board of Directors (“the Board”), the composition of which is essentially the same as s.14(3) will attest, but with a more defined set of responsibilities [see s.14(4) and (5)].

Sections 15 and 16 regulate the appointment of the Governor, Deputy Governors as well as the directors on the Board. Section 15(2), in particular, makes it imperative that the Governor and Deputy Governors be “persons of impeccable reputation with proven experience and recognized knowledge in monetary or financial matters”.

Another change reflected in the new Act relates to the term of appointment. Where previously the Governor and Deputy Governors were appointed for a five-year term, a Deputy Governor now serves for three years: s.15(4). With respect to the provision on reappointment of both, however, the position is the same.

Section 17 sets out the circumstances for the disqualification of the Governor, Deputy Governor or other directors and the grounds on which the appointment of top Bank management may be terminated.

- *Meeting of the Board*

Previously, in the Governor’s absence, any Deputy Governor so designated by the Governor shall be the chairman of the Board. With the new Act, in the Governor’s absence, the chairman shall be elected from among the directors appointed under s.16(1) of the new Act.

Section 19 contains provisions on the meetings of the Board. It is not only the chairman who can summon a meeting of the Board; any other director may do so on condition that each director has at least three days’ notice or, if the meeting is urgent, the directors agree to waive the requirement: s.19(3) and (4).

Another notable difference is that the quorum is now five directors, from four previously: s.19(5).

In keeping with technology, a director is authorized to use live video, television links or other appropriate communication or multimedia facilities to participate in any meeting of the Board: s.19(6).

Also, a resolution in writing signed by all directors shall be as valid and effectual as if it had been passed at a meeting of the Board duly convened and held: s.19(7).

- *Board committees*

Section 21 of the new Act stipulates the setting up, composition and functions of these committees:

- (a) Board Governance Committee (“BGC”);
- (b) Board Audit Committee (“BAC”); and
- (c) Board Risk Committee (“BRC”).

The BGC recommends members of the Monetary Policy Committee, Assessor Committee and other committees of the Bank and to examine and recommend to the Board the budget and operating plan of the Bank for approval.

The BAC assists the Board in its oversight of, inter alia, the integrity of the accounts and financial statements of the Bank as well as the performance of the internal audit function of the Bank.

The BRC is to assist the Board in its oversight of the review and management of the enterprise risks of the Bank.

Monetary Policy Committee

The provisions of s.22 relate to monetary policy and empower the Bank to formulate and implement such policy autonomously, without external influence. Further to this, s.23 provides for the setting up of the Monetary Policy Committee (“MPC”) to formulate monetary policy and policies for the conduct of “monetary policy operations” (the definition of which is listed in s.25(1) as “any transaction undertaken to manage liquidity in the financial system”).

In addition to the Governor, Deputy Governors and members appointed from among directors ap-

pointed under s.16(1) of the new Act or officers, the MPC may consist of any other person appointed by the Minister on the recommendation of the BGC, which must be satisfied that the nominee has the necessary expertise and experience, and is a person of probity, competence and sound judgment: s.24(4) and (5).

The Financial Stability Executive Committee is a new creature under the new Act, whose establishment and composition are set out in s.37. Its role is to accept or reject a proposal on financial stability that is tabled; it can also require the Bank to table another proposal for its consideration. Its powers and functions are outlined in s.38.

Powers to promote financial stability

A new Part VI outlines the financial stability functions and powers of the Bank. As s.27 confirms, Malaysia has a dual financial system consisting of the conventional and the Islamic.

The Bank may require the submission of information or document by certain persons in the interest of financial stability: s.30. It may issue an order in the interest of such stability, and to require any person to

take such measures as the Bank considers necessary or appropriate to avert or reduce any risk to financial stability: s.31.

Notwithstanding the powers to issue an order in writing as described above, s.32 states the Bank may, inter alia, provide liquidity assistance to any

financial institution for the purpose of averting or reducing any risk to financial stability.

The Financial Stability Executive Committee is a new creature under the new Act, whose establishment and composition are set out in s.37. Its role is to accept or reject a proposal on financial stability that is tabled; it can also require the Bank to table another proposal for its consideration. Its powers and functions are outlined in s.38.

The Bank may enter into arrangements to cooperate with or obtain information from other supervisory authorities for the purposes of promoting financial stability, and any information shared shall not be disclosed to any person: s.40.

Money market and foreign exchange market

The Bank can issue rules, codes, standards, principles or guidelines for the money market, the foreign exchange (forex) market or the market for the derivatives related to the currencies, securities and other financial instruments traded in those markets: s.43. Additionally, it can appoint a self-regulatory organization for the forex market or the market for derivatives.

In relation to disclosure of credit information, s.47 contains provisions on the credit bureau established by the Bank, and for the disclosure of credit information collected by the bureau for certain purposes.

A new provision in the new Act, s.49, allows the Bank to set up funds to provide financing through financial institutions on such terms and conditions as the Bank thinks necessary in the event of any exigent circumstances or *force majeure* and to any segment of the economy for the purposes of promoting financial inclusion.

Islamic business

While provision had been made for the establishment of a Shariah Advisory Council (“SAC”) under the repealed Act, it is interesting to note that the new Act gives the SAC the discretion to determine its own procedures: s.51(2).

Section 55 requires the Bank to consult the SAC, and also aims to assist Islamic financial institutions, which may, in respect of Islamic financial business, refer for a ruling or seek the advice of the SAC in order to ascertain that the business is consistent with the Shariah.

Any ruling made by the SAC shall be binding on the Islamic financial institutions, and the ruling shall prevail over one given by a Shariah body or committee of the Islamic financial institution.

Any ruling made by the SAC shall be binding on the Islamic financial institutions (s.57), and the ruling shall prevail over one given by a Shariah body or committee of the Islamic financial institution (s.58).

Section 59 empowers the Bank to issue circulars, guidelines or notices on Shariah matters relating to the Islamic financial business carried on by an Islamic financial institution in accordance with the advice or ruling of the SAC.

Provision has also been made in the new Act for the Bank to develop and promote Malaysia as an international Islamic financial centre: s.60.

Under s.73 of the new Act, the Bank may put in place such arrangements or take measures approved by the SAC to ensure that such functions, business or affairs of the Bank are in accordance with the Shariah.

Other powers

The Bank can give directions to, or impose requirements on, financial instruments for the purposes of giving effect to the objects of the Bank or safeguarding the balance of payments position: s.77(1).

Failure to comply with the directions or requirements constitutes an offence and shall be liable to a fine not exceeding RM10 million or to imprisonment for a term not exceeding 10 years, or both: s.77(3).

Section 78 pertains to the record of international accounts to be maintained by the Bank.

Currency

Under the repealed Act, the Bank had to give at least three months' notice to call in any currency that it issued. Pursuant to s.64 of the new Act, the Bank now need only give one month's notice in the *Gazette* of its intention to do so.

International matters

In line with the government's ambition to develop Malaysia into an international financial hub, s.79 of the new Act provides for the Bank's participation and provision of financing to promote bilateral, regional and international monetary, financial or economic co-operation.

Section 81 enables the Bank to participate in the Bank for International Settlements and any other international financial institution.

Further, s.82 empowers the Bank, with the approval of the Minister, to make regulations for, or issue directions to financial institutions in order to discharge or facilitate the discharge of the Government's international obligations under the United Nations Security Council Resolutions. Failure by a financial institution to comply constitutes an offence, attracting a fine of up to RM100,000.

Officers and employees

Generally, the Bank shall not extend financing to an officer or employee (s.84). However, it may do so upon such terms and conditions as the Board may determine:

- (a) for the purchase, erection or renovation of a house in which he resides or intends to reside;
- (b) to discharge a mortgage or encumbrance on such a house; or
- (c) for the purchase of a vehicle.

Previously, such financing was given based on Shariah principles.

General provisions

- *Secrecy*

Previously, the preservation of secrecy was confined to existing directors, officers or employees of the Bank. Now, even former directors, officers and employees of the Bank, as well as members of the SAC or any committee appointed under the new Act, are prohibited from disclosing information relating to the business or affairs of the Bank or of a financial institution, or of a customer of the Bank or of a financial institution, except for certain specific purposes: s.86.

- *Immunity*

Under the repealed Act, immunity against proceedings (so long as there was good faith) was only applicable to the Bank. With the new Act, any officer, employee or person acting on behalf of the Bank enjoys immunity from an action, suit or prosecution, provided that the act was done or omitted to be done in good faith: s.87.

- *Offence by body corporate*

Section 91 is a new provision and stipulates that if a body corporate commits an offence, its director, CEO, COO, manager, secretary or any person responsible for the management of affairs may be charged in the same proceedings with the body corporate — unless he can establish:

- (i) that the offence was committed without his knowledge, consent or connivance; and
- (ii) he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.

Conclusion

While the new Act does not exactly bring a radical change to the country's financial system, it should still be commended for striving to achieve the national vision of being recognised as an international financial hub in terms of both conventional and Islamic finance. **LH-AG**

For more on the new Act, see www.bnm.gov.my/documents/act/cba2009_01.pdf

About the author

Choo Dee Wei (cdw@lh-ag.com) is an associate with the firm's Banking & Insolvency Practice Group.



Partner Profile

Stephen Jiew

Stephen Jiew has been practising exclusively in intellectual property (IP) and commercial law since 1996 in multiple jurisdictions including Japan, Singapore and Malaysia with leading names in the IP field in both private practice and in-house.

While serving as the regional IP counsel of a leading global fast moving consumer goods (FMCG) company, he gained industry experience of the commercial and strategic value of IP on a regional scale through his direct involvement in managing the IP aspects of the product innovation pipeline, from inception to launch.

His practice spans the entire spectrum of IP development, management, exploitation and enforcement in industries as diverse as FMCG, life sciences, sports, electronics, IT, footwear and alcohol.

Stephen has in-depth experience in devising strategic IP protection programs for large volume IP owners in managing their IPR portfolios locally and across multiple jurisdictions. His transactional experience encompasses the IP aspects of corporate reconfiguration exercises, cross-border mergers and acquisitions, investments, procurement, IPOs, divestitures and joint ventures. He assists clients in the commer-

cialisation of their IP portfolios by structuring and negotiating licenses, franchises, co-branding agreements, strategic alliance arrangements, product endorsements and sponsorship deals.

Stephen is a registered patent agent and has a particular interest in high-technology industries such as ICT, healthcare and life sciences. He has assisted clients in conducting asset management programmes and in negotiating complex cross-border licences, technology transfer agreements, research and development agreements, evaluation agreements and collaboration agreements.

Stephen has had occasion to formulate anti-counterfeiting programs to combat piracy for trade mark owners of supermarket fame and is experienced in orchestrating appropriate local enforcement measures in alignment with clients' corporate IP agendas where the local piece is part of a global litigation strategy.

He is a regular speaker on the international conference circuit including those organised by INTA and IBA. He joined Lee Hishammuddin Allen & Gledhill as a partner in its IP department on 1 August 2009.

LH-AG

ABOUT LEE HISHAMMUDDIN ALLEN & GLEDHILL

The firm has more than 80 lawyers in Kuala Lumpur, Penang and Johor Bahru. Our areas of practice include the following specialist practice groups, each led by an experienced partner:

Banking & Insolvency

Construction

Corporate Disputes

Employment

Financial Services

Foreign Investment

Insurance

Intellectual Property

Mergers & Acquisitions

Projects

Real Property Disputes

Taxation & Private Clients

If we can be of service to you, please contact us at:

Lee Hishammuddin Allen & Gledhill

Level 16, Menara TM Asia Life, 189, Jalan Tun Razak,
50400 Kuala Lumpur, Malaysia

Tel : +603 2161 2330

Fax : +603 2161 3933, 2161 1661

E-mail : enquiry@lh-ag.com



LEGAL HERALD

Published by the Knowledge Department

Lee Hishammuddin Allen & Gledhill

For further information about the *Legal Herald*,
please contact knowledge@lh-ag.com or
the person whom you normally consult.

Opinions, comments and suggestions are welcome.

Consultant	Dato' K C Vohrah	kcv@lh-ag.com	+603 2165 8408
Senior Partners	Dato' Thomas M L Lee	tl@lh-ag.com	+603 2165 8411
	Datuk D P Naban	dpn@lh-ag.com	+603 2165 8448
Managing Partner	Muthanna Abdullah	ma@lh-ag.com	+603 2165 8497
Head of Dispute Resolution	Lambert Rasa-Ratnam	lr@lh-ag.com	+603 2165 8459
Head of Corporate	Iain Sedgley	is@lh-ag.com	+603 2165 8420
Banking & Insolvency	Kumar Kanagasingam	kk@lh-ag.com	+603 2170 5803
	Sean Yeow Huang-Meng	yhm@lh-ag.com	+603 2165 8472
	Andrew Chiew	ac@lh-ag.com	+603 2165 8497
	Mong Chung Seng	mcs@lh-ag.com	+603 2165 8511
Construction	Nitin V Nadkarni	nn@lh-ag.com	+603 2165 8445
Corporate Disputes	Rosli Dahlan	rd@lh-ag.com	+603 2170 5804
	G Vijay Kumar	vkg@lh-ag.com	+603 2165 8434
Employment	Lim Heng Seng	lhs@lh-ag.com	+603 2165 8501
Financial Services	Tay Weng Hwee	twh@lh-ag.com	+603 2165 8431
Foreign Investment	Ooi Bee Hong	obh@lh-ag.com	+603 2170 5805
Insurance	G Vijay Kumar	vkg@lh-ag.com	+603 2165 8434
Intellectual Property	Bahari Yeow Tien Hong	yth@lh-ag.com	+603 2165 8450
	Stephen Jiew	sj@lh-ag.com	+603 2170 5816
Knowledge	Koh Kek Hoe	kkh@lh-ag.com	+603 2165 8582
Mergers & Acquisitions	Ng Leong Huat	nlh@lh-ag.com	+603 2165 8430
Projects	Iain Sedgley	is@lh-ag.com	+603 2165 8420
Real Property Disputes	Rosli Dahlan	rd@lh-ag.com	+603 2170 5804
Taxation & Private Clients	Datuk D P Naban	dpn@lh-ag.com	+603 2165 8448