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Importance of
ESG in Litigation

Green Incentives
in Malaysia

Updates
to the Law

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- 2020: Leading and Recommended Law Firm in Malaysia
- 2019: Leading and Recommended Law Firm in Malaysia

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- 2023: Recommended Firm
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- 2019: Recommended Firm
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- 2020: Top Ranked Leading Firm
- 2019: Top Ranked Leading Firm
- 2018: Top Ranked Leading Firm

Our Senior Partner, Jeff Leong, is recognised on Asia Business Law Journal's A List of Malaysia's Top 100 Lawyers and Legal 500's Hall of Fame for Corporate and M&A in Malaysia.

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SENIOR PARTNER'S NOTE



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Greetings!

2022 was a year marked with rising uncertainties and volatilities.

The Ukraine war, high energy prices, record inflation, the surging US dollar and rising interest rates have dampened demands and slowed growth on the global front. Growing geopolitical tensions between the United States and China and the related uncertainties also prompted many industry players to relook at the possibility in relocating or sourcing alternative supply chains.

Despite global uncertainties, Malaysia has started to gradually recover from the Covid pandemic. Malaysia's economy is showing resiliency with strong recovery growth in the second quarter and third quarter of 2022, largely due to an improved labour market and income condition. Nonetheless, extenuating global factors will continue to pose great challenges for local industry players, many of whom will need to find ways to adapt and seek opportunities amidst these challenges.

The results of the 15th General Election has also brought uncertainties to local financial market and economy. A diverse ruling coalition may, whilst presenting itself to be a unity government, be a hurdle to itself in implementing major decisions, especially on structural or policy reforms.

The Malaysian economy has largely been stagnant for the greater part of last 3 years, amidst Covid-19 pandemic, political infighting, as well as both domestic and global economic challenges. Higher cost of living due to rising inflation has eroded general purchasing power and pushing down consumer demand. A lot of hopes have been placed on the newly formed government to push forward measures to address the economic slack.

We have seen Singapore, with its reopening in 2022, experiencing great influx of funds, especially a large part of it is from China, with total assets under its management rose 16% to S\$5.4 trillion. In a 2023 investment outlook survey conducted by an asset management firm, Asia (excluding China) will see its best growth opportunities in emerging markets. Malaysia should get a piece of this action before the trend starts to taper. There are many calls on the coalition government to put aside political differences and refocus on taking steps in bringing the Malaysian economy back on its foot.

With some luck, we hope to see 2023 as a year of growth for Malaysia!



EDITOR'S NOTE

As 2023 rolls on, we are constantly reminded that we're in an ever-changing world. We thought that the world is on the brink of economic disaster, yet it looks like we are hanging on. Still, the Damoclean clouds of volatility and uncertainty hang over us ominously.

At the same time, the pandemic which headlined most of the past two years has faded away like a bad dream. But we have come out on the other side, stronger and more resilient. With this, I would like to take this opportunity to congratulate SFP Tech Holdings Berhad, YX Precious Metals Berhad, DS Sigma Holdings Berhad, and Cape EMS Berhad. All of these were successful businesses that went public on Bursa Malaysia in 2022 and 2023.

These four companies operate in four different sectors. Yet they join over 40 other companies that managed to list on Bursa Malaysia in 2022 and 2023 – a high score of listings that looks set to break the last bull run in 2006–2007. This shows that Malaysia's economy is well and truly on its way to recovery.

We at Jeff Leong, Poon and Wong are glad to be part of the listing journey of SFP Tech Holdings Berhad, YX Precious Metals Berhad, DS Sigma Holdings Berhad, and Cape EMS Berhad. We are proud to be able to assist them in making all the necessary preparations to take their business to the next level.

In addition, we are also keeping a close eye on legal developments in Malaysia. We cover some of these in this issue of our newsletter, including:

- Payment disputes in construction contracts;
- Environmental, social and governance (ESG) factors in litigation;
- The latest, major amendments to the Employment Act;
- Misrepresentation in conveyancing;
- And many more.

We hope that you gain new insights from these articles written by our subject matter experts. Should you wish to discuss anything in more detail, feel free to get in touch with your usual JLPW contact, email us at jlpw@jlpw.com.my, or call us at +603 2203 3388.



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Green Incentives in Malaysia

BY SIAO JOHN SON & SEOW WEE LOONG

The environment and economic development are often painted as diametrically opposite interests, with critics often arguing that decarbonisation efforts result in too high of an economic cost.

On 25 November 2022, a land court in the state of Queensland, Australia, recommended that a mining lease not be granted for a proposed new coal mine on the grounds that such a mine “risks unacceptable climate change impacts to Queensland people and property, even taking into account the economic and social benefits of the project.”¹

Critics will be quick to point to the above case as proof that economic growth has been sacrificed at the altar of the climate change movement. Such beliefs are not only outdated but dangerous as well. Climate change, with its potential to damage and destroy property and infrastructure and cause loss of life is in fact a greater threat to economic growth.

Now more than ever in Malaysia, going green can be advantageous for a company’s bottom line. This article explores some of the available green incentives in Malaysia which seeks to incentivise companies in Malaysia to adopt greener measures.

Tax Allowance

In an effort to boost the Malaysian economy and increase the generation of energy through renewable resources, the Malaysian government (“**Government**”) has, since 2013, introduced the Green Investment Tax Allowance (“**GITA**”), a tax allowance on 100% of capital expenditure incurred for: (i) approved green technology assets; and (ii) green technology projects undertaken by qualifying companies, where such allowance can be offset against 70% of the company’s statutory income for the relevant year of assessment.

GITA for Purchase of Green Technology Assets

Companies who incur capital expenditure on green technology assets can benefit from the GITA, subject that the green technology assets must, inter alia:

- (a) be registered and listed under the MyHIJAU directory;
- (b) be verified by the Malaysian Green Technology and Climate Change Corporation;
- (c) be for the company’s own consumption and used in the business carried out in Malaysia; and
- (d) be purchased between 25 October 2013 and 31 December 2023.

The list of qualifying green assets can be found in the MyHijau Directory.²

GITA for Green Technology Projects

In respect of capital expenditure for green technology projects, the GITA is available to qualifying companies which undertake green technology projects in the renewable energy, energy efficiency, green building, green data centre and integrated waste management sectors. Interested applicants should note that:

- (a) the green technology project must obtain a conditional approval letter from Malaysian Investment Development Authority (“**MIDA**”); and
- (b) Applications for the allowance must be submitted to MIDA prior to 31 December 2023 and before the first qualifying capital expenditure is incurred.³

¹ Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21.

² <https://dir.myhijau.my/directory>.

³ Green Technology Tax Incentive Guidelines published by the Malaysian Green Technology and Climate Change Corporation dated 21 March 2022 (“**Green Technology Tax Incentive Guidelines**”) at <https://www.mgtc.gov.my/wp-content/uploads/2022/07/REC-GTGT-007-GUIDELINES-FOR-GREEN-TECHNOLOGY-TAX-INCENTIVE-GITAGITE.pdf>.



Tax Exemption

The Government has also introduced an incentive for service provider companies. This incentive is known as Green Investment Tax Exemption (“GITE”). Through the GITE, an eligible green technology service provider company will be eligible to an income tax exemption of 70% on the statutory income derived from undertaking any qualifying green activities for 3 years. To be eligible, service provider companies have to fulfil, *inter alia*, the following criteria:

- (a) 100% of income must be derived from at least 3 qualifying activities⁴ in the following green technology sectors:
 - (i) Renewable Energy;
 - (ii) Energy Efficiency;
 - (iii) Electric Vehicle;
 - (iv) Green Building;
 - (v) Green Data Centre;
 - (vi) Green Certification and Verification;
 - (vii) Green Township;
- (b) Employs at least 5 full-time employees in Malaysia with at least 2 of them which are competent in the field of green technology; and
- (c) Have in place a proper green policy.⁵

GITE for Solar Leasing

Another tax exemption programme in place, known as GITE leasing, is specific to companies providing solar leasing services. In order to be eligible, solar leasing companies must *inter alia* employ at least 5 full-time employees working in Malaysia which includes at least 2 employees which are competent in the field of green technology, and the income that qualifies for exemption must be derived from the leasing activities. Qualifying applicants are entitled to an income tax exemption of 70% on statutory income for solar leasing activities for up to 10 years.⁶

Photo by JLPW Associate, Zac Lee



⁴ Green Technology Tax Incentive Guidelines.

⁵ A statement about the commitment to sustainability and environment management by the company.

⁶ <https://www.mgtc.gov.my/what-we-do/green-incentives/green-investment-tax-incentives-gita-gite/>.



Pioneer Status

Companies are also eligible for a tax exemption if they are granted pioneer status under the Promotion of Investment Act 1986. If granted pioneer status, a company will qualify for income tax exemptions and investment tax allowances⁷. However, pioneer status will only be granted to companies which participate in a “promoted activity” or which produces a “promoted product” and intends to construct or has a factory in Malaysia for that purpose. The list of all promoted activities and products are available on MIDA’s website.⁸

Several examples of green promoted activities / products include the manufacture of electrical and electronics products and components involving alternative energy, generation of renewable energy, conservation of energy and others.⁹

Grants

Under the 12th Malaysia Plan, the Government has approved the Energy Audit Conditional Grant to be continued for from 2021 – 2025 (“**EACG 2.0**”). The EACG 2.0 is a programme where the Government (Through Sustainable Energy Development Authority (“**SEDA**”)) provides financial assistance to building/installation owners to conduct an energy audit on their building/installation to assist in the implementation of energy savings.

The EACG 2.0 seeks to encourage companies to identify / evaluate the energy consumption of its building / installation and promote the efficient usage of energy. The amount of each grant differs depending on an applicant’s sector. For the industrial sector, a company can apply for up to RM100,000.00 per site / account while for the commercial sector, the grant is up to RM60,000.00 per site / account.¹⁰

To qualify, the following requirements must be fulfilled:

- (a) The building / installation must have a minimum energy consumption of 100,000 kWh/month;

- (b) Within 2 months of signing the contract with SEDA, the grant recipient must appoint an energy service company registered with the Energy Commission to conduct the energy audit and to implement the proposed energy saving measures within 3 years. However, anyone who has previously received a grant under the initial EACG programme is not eligible to apply.

Conclusion

As the world continues to grapple with balancing economic and climate change challenges, companies and business owners should continue taking on larger and more important roles in reducing greenhouse gas emissions. Thanks to the available tax exemptions and allowances, Malaysian companies can now adopt a more holistic approach of taking long-term greener measures without having to sacrifice their bottom lines.

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⁷ Promotion of Investments Act 1986.

⁸ <https://www.mida.gov.my/setting-up-content/promoted-activities/>.

⁹ Promotion of Investments (Promoted Activities and Promoted Products) Order 2012; Promotion of Investments (Promoted Activities and Promoted Products for High Technology Companies) Order 2012; Promotion of Investments (Promoted Activities and Promoted Products for Selected Industries) Order 2012; Promotion of Investments (Promoted Activities and Promoted Products for Reinvestment) Order 2012; Promotion of Investments (Promoted Activities and Promoted Products for Small Scale Companies) Order 2012.

¹⁰ <https://www.seda.gov.my/energy-demand-management-edm/energy-audit-conditional-grant-commercial-building/#1658654382640-2f89dc30-5c04>.

Importance of ESG in Litigation

BY FATIN SYAHIRAH AZMAN

ESG Litigation

Environmental, social, and governance (“ESG”) principles which were once voluntary have now slowly become mandatory as regulators in major markets have introduced mandatory reporting requirements. ESG have become an integral part of a corporate entity as stakeholders and investors are now calling for enhanced compliance to ESG principles. As such, companies are more susceptible to risk in connection with non-compliance of ESG principles thereby leading to unnecessary litigation exposures.

Contractual disputes could arise from the non-compliance of ESG principles that were incorporated into a contract. Non-compliance of ESG principles arising from negligence and nuisance caused by/to neighbouring companies may also lead to tortious claims against an entity. Further, companies may face difficulties whilst applying for permits, approvals, licences and certificates for their non-compliance to ESG principles. Are the companies in Malaysia prepared for the implementation of ESG principles?

ESG Related Case Law

There has been an increasing number of ESG related cases being litigated globally. ESG litigation, in the form of non-compliance or breach of ESG principles by the respective companies, has yet to emerge in Malaysia. As such, case studies are based on foreign cases, such as greenwashing litigation and failure to disclose climate risks.

In *Lungowe and others v Vedanta Resources plc and another*¹, 1,826 Zambian villagers brought a claim in an English court against UK-based Vedanta and its Zambian subsidiary Konkola Copper Mines as they had polluted the local waterways, causing personal injury to the local residents, as well as damage to property and loss of income. The UK Supreme Court provided



Photo by JLPW Associate, Tyler Chan

guidance as to when a parent company can be held responsible for tortious acts committed by its overseas subsidiaries under English law. This exposes the parent companies to the possible liability for the act of their subsidiaries.

In *Pedro Ramirez Jr v. Exxon Mobil et al, U.S. District Court, Northern District of Texas*², a derivative suit was filed by ExxonMobil's shareholders against its directors for a breach of fiduciary duty and failure to disclose climate risks on the company's business reserves and assets. They argued that it has misled the public and shareholders by using different accounting for the costs of GHG emissions in public than they did in private. The Federal District Court for the Northern District of Texas found that certain Exxon officials committed material misstatements concerning the

¹ *Lungowe and others v Vedanta Resources plc and another* [2019] UKSC 20, [2019] 3 All ER 1013.

² *Pedro Ramirez Jr v. Exxon Mobil et al, U.S. District Court, Northern District of Texas*, No. 16-03111 (August 14, 2018).



company's use of proxy costs for carbon in business and investment decisions.

In the pending case of *Usler v. Vital Farms, Inc.*³, consumers represented by PETA filed a lawsuit against egg producer Vital Farms, Inc. and three of its officers. The plaintiffs attacked statements on Vital Farms' egg cartons that their operations were "ethical" and "certified humane", their hens were "pasture-raised", and their mission was "the humane treatment of farm animals". Plaintiffs claimed that these statements were false, and when viewed in the context of the pictures on the egg cartons, marketing statements on social media, and statements in its SEC filings, they tricked consumers into paying premium prices for eggs that they believed were ethically sourced.

Looking at the development of ESG statutory disclosures and obligations, companies should expand, manage and mitigate the risk of ESG litigation. The importance of companies to incorporate ESG management into their risk management framework is to identify, analyse and minimise all ESG risks as more ESG litigations can be expected.

Our lawyers represent clients of all industries impacted by ESG principles, including energy, tax, consumer products, construction and infrastructure, workplace safety, power, and more. With experienced lawyers in our team, we are more than prepared to help our clients to manage their ESG litigation risks.

For further details, please contact our lawyers, Ganesh Nathan, Seow Wee Loong and Fatin Syahirah Azman.

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³ *Usler v. Vital Farms, Inc.* No. A-21-CV-447-RP, 2022 WL 1491091 (W.D. Tex. Jan. 31, 2022).



Updates on Registering Your Franchise, New Franchising Requirements and More!

BY TAN LE YU & JOY LIM PEK KEE

Franchising is governed in Malaysia by the Franchise Act, which regulates the sale and operation of any franchise in Malaysia. The relevant ministry that oversees franchises is the Ministry of Domestic Trade and Cost of Living (KPDNHEP) with its Franchise Development and Direct Selling Division, as well as the Registrar of Franchise.

Recently, to ensure conformity with the current developments of the franchise business in Malaysia, the long-awaited Franchise (Amendment) Act 2020 has come into force on 28 April 2022.

Here, we will highlight changes to the law that franchise industry stakeholders should be aware of.

(a) Mandatory Requirements for Registration of a Franchise

If you're a foreign franchisor looking to enter the Malaysian market, you will be required to register your franchise under Section 6 of the Franchise Act, in addition to obtaining an approval under Section 54 of the Franchise Act. This additional registration requirement is in line with the Court of Appeal case in *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd*¹ where it was held that:

*“...**any foreign franchise or franchisor, in order to lawfully participate in the franchise industry in this country, ought to be registered under the said two provisions of the [Franchise] Act.** Where no such registration has been effectuated by the foreign franchisor, but the franchise agreements had nonetheless been executed between the foreign franchisor and its local franchisee, such agreements*

*must come to naught as being **void and unenforceable.**”*

If the franchise is not registered under the Franchise Act, any franchise agreements that have been signed and executed will become void and unenforceable. This is in line with *SP Multitech Intelligence Homes Sdn Bhd v. I Home Sdn Bhd*², *Munafsya Sdn Bhd v. Proquaz Sdn Bhd*³ and *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor*⁴.

Therefore, in addition to obtaining approval under Section 54 of the Franchise Act, foreign franchisors are also required to register their franchise under Section 6 under the Franchise Act. However, pursuant to Section 27 of the Franchise (Amendment) Act 2020, for transitional purposes, a foreign franchisor who has already registered under Section 54 of the Franchise Act prior to 28 April 2022 shall be deemed to have been registered under Section 6 of the Franchise Act.

Furthermore, the 2020 amendments to the Franchise Act also make clear that all provisions previously applicable to local franchisors will now extend to foreign franchisors. For example, foreign franchisors are now required to submit disclosure documents and annual financial reports in accordance with Section 16 of the Franchise Act, as local franchisors already do.

(b) Re-registration of Franchise under MyFex2.0

On 28 July 2022, the Registrar of Franchise announced that all franchise registrations will be expiring in conjunction with the 2020 amendments to the Franchise Act. In line with this change, the Registrar introduced a new online system, MyFex2.0 to replace the old system

¹ *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd* [2021] 1 CLJ 155.

² *SP Multitech Intelligence Homes Sdn Bhd v. I Home Sdn Bhd* [2010] 1 LNS 1286.

³ *Munafsya Sdn Bhd v. Proquaz Sdn Bhd* [2013] 2 CLJ 189.

⁴ *Tea Delights (M) Sdn Bhd & Anor v. Yeap Win Nee & Anor* [2015] 1 LNS 936.



Photo by JLPW Associate, Zac Lee

and act as a platform for franchisors and master franchisees to file their registration applications.

Hence, all franchisors, local and foreign, are now required to register their franchises in Malaysia under the new system. For already registered franchises, there are no fees payable to the franchisors for filing the re-registration application.

The re-registration process is similar to the old process, but franchisors are required to submit additional documents, for example a disclosure document in the format prescribed by the Registrar. Franchisors are given a grace period of three years from 1 August 2022 to re-register their franchises under MyFex2.0.

Based on the information available on the MyFex2.0 platform, the registration process is expected to take around one to three months, provided that all the

information and documents are completed. As such, we anticipate that the re-registration process to be relatively straightforward.

(c) Registration of Franchisees by Franchisor

Although not expressly stipulated in the 2020 amendments, based on information available on MyFex2.0, it appears that the obligation to register franchisees as required in Section 6B of the Franchise Act will now be the responsibility of the franchisors.

(d) Effective Period of a Franchise Registration

Prior to the 2020 amendments, the validity of the registration of a franchise is perpetual and would continue to be effective until and unless the Registrar of Franchise issued a notice of suspension, termination or cancellation under Section 10 of the Franchise Act.



That said, the validity of a franchise registration is now limited to five years as provided under the Franchise (Prescription of Period of Effectiveness of Registration) Regulations 2022. As consulted with the Registrar, we are informed that the introduction of such validity period is to ensure that the franchise stays active.

(e) Renewal of a Franchise Registration

As the franchise registration will only be valid for five years, it is also a new requirement for franchisors to apply to the Registrar and pay the prescribed fees for such a renewal. Such applications must be filed 30 days before the expiry date. It is also vital to note that the Registrar may impose certain conditions as it deems fit for the renewal.

(f) Additional Provisions to be Included in a Franchise Agreement

In Malaysia, certain mandatory provisions must be included in a franchise agreement under Section 18(2) of the Franchise Act. These include, among others:

- (i) The franchise term, the terms of renewal of the franchise agreement;
- (ii) Franchising territory; and
- (iii) Cooling-off period shall not be less than seven working days, during which the franchisee has the option to terminate the agreement

The franchise laws in Malaysia generally allow a franchisor to either extend or renew a franchise term. In addition to including terms on renewal term, the 2020 amendments codify the requirement to include the terms on extension in a franchise agreement.

(g) Failure to Comply with Mandatory Requirement

With the 2020 amendments, the omission of the mandatory provisions under Section 18(2) of the Franchise Act will no longer result in the nullification of the franchise agreement. However, any person who omits the inclusion of any compulsory provisions commits an offence and will be liable to a fine and/or imprisonment upon conviction. In addition, the courts may declare the franchise agreement to be null and void, order the franchisor to refund the payment received from

the franchisee and prohibit the franchisor from making any new franchise agreement or appointing any new franchisee.

Therefore, it is vital to sure that all the mandatory terms are included in a franchise agreement.

(h) Display of Registration of Franchise

Pursuant to the newly introduced Section 10B of the Franchise Act, a franchisor or franchisee shall always display the certificate of registration of the franchise in a conspicuous position at the place of business. Failure to comply with this provision is an offence.

(i) Changes to the Fees Payable to the Registry

As provided under the Franchise (Forms and Fees) (Amendments) Regulations 2022, there are certain revisions made to the fees payable to Registrar, including processing fees (payable upon filing of application) and registration fees (payable upon successful registration).

Conclusion

In a nutshell, franchisors and franchisees are encouraged to carefully observe the Franchise Act as well as its 2020 amendments to ensure full compliance. In the meantime, if you're a franchisor, you should re-register your franchise under MyFex 2.0 as soon as possible before 1 August 2025.

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Is “Pay When Certified” The Same As “Pay When Paid” in Construction Contracts?

BY JOLIN YEW CHEE IT

Since 15 April 2014, the Construction Industry Payment and Adjudication Act 2012 (“CIPAA”) provides a regime whereby an unpaid party can claim for payment for work done and services rendered under the express terms of a written construction contract. With the main objective to provide a speedier summary procedure for temporary resolution of payment disputes which arose under a construction contract, Section 35 of the CIPAA has removed the pervasive and prevalent practice of conditional payment (i.e. “pay when paid”, “pay if paid” and “back to back”) by invalidating conditional payment clauses in construction contracts, mainly to ease cash flow in the construction industry by providing default payment terms in the absence of provisions to that effect in the construction contract under Section 36 of the CIPAA.

It is a conditional payment within the ambit of Section 35(2) of the CIPAA when:

- (a) The obligation of one party to make payment is conditional upon that party having received payment from a third party; or
- (b) The obligation of one party to make payment is conditional upon the availability of funds or drawdown of financing facilities of that party.

Since “conditional payment” is not restricted to the 2 circumstances stipulated in Section 35(2) of the CIPAA as decided in the High Court case of *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case*¹, is a “pay when certified” clause in a construction contract void?

The Court of Appeal recently in *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another appeal*² set aside a High Court’s decision which held that a “pay when certified” clause is tantamount to conditional

payment and will be void under Section 35 of the CIPAA, as it is not limited to “pay when paid” clauses only.

Background

Lion Pacific Sdn Bhd (“**Lion Pacific**”) was appointed by a consortium as the subcontractor for the System Works Package parcel of a construction project (“**Works**”). In turn, Lion Pacific engaged Pestech Technology Sdn Bhd (“**Pestech**”) as its subcontractor for the Works (“**Sub-Contract**”).

Pestech commenced an adjudication proceeding against Lion Pacific and the adjudication decision was in favour of Pestech. In the High Court, Pestech’s application to enforce the adjudication decision was allowed, whereas Lion Pacific’s application to stay and/or set aside the adjudication decision was dismissed.

Core Issues

1. Whether CIPAA has no application to the Sub-contract since the main contract (which forms part of the Sub-contract) was entered into prior to the coming into force of CIPAA.
2. Whether the adjudicator had acted in excess of his jurisdiction by incorporating new non-existent contractual term into the Sub-contract.
3. Whether there were manifest errors in the adjudication decision.

Issue No. 1

Lion Pacific contended that the adjudication decision was null and the High Court had come to an erroneous finding that the adjudicator has jurisdiction to decide the payment claim submitted by Pestech based on the grounds, among other things, that:

¹ *Econpile (M) Sdn Bhd v IRDK Ventures Sdn Bhd and another case* [2017] 7 MLJ 732.

² *Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another appeal* [2022] MLJU 2109.



- (a) Pestech is fully aware that the contract entered into between the Government of Malaysia and the consortium and the contract entered into between the consortium and Lion Pacific were entered prior to CIPAA coming into force.
- (b) The terms and conditions (“**T&C**”) of the main contract are equally applicable to the Sub-Contract between Pestech and Lion Pacific pursuant to the T&C of the Sub-Contract.
- (c) Under the Sub-Contract, Pestech was made a party to the main contract which means that the main contract applies to all disputes between the parties to the Sub-Contract, when both the contracts formed part of the same series of transactions.
- (d) As Pestech had knowledge that the main contract applied to both the above parties, Pestech is deemed to be a party to the main contract.
- (e) As the main contract came into existence before CIPAA came into force, any payment dispute under the Sub-Contract cannot be referred to the adjudicator pursuant to CIPAA rendering the adjudicator being devoid of jurisdiction to adjudicate the dispute.

It is indisputable that CIPAA is prospective in nature and would not apply to contracts entered into prior to CIPAA coming into force – see Federal Court case of **Jack-In Pile (M) Sdn Bhd. v Bauer (Malaysia) Sdn. Bhd. & Another**.³

On the other hand, Pestech contended that the date of execution of the main contract is irrelevant to the adjudication proceedings and that the date of the Sub-Contract should be the only relevant date for consideration as to whether CIPAA applies as the adjudication proceedings arose out of the Sub-Contract.

The Court of Appeal held in favour of Pestech and concluded that CIPAA applies to the Sub-contract on the following reasons:

- (a) The main contract and the Sub-contract are separate contracts with only one common party.

- (b) Pestech’s payment claim was based on the Sub-Contract which was concluded after CIPAA came into force.
- (c) All the rights and obligations of Pestech and Lion Pacific arose solely from the Sub-Contract (not the Main Contract).
- (d) The mere fact that the Sub-Contract had incorporated all the provisions of the main contract into the Sub-Contract did not mean that Lion Pacific and Pestech had entered into the main contract.

Issue No. 2

Lion Pacific contended that:

- (a) the adjudicator has decided that the certification mechanism as agreed between the parties is a mechanism which is prohibited by Section 35 of the CIPAA (prohibition of conditional payment, e.g. “pay when paid” clause); and
- (b) Pursuant to the Sub-Contract, the certification by the Ministry of Transportation (“**MOT**”) is required to confirm whether Pestech had in reality completed its works (Clause 4.1 of the Sub-Contract) (“**Clause 4.1**”) prior to any payment made to Pestech.



The question for determination is whether the said certification was purely to determine the works carried

³ *Jack-In Pile (M) Sdn Bhd. v Bauer (Malaysia) Sdn. Bhd. & Another* [2020] 1 CLJ 299.



out by Pestech and should not be regarded as a provision for conditional payment.

The Court of Appeal held in favour of Lion Pacific, whereby Clause 4.1 is not invalidated by Section 35 of the CIPAA for reasons that:

- (a) The adjudicator has exercised his powers in excess of jurisdiction when he erroneously concluded that Section 35 of the CIPAA applies to not just “pay when paid” provision but also to “pay when certified” provision, therefore Clause 4.1 cannot apply despite this clause not being a “pay when paid” provision.
- (b) The adjudicator’s misconstruction of the term “pay when certified” as being “pay when paid” which is prohibited as a conditional payment also amounted to the incorporation of a new non-existent contractual term into the Sub-Contract to which the parties had not mutually agreed and the purported “pay when paid” clause was never in existence.
- (c) There was no default by Lion Pacific in making payment to Pestech as Lion Pacific is only obliged to make payment to Pestech upon certification of the work done by MOT as expressly provided in Clause 4.1 to which the High Court ought to have given effect as a mutually agreed term.
- (d) Notwithstanding the object of CIPAA being to facilitate prompt payment, the contractual obligations of the parties as expressly agreed upon cannot be disregarded.
- (e) Section 35 of the CIPAA was not intended to replace the certification or valuation to assess the progress of works carried out by the relevant authority for payment to be affected.

Issue No. 3

Lion Pacific claimed that there was purported denial of natural justice to Lion Pacific by the adjudicator premised on the grounds, among other things, that:

- (a) the adjudicator’s failure to appreciate that there was an absence of the certification from MOT and proceeded to make an award in favour of Pestech based on a “pay when paid” clause;

- (b) the adjudicator had unilaterally incorporated new non-existent term into the contract between the parties, which was never agreed upon by the parties; and

- (c) Lion Pacific was never asked to address the proceeding on the core issue that was material to the adjudicator’s final decision.

The Court of Appeal concurred with Lion Pacific’s position that the High Court had also not appreciated the adjudicator’s failure to consider the fundamental element of Lion Pacific’s defence, namely, the non-entitlement of Pestech to its claim without certification by the MOT; and the certificate issued by Lion Pacific was only at the request of Pestech for securing financing and not for work done, which was the basis of the payment claim for which evaluation and certification by the approving authority was crucial.

Therefore, the Court of Appeal had allowed Lion Pacific’s appeal, and set aside the decision of the High Court and the adjudication decision.

Closing

This decision confirms that CIPAA is applicable to construction contracts (including sub-contracts) entered into after CIPAA came into force on 15 April 2014.

This is also an interesting decision by the Court of Appeal as it affirms the position that a clause requiring payment to be conditional upon certification is not a conditional payment clause prohibited under Section 35 of the CIPAA. Such a condition might not be unreasonable and might be good in enhancing efficiency in contracts management. There might well be a myriad of conditions not all of which would be defeating the purpose of the CIPAA.

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Key Amendments to the Employment Act 1955

BY TYLER CHAN XIN HAN & SEOW WEE LOONG

In 2022, Malaysia saw the introduction of the Employment (Amendment) Act 2022 (“**Amendment Act**”) and the Employment (Amendment of First Schedule) Order 2022 (“**Order**”), that will expand the reach of the Employment Act 1955 (“**EA 1955**”) whilst mending the legislative gaps in the EA 1955. The Amendment Act and the Order came into operation on 1 January 2023.

This article seeks to highlight the key amendments to the EA 1955 which employers should take note of.

Scope of Employment Act 1955

The Order expands the scope of the EA 1955 to include any person who has entered into a contract of service. Following the amendment, the EA 1955 shall apply to all employees who have entered into a contract of service. Note however that the following provisions of the EA 1955 will not apply to employees whose wages¹ exceed RM4,000.00:²

- (a) Pay for work on a Rest Day;³
- (b) Pay for Overtime Work;⁴
- (c) Entitlement of allowance during Shift Work;⁵
- (d) Additional pay for working on a Holiday;⁶ and

- (e) Termination, Lay-off benefits and Retirement Benefits.⁷

Hours of Work

The Amendment Act changes an employee’s hours of work from 48 hours to 45 hours per week.⁸ For clarity, the number of hours worked beyond 45 hours a week shall be considered as overtime work and may entitle an employee to overtime pay.⁹ As stated above, employees whose salary exceeds RM4,000.00 per month may not be entitled to overtime pay.¹⁰

Contractor for Labour

A person who contracts with a principal¹¹, contractor¹² or sub-contractor¹³ to supply labour and employees to them is now required to enter into a contract in writing with such employees and make such contracts available for inspection a contract in writing. Failing so, they may be liable to a maximum fine of RM50,000.00.¹⁴

Maternity Protection

Maternity leave entitlement for female employees has been increased to a minimum of 98 consecutive days.¹⁵ The amended EA 1955 also provides additional protections to pregnant employees whereby an employee who is pregnant or is suffering from an illness arising out of her pregnancy cannot be terminated from

¹ Wages shall not include any payment by way of commission, subsistence allowance and overtime payment.

² Order 2 Employment (Amendment of First Schedule) Order 2022.

³ S60 EA 1955.

⁴ S60A(3) EA 1955.

⁵ S60C(2A) EA 1955.

⁶ S60D(3) – (4) EA 1955.

⁷ S60J EA 1955.

⁸ S60A(1) EA 1955.

⁹ S60A(3) EA 1955.

¹⁰ Paragraph 1A, First Schedule EA 1955.

¹¹ “**Principal**” means any person who in the course of or for the purposes of his trade or business contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal; S2 EA 1955.

¹² “**Contractor**” means any person who contracts with a principal to carry out the whole or any part of any work undertaken by the principal in the course of or for the purposes of the principal’s trade or business; S2 EA 1955.

¹³ “**Sub-Contractor**” means any person who contracts with a contractor for the execution by or under the sub-contractor of the whole or any part of any work undertaken by the contractor for his principal, and includes any person who contracts with a sub-contractor to carry out the whole or any part of any work undertaken by the subcontractor for a contractor; S2 EA 1955.

¹⁴ S33A EA 1955.

¹⁵ S37(1)(d)(ii) EA 1955.



her employment, except where there is a wilful breach of her contract of service; misconduct; or the closure of the employer's business.¹⁶

In the event of such a termination, the burden lies with the employer to prove that the termination of said employee is not due to her pregnancy or illness arising out of her pregnancy.¹⁷

Paternity Leave

Married male employees are now entitled to 7 consecutive days of paid paternity leave, for 5 confinements irrespective of the number of spouses,¹⁸ subject to the employee:

- (a) being employed by the same employer for a minimum of 12 months immediately before the commencement of the paternity leave; and
- (b) Providing at least 30 days-notice from the expected confinement or as early as possible after the birth.¹⁹

Employment of Foreign Labour

As of 1 January 2023, employers intending to employ foreign employees must obtain approval from the Director General of Labour ("DG") prior to the employment.²⁰

The approval shall be subject to the employer:

- (a) having no outstanding matter relating to any decision, order or directive under the EA 1955;
- (b) having no outstanding matter or case under the EA 1955, Employees' Social Security Act 1969, Employees' Minimum Standards of Housing, Accommodations and Amenities Act 1990 or National Wages Consultative Council Act 2011; or

- (c) Having not been convicted of any offence under anti-trafficking in persons and forced labour.²¹

If an employer fails to obtain approval prior to employing foreign employees, they shall upon conviction be liable to a maximum fine of RM100,000.00 and/or imprisonment of up to 5 years.

Additionally, if an employer terminates a foreign employee, the employer is required to provide a notice to the DG within the stipulated notice period:²²

	Events	Notice Period
(i)	Termination of employment of a foreign employee due to: <ul style="list-style-type: none"> • termination by employer; • expiration of employment pass; or • Repatriation or deportation. 	30 days
(ii)	Termination of employment of a foreign employee due to: <ul style="list-style-type: none"> • termination by the foreign employee; or • abscondment. 	14 days

Flexible Working Arrangement

Employees now have the option to make an application in writing to their employer for a flexible working arrangement to vary the hours, days or place of work in relation to their employment.²³ However, an employer is not obliged to approve such a request, and shall upon receiving such application either approve or refuse the application in writing (stating the grounds of such refusal), within 60 days of its receipt of the application.²⁴

¹⁶ S41A(1) EA 1955.

¹⁷ S41A(2) EA 1955.

¹⁸ S60FA(1)-(2) EA 1955.

¹⁹ S60FA (3) EA 1955.

²⁰ S60K(1) EA 1955.

²¹ S60K(4) EA 1955.

²² S60KA EA 1955.

²³ S60Q(1) EA 1955.

²⁴ S60Q(2)-(3) EA 1955.



Notice of Sexual Harassment

Employers are now required at all times to exhibit conspicuously at the place of employment a notice to raise awareness on sexual harassment.²⁵

Forced Labour

The EA 1955 now contains express provisions prohibiting the use of forced labour.²⁶

Activities that may suggest forced labour include:

- (a) threatening, deceiving or forcing an employee to do any activity, service or work; and
- (b) Preventing an employee from proceeding beyond the place of such activity, service or work.²⁷

Employers engaging in acts of forced labour will commit an offence and shall, upon conviction be liable to a maximum fine of RM100,000.00 and/or imprisonment of up to 2 years.

Presumption of Relationship of Employee and Employer

In the event of any proceedings initiated against an employer for any offences committed in contravention of the EA 1955 and notwithstanding that there is no written contract of service, the EA 1955 now creates a rebuttable presumption that a person is an employee if:

- (a) their manner of work is subject to the control or direction of another person;
- (b) their hours of work are subject to the control or direction of another person;
- (c) they are provided with tools, materials or equipment by another person to execute work;
- (d) their work constitutes an integral part of another person's business;

- (e) the work performed is solely for the benefit of another person; or
- (f) Payment is made to them in return for work done by them at regular intervals and such payment constitutes the majority of their income.²⁸

Likewise, there is a rebuttable presumption that a person is an employer if:

- (a) they control or direct the manner of work of another person;
- (b) they control or direct the hours of work of another person;
- (c) they provide tools, materials or equipment to another person to execute work;
- (d) the work of another person constitutes an integral part of their business;
- (e) the work performed is solely for their benefit; or
- (f) Whether or not payment is made by them in return for work done for them by another person.²⁹

Impact on Existing Employees

Prior to the amendments to the EA 1955, employees were generally categorised into employees which fell under the jurisdiction of the EA 1955 ("**EA Employees**") and employees not within the scope of most of the provisions of the EA 1955, such as employees who earned more than RM2,000.00³⁰ per month ("**Non-EA Employees**"). Upon the coming into force of the Amendment Act, the EA 1955 will apply to all employees with a contract of service. As such, employers should review all their employees' existing employment terms to bring them in line with the existing provisions in the EA 1955 which includes, inter alia:

- (a) Wages must be paid no later than the 7th day after the last day of any wage period;³¹

²⁵ S81H EA 1955.

²⁶ S90B EA 1955.

²⁷ S90B EA 1955.

²⁸ S101C(1) EA 1955.

²⁹ S101C(2) EA 1955.

³⁰ This RM2,000.00 threshold has since been deleted by virtue of the Employment (Amendment of First Schedule) Order 2022.

³¹ S19(1) EA 1955.



- (b) Employees shall be entitled to one whole rest day in each week;³²
- (c) An employees' normal working hours shall not:
 - (i) require the employee to work for more than 5 hours without a break of at least 30 minutes;
 - (ii) be more than 8 hours in a day;
 - (iii) require the employee to work in excess of a spread over period of 10 hours in a day; and
 - (iv) exceed 45 hours a week;³³
- (d) Employees engaged in shift work may be required to work for more than 8 hours in any one day or more than 45 hours in any one week, save that the average number of hours worked over a period of 3 weeks do not exceed 45 hours per week;³⁴
- (e) Employees shall be entitled, but not limited to, the following leave:

Length of Employment	Paid Annual Leave for Every 12-Months of Continuous Service ³⁵	Sick Leave in Each Calendar Year ³⁶
Less than 2 years	8 days	14 days
2 years or more but less than 5 years	12 days	18 days
5 years or more	16 days	22 days

- (f) Where hospitalisation is necessary, the employee shall be entitled to 60 days of sick leave in addition to the non-hospitalisation sick leave³⁷

Employers are reminded that any provision in a contract of service which is less favourable to an employee than the provisions as provided in the EA 1955 shall be void

³² S59(1) EA 1955.
³³ S60A(1) EA 1955.
³⁴ S60C(1) EA 1955.
³⁵ S60E(1) EA 1955.
³⁶ S60F(1)(aa) EA 1955.
³⁷ S60F(1)(bb) EA 1955.
³⁸ S7 EA 1955.
³⁹ S101B EA 1955.

and substituted by the more favourable provision in the EA 1955.³⁸

Furthermore, at the time of the commission of an offence under the EA 1955, (i) the directors, managers or similar officer of a body corporate; (ii) every partner in a partnership; and (iii) every office-bearer of a society or trade union, shall be deemed to have committed the offence and may be charged jointly and severally in the same proceedings as the body corporate, partnership, society or trade union.³⁹

Conclusion

The Amendment Act and the Order has furthered strengthened employee rights in Malaysia and brought more workers under the protections of the EA 1955. Employers are advised to take heed of the wider application of the EA 1955, and to take the necessary steps to update their employment contracts, employees' handbook and/or other relevant policies to be aligned with the amended legislation to ensure compliance with the amended EA 1955.

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Purchaser Taking Possession but Complains about Misrepresentation - “Can You Blow Hot and Cold?”

BY LEE CHAI PING & JAMES WONG CHEE CHIN

Frequently, we come across numerous enticing packages and offers from developers to potential buyers in new housing developments. Undoubtedly, these incentives serve as a significant advantage, expediting the sales process. They also create a win-win scenario where developers can successfully sell their units while purchasers can acquire their new homes with additional benefits.

Nonetheless, over time, a notable increase in claims filed by buyers against developers over these packages has been observed. These legal actions span across various court levels, with some even reaching the highest appellate court in Malaysia, the Federal Court (FC).

In this article, we will be discussing one of the FC decisions involving a high-rise property in one of the biggest project developments in Johor which has been advertised as five (5) star living place, fronting the panoramic sea-view with specification of balcony in an exclusive luxury residence.

In the case of ***Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor***,¹ the Purchaser claimed that he was given a wrong unit without a covered balcony and alleged that the unit display model which he wanted to buy from the sales representative at the showroom was with a covered balcony. The Purchaser then pursued to file a claim to the Tribunal and the Tribunal ruled in favour of the Purchaser to amend and add specification of the unit purchased by the Purchaser to include the covered balcony, which was not provided for in the sale and

purchase agreement (“SPA”), and awarded a sum of RM50,000.00 as compensation to the Purchaser.

Dissatisfied with the decision, the Developer appealed to the High Court (“HC”) to seek order to quash the decision made by the Tribunal which allowed the Purchaser’s claim. The Developer contended that under the SPA, the Purchaser’s unit did not come with a covered balcony and that merely relying on the display model, the Tribunal has no jurisdiction to enforce terms which were not found in the SPA.

Nonetheless, the Tribunal’s decision was upheld by the HC and, on appeal, by the Court of Appeal (“CA”) as well. The Developer appealed to the FC.

Decision by the Federal Court

The FC overruled the HC and CA’s decision and allowed the appeal.

In the FC’s judgement, the court had made reference to the judgment in ***Southville City Sdn. Bhd. v Chua Teck Kee & Anor***² that the Tribunal, being the creature of statute, could only act within the four walls of the statute. Section 16N(2) of the Housing Development (Control and Licensing) Act 1966 (‘Act’) limits the Tribunal’s jurisdiction to a claim that is based on a cause of action arising from the sale and purchase agreement entered into between the homebuyer and the housing developer. The Tribunal has no jurisdiction over matters following outside the SPA in the form of collateral contracts, representations or warranties, see ***Court of Appeal in Encony Development Sdn. Bhd. v Robert Geoffrey Gooch & Anor*** (“*Encony Development*”).³ The provision of covered balcony was not an express

¹ *Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2022] MLJU 678.

² *Southville City Sdn. Bhd. v Chua Teck Kee & Anor* (2019) MLRHU 957.

³ *Encony Development Sdn. Bhd. v Robert Geoffrey Gooch & Anor* [2016] 3 MLJ 400 (CA).



term in the SPA and therefore the Tribunal had no jurisdiction to enforce terms which were not found in the SPA.

In this appeal, the FC further held that the Tribunal has no power to rectify the SPA by adding or excluding terms inconsistent with the statutory terms of the schedule agreement under Section 16Y(2)(e) of the Acts and the Tribunal was wrong in taking into consideration the display model instead of the SPA. Hence, the Tribunal's power to vary or set aside a contract is only exercisable when a clause in the agreement is inconsistent with the Schedule H of the Housing Development (Control and Licensing) Regulations 1989.

Another highlight on the facts of this case was that the wrong allocation unit claim made by the Purchaser was initiated after having inspected, taken possession and even renovated the unit. The FC has taken the stance that there was an estoppel by conduct on the part of the Purchaser when he signed and accepted the vacant possession of the unit and exercised his right to ownership by renovating the unit. The Purchaser could not be allowed to, on one hand, say that he got the wrong unit but, on the other hand, accept delivery of vacant possession and renovate it.

Commentary

In Malaysia, the relationship between a house-buyer and a licensed developer is governed by the housing development legislation and its object is to protect house buyers against developers. Whilst the Act is designed to protect the purchasers and is a social legislation, it is also pertinent that a prospective purchaser must always read and understand the contents of the agreement before signing. From the cases discussed above, the tribunal itself has a limitation of jurisdiction which confined to the four corners of the SPA and does not include the terms that is not within the context of an agreement.

It further appears that the Court prefers to look at the documentary evidence as opposed to oral evidence, to strictly complied with the terms in the signed agreement and negates any oral representation made prior to the signing. In *Encony Development*, the developer

terminated SPA on grounds of the purchasers' failure to pay progress billings. The Purchaser filed a suit to challenge the termination of SPA and alleged that there were oral representations and collateral promises made by the developer prior to the signing of SPA and pursuant to the oral representations and collateral promises the developer's termination was wrongful. The CA held that the written terms of the statutory SPA governed the parties' contractual relationship for the sale and purchase of residential property and no parole evidence or external terms could be imported into the SPA contract. The terms of the SPA, being subsequent to the representations and assurances, prevail and remain binding on the parties.

Whilst we often see marketing leaflets, brochures as well as display models, which is separate from the agreement, it may somehow consider a representation or pre-contractual term. One may argue that it is an "invitation to treat" and should not be considered as part of the contract. Whether or not it amounts to representation depends on how assertive they are and whether a reasonable man can be induced by it and eventually rely on it and sign the SPA. The onus of burden is on a representee to show that the misrepresentation induced him to enter into the contract. In a recent HC case of *Musrin Ma'rof & Ors V. Country Garden Danga Bay Sdn Bhd*,⁴ the learned judge, Awg Armadajay Bin Awg Mahmud held that: -

"...essentially, Brochures and advertisements are commendations which at its highest, is an invitation to treat. The actual offer and acceptance and the intention to create a legal relationship are all culminated in the Sale and Purchase Agreement. Parties are duly bound to scrutinise the terms (small prints included) and do due diligence (if necessary)"
If brochures are binding, then a contract to the world is valid. What is needed to prove fraud or fraudulent misrepresentation is found within the perimeters of sale and purchase agreement. Anything else would be mere commendations which may (but not necessarily so) be like the ambiguous clauses in sale and purchase agreement..."

This reinforces that one must always read, understand the contents of the agreement before the signing, any

⁴ *Musrin Ma'rof & Ors V. Country Garden Danga Bay Sdn Bhd* [2019] MLRHU 1680.



representations or promises being made outside of the SPA shall always be put in writing to assert the intentions to have contractual force.

In this situation where the purchaser having inspected, taken possession and even renovated the house, the Courts in Malaysia are more likely to adopt the doctrine of approbate and reprobate where it reflects the principle

of keys (and hence vacant possession) was done with condition - such as under protest or without prejudice - the purchaser will be reserving his right to challenge the acceptance later.

Developer should note that having a good reputation is the key to their brand recognition-primary competitive advantage in the market where the home seekers will tend to evaluate properties based on the credibility and recent track record as well as the portfolio of the past projects which will somehow give influence to home seekers in making housing purchasing decision as well.

The Developer should not - and it should equally ensure its sale agents not to - rush into making representation which is inaccurate or misleading to induce sale. Developers should take note that under the Act, it is a criminal offence for any misleading statement, false representation or description of the particulars or information for advertisement. Developers should always exercise prudence to stay true to their representations and commitments to deliver as per their promises to avoid unnecessary conflicts and misleading the market.

whereby a person cannot both approve and reject an instrument, often more commonly described as blowing hot and cold, or having one's cake and eating it too. The purchaser's choice to accept the property and proceed to renovate the property cannot afterwards pursue a claim that the property lacks certain feature which was alleged to be promised by the developer. Nonetheless, the Courts has further stated that where the acceptance

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Updates on The Company Director and Company Secretary Code of Ethics

BY HENRY TAN HUP YIAK & JEFF LEONG PAK LIM

The Companies Commission of Malaysia (“**CCM**”) issued consultative document on 27 March 2023 to obtain feedback from the public on the proposed updates on the company director and company secretary code of ethics. The proposed updates are to ensure the company director and company secretary code of ethics are in accordance with the current regulatory landscape in Malaysia.

In the context of the company director code of ethics, a company director means any person occupying the position of a director or carrying out such functions including primarily responsible for the management of the company by whatever name called (such as governors, trustees, chief executive officer and managing director). Company director also means a person in accordance with whose directions and instructions the majority of directors of a corporation are accustomed to act which include an alternate or substitute director. Company director also includes both executive and non-executive directors.

Proposed Updates on Directors’ Code of Ethics

The proposed updates on the company directors code of ethics can be summarised as follows:

- (a) New code of ethics pertaining to section 17A of the Malaysian Anti-Corruption Commission Act 2009¹ (“**MACCA 2009**”):

Company directors must ensure that the company has established an adequate procedure, appropriate controls, and contingency measures by establishing anti-corruption programme and policy which are reasonable and proportionate to the nature and size of the organisation. Company

directors should ensure that the programme is enforced to protect the company and top management from any liabilities arising from Section 17A MACCA 2009.

- (b) New code of ethics for company director to encourage sustainable business practices:

Company directors must take accountability for the governance of sustainability by integrating sustainability considerations into all aspects of decision-making, including strategic planning, risk management and investment decisions. Besides that, appropriate policy and initiatives should be adopted to achieve sustainability in the social, economic, and environmental conditions in pursuing profitability. Company directors should also strive to treat employees fairly and promote quality of life by adopting sustainable corporate social responsibility.

- (c) New code of ethics under the “Corporate Governance” principle on continuous professional development programmes:

Company directors should attend continuous professional development programmes to keep abreast with corporate governance developments.

- (d) New code of ethics under the “Relationship with Shareholder, Employees, Creditors, Customers and other Stakeholder” on promoting professionalism and adopting positive attitude in dealing with government and regulatory bodies:

¹ Section 17A of the MACCA 2009 states:

“(1) A commercial organization commits an offence if a person associated with the commercial organization corruptly gives, agrees to give, promises or offers to any person any gratification whether for the benefit of that person or another person with intent-

(a) to obtain or retain business for the commercial organization; or

(b) to obtain or retain an advantage in the conduct of business for the commercial organization.”

Company directors should be conscious of the interests of shareholders, employees, creditors, and customers of the company. This includes ensuring that appropriate training and programmes are adopted for the employees to understand and appreciate the value of good corporate governance.

- (e) New code of ethics pertaining to the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (“**AMLA 2001**”):

Company directors must ensure that the company adopts appropriate policies and procedures which are consistent with the principles set out under the AMLA 2001 to prevent the company from the risks of being exposed to money laundering and/or terrorism financing activities.

Proposed Updates on Company Secretaries’ Code of Ethics

As for the company secretary code of ethics, the proposed updates on the code of ethics can be summarised as follows:

- (a) New code of ethics under the “Professionalism” principle:

The company secretary should take the necessary steps to ensure compliance with relevant legislations, regulations, procedures and guidelines governing a company. Also, a company secretary should keep abreast with the requirements of the practising certificate issued under Section 241 of the Companies Act 2016.

- (b) New code of ethics under “Corporate Governance” principle on continuous professional development programmes:

The company secretary should attend continuous professional development programmes to keep abreast with corporate governance developments.

- (c) New code of ethics pertaining to the AMLA 2001:

The company secretary should undertake Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) measures as required under Part IV (Reporting Obligations) of the AMLA 2001,

its subsidiary instruments and the AML/CFT – Designated Non-Financial Businesses and Professions (DNFBPs) & Other Non-Financial Sectors (Sector 5) Policy Document. Further, the company secretary should ensure that laws and regulations are adhered to, that business is conducted in conformity with high ethical standards and are not associated with money laundering or financing of terrorism activities. Besides that, the company secretary should cooperate with relevant law enforcement agencies by timely disclosing information to relevant law enforcement agencies.

Lastly, a company secretary should adopt policies and procedures which are consistent with the principles set out under the AMLA 2001 and the guidelines, and take appropriate steps to identify, assess and mitigate the AML/CFT risks as well as have an effective procedure to identify its customers and to obtain satisfactory evidence to verify its customers’ identity.

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Directors Beware! Personal Liability in Oppression Claims: The Auspicious Journey Case

BY W SOFIA ALIYA W SHALIHU DIN & EILEEN TAN YUH WEN

Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors [2021] 4 CLJ 721

In corporate governance, shareholders control the company through the appointment of directors. Directors will, in turn, run the business of the company.

Furthermore, considering a company is a separate legal entity, it should flow that directors are not liable for the actions of the company. They are purely agents of the company and may not be personally liable for the losses or damages incurred – in most circumstances.

The unfortunate result of these two principles is that minority shareholders often have limited recourse against unfair or prejudicial actions by majority shareholders. Fortunately, company law provides redress against such actions through statutory means via section 346 of the Companies Act 2016.

Directors are merely agents of companies

A founding principle of company law observes a company enjoying separate legal personality from its members. Based on this principle, members and/or directors will not be liable for any actions of the company.

Directors are appointed by the shareholders of a company, and their appointment is made via a shareholders' resolution. Once a majority of shareholders have voted on the resolution, the director is appointed.

Like shareholders, directors are not personally liable for the acts of the company unless the actions are prohibited by statute; it is a case of breach of fiduciary duty; the actions are beyond their authority, among others.

Hence, directors enjoy near-blanket immunity in running the company. This allows them to use good judgment to make decisions – however unpopular they may be – so that the company may achieve its objectives.

Oppression Actions

However, a crucial question is whether directors will still be personally immune in an oppression claim where they have acted to the detriment of minority shareholders.

To protect the interests of minority shareholders, the Companies Act 2016 provides that the minority may resort to statutory remedies upon having proven there were oppressive, prejudicial or discriminatory acts, or omissions by those in control.

Thus, the question must be asked: does this principle apply in oppression proceedings where the majority shareholder is itself a company and the acts of oppression and unfair dealings are derived from the mind and the actions of the principal directors?

The Federal Court of Malaysia has addressed this issue in the case of ***Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors***.

The Auspicious Journey case

Auspicious Journey Sdn Bhd (“**Auspicious Journey**”) and Hoe Leong Corporation Ltd (“**Hoe Leong**”) formed a joint venture company, Ebony Ritz Sdn Bhd (“**Ebony Ritz**”), to acquire shares in Semua International Sdn Bhd (“**Semua**”). Auspicious Journey and Hoe Leong each held 20% and 80% of shares in Ebony Ritz, respectively. Through this joint venture company, Auspicious Journey and Ebony Ritz would acquire 49% of shares in Semua. The remaining shares of 51% would be held by Sumatec Resources (“**Sumatec**”). Following its acquisition,



Auspicious Journey, Ebony Ritz and Sumatec entered into multiple contracts, which included an agreement granting Auspicious Journey a call option to acquire 49% of Sumatec's shares in Semua.

In the events which followed, Semua faced financial distress; hence this supervened the aforementioned contracts.

In an attempt to salvage Semua, Hoe Leong had entered a conditional arrangement with Setinggi Holdings ("Setinggi"), its own nominee company. The consequences of the agreement would see Hoe Leong and Setinggi, together, as the majority shareholder effective upon its purchase of Sumatec's 51% of shares. This effectively made Auspicious Journey a minority shareholder.

This was deemed a self-interested move by Hoe Leong and was kept secret from Auspicious Journey until much later. Further, the move potentially placed Auspicious Journey at risk of losing their call option right.

The Decisions in the High Court and the Court of Appeal

The High Court held that it was indeed a case of oppression where the affairs of Ebony Ritz were conducted in a manner oppressive to and which discriminated against or prejudiced minority shareholders. This position was affirmed by the Court of Appeal.

That said, both courts refused to impose personal liability over the directors, relying on the principle that directors could not be held personally liable for the acts of the company unless it was a personal act or wrongdoing by the directors and that act was outside its obvious agency.

The Federal Court's Unprecedented Decision

Upon appeal to the Federal Court, the following questions were asked:

- (a) Could directors be held personally liable in an oppression case?
- (b) Could third parties be held personally liable in an oppression case?

The Federal Court took a wide and liberal construction of the oppression provisions in the Companies Act 2016. Having considered the case of the Canadian Supreme Court, *Wilson v Alharayeri [2017] SCC 39*, the Federal Court set out seven factors as to when oppression liability may be extended to directors and other third parties:

- (a) There should be deliberate involvement or participation in, or a sufficiently close connection to the oppressive or detrimental or prejudicial conduct.
- (b) The imposition of liability should be fair or just in all the circumstances of the particular case.
- (c) In assessing whether the imposition of such liability is fair or just, the court should be satisfied that the remedy results in fairness to the parties concerned as a whole.
 - (i) For example, liability may well be more easily assessed and imposed where a director has breached his duties, acquired personal benefit or where his acts or omission will result in prejudice to other shareholders. However, the facts of each particular case are different, and the courts will ultimately determine the imposition of liability on directors on an objective basis.
- (d) The attribution or imposition of liability should be circumspect, going no further than is necessary to remedy the breach complained of or to stop the oppressive or prejudicial conduct.
- (e) Such imposition of liability must be reasonable and serve to alleviate the legitimate concerns of the shareholders of the company in question.
- (f) In exercising its powers under section 346 of the Companies Act 2016, the court should bear in mind general corporate law principles, such that director liability does not become a substitute for other statutory relief or under the common law.
- (g) In summary, the question for the court is whether, in the context of the oppression provision, the defendant was so connected to the oppressive,



detrimental or prejudicial conduct that it would be fair and just to impose liability against him for such conduct.

The Actual Outcome of Auspicious Journey

Based on the above principles, the Federal Court held that the acts perpetrated by the majority shareholders were indeed oppressive against the minority shareholder.

Nevertheless, the Court refused to impose personal liability against the directors of Hoe Leong. While Hoe Leong's actions may be oppressive and prejudicial to Auspicious Journey, they were all related to salvaging the failed joint venture. For example, Hoe Leong had already injected RM38 million into Semua, when in contrast, Auspicious Journey refused to do so.

The Court observed that the 'fair and just' test discussed above determined the directors of Hoe Leong were not personally liable for the oppressive actions taken.

Conclusion

The Federal Court reiterated that the underlying purpose of an oppression action is to achieve fairness for minority shareholders where there has been abuse by the majority via directors or third parties. In achieving this purpose, the Federal Court enunciated it "may make such order as it thinks fit with the view to bringing an end or remedying the matters complained of," which includes the imposition of personal liability on directors.

Regardless of the outcome of Auspicious Journey, it is now clear personal liability can, in appropriate cases, be imposed on the directors and third parties. This decision is in line with other common law jurisdictions such as Singapore and the United Kingdom.

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Cases of Interest – DR Department’s Pick

BY LUTHER CHEONG ZHE QI & GANESH NATHAN

The law is always developing, either by way of newly enacted statutes by the Parliament or by way of cases decided by the Courts. In this DR Department’s Pick, we seek to discuss a few recent cases from different areas of law.

Construction Law

In the construction industry, interim claims can normally be rectified unilaterally so long as it is justified. This position has recently been confirmed by the Court of Appeal in the case of **Puncak Niaga Construction Sdn Bhd v Mersing Construction & Engineering Sdn Bhd**.¹

The case concerns an adjudication proceeding where Puncak Niaga has failed to make payment for the interim claims submitted by Mersing. Puncak Niaga raised the argument that the claims were premature and not due as the claims submitted were amended and approval had not been obtained.

The Court was of the view that a mere “refinement” or amendment of a claim which had previously been submitted and included as part of the payment claim, did not constitute a new or pre-mature claim.

Employment Law

It is trite in employment law that employers cannot terminate their employees without just cause or excuse. This has been confirmed by the Federal Court in the case of **Ismail Nasaruddin bin Abdul Wahab v Malaysian Airline System Bhd**.²

The central issue in this case is whether an employee, who happened to be the leader of a trade union, could be terminated for issuing a press statement complaining about his company.

The Federal Court was of the opinion that existing legislations do not prohibit the issuance of press statements by trade union officers or members and that an employee cannot be dismissed solely because of his or her participation in trade union activities.

The Court further stated that, if the employer wishes to dismiss the employee, it is for that employer to justify that the dismissal was done with just cause or excuse.



¹ *Puncak Niaga Construction Sdn Bhd v Mersing Construction & Engineering Sdn Bhd* [2022] 7 AMR 236.

² *Ismail Nasaruddin bin Abdul Wahab v Malaysian Airline System Bhd* [2022] 7 AMR 641.



Company Law

Liquidators should strive to come to a consensus in all matters relating to the liquidation process. However, in the event that there are conflicting views, the liquidators can apply to the court for directions. **Tan Kim Chuan v Tan Kim Tian & Ors and Another Appeal**³ concerns an application by the parties for a court direction following the dividing opinions of the liquidators relating to the disposal of properties.

Properland Realty Sdn Bhd, a company owned by both Tan Kim Chuan and Tan Kim Tian, was wound up following a winding up order and two liquidators were appointed. Initially, the liquidators jointly agreed to dispose the properties by way of first right of refusal. Subsequently, one of them changed his mind and suggested an open tender. Due to the conflicting opinions, the party sought the direction from the Court.

The Federal Court was of the view that any arrangements that the liquidators made must be in the best interest of the company and contributories and must aim to expedite the liquidation process. The Federal Court further stated that any changes to the agreed arrangement must be considered with great care.

Contract and Tort Law

The word “negligence” has regularly been used in contracts of various nature, either to limit the parties’ liability or exclude it entirely though the true breadth of the term is not known, even to the draftsmen. The word “negligence” is finally scrutinised by the U.K. Supreme Court in **Triple Point Technology, Inc (Respondent) v PTT Public Company Ltd (Appellant)**.⁴

In this case, both parties entered into a software contract. The respondent was contracted to design, install, maintain and licence a customised software system for the appellant. The appellant, in turn, was to pay the respondent in milestones. The respondent was late in completing the first stage of the project. The appellant then refused to pay the respondent. The respondent then sued the appellant for non-payment and the appellant counterclaimed for liquidated damages.

Pursuant to the contract, the amount of the liquidated damages was limited to the contractual price except in cases involving negligence. The issue in this case, among others, was whether the word “negligence” in the contract meant the tort of negligence or whether it included breach of contractual duty of skill and care.

The Court held that the word “negligence” covered both the tort of failing to use due care and a breach of contractual provision to exercise care and therefore both types of negligence were not subject to the cap on the amount of liquidated damages.

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³ *Tan Kim Chuan v Tan Kim Tian & Ors and Another Appeal* [2022] 10 CLJ 503.

⁴ *Triple Point Technology, Inc (Respondent) v PTT Public Company Ltd (Appellant)* [2021] UKSC 29.



Interview with Senior Staff: Somasundram Thurairaju

BY FATIN SYAHIRAH AZMAN & TOH AN NI

Jeff Leong, Poon & Wong was founded in 1999 and began its operation as a small firm in Kuala Lumpur. That was when a young man by the name of Somasundram (also known as Sundram) was hired as a chief clerk in the Litigation Department. Nineteen years later, Sundram is amongst the longest-serving employees in JLPW. We recently interviewed Sundram who gave us a revealing insight into his long career with JLPW.

Prior to joining JLPW, you worked as ...

I was a chief clerk in (SSCM) before joining JLPW.

You join JLPW on ...

I joined JLPW on 4.5.2004.

You left your old firm and joined JLPW because ...

I left my previous firm as they were about to merge with another firm. I sent my CV around and surprisingly I received a call from the then litigation partner from JLPW who invited me to join his department.

The size of JLPW when you first joined ...

It was a sizeable firm with 7 partners and 14 associates.

Your first working day at JLPW ...

A little nervous though, I was with the litigation partner for almost half a day. He gave so many instructions, kept emphasising on the necessity to introduce a correct system for the department and enquired me about my plans for this department and ways to bring those plans into effect. Phew!!

As chief clerk, what was your role then and how has it changed now?

Just a few months after joining JLPW, I realised that a more organised administration system was needed in the litigation department. I knew that that was the best



time for me to use my experience to revamp the already obsolete system and to streamline a new system for the lawyers, secretaries / support staff and other administration work relating to the department.

When I started working in 1981, everything was manual. I used typewriters and I had to type lots of Court documents inserted with a few carbon copies. I had to erase all carbon copies if I accidentally made an error. It was time consuming.

Moreover, letters were all handwritten, Court dates were manually entered in the Court diary, file search was physically done in the Court, etc. However, with modern



technology, especially with the introduction of computers, preparation of documents was much easier and faster. Most correspondences / services can now be done via emails, Court matters are heard via e-reviews and Zoom. Getting information across is much faster, convenient and saves a lot of time. Lots of differences between the time I started and now. Thanks to technology.

The most memorable year for you throughout your years at JLPW ...

I would say sometime in 2011. We had a super busy year where we had to stay back late most of the times and even worked overnight.

How young are you? Is it challenging for you to work beyond your retirement age?

Just celebrated my 63rd birthday a few months back. I don't feel much difference, apart from feeling a little tired sometimes. But I just cannot stop yet.

Are your family fine with you working post-retirement age?

They asked me to slow down, take it easy and encourage me to retire soon.

Any last words ...

JLPW is a great place to work as it cares about and supports its employees while also challenging them to grow with the firm.

At the present moment, in our dispute resolution department, we are encouraged to engage with one another in a positive way which creates a very friendly and warm working environment. I strongly say that JLPW is a good place to work as it is led by exceptional and inspiring leaders who set an example from the top. I wish to also thank the Senior Partners and also each and every one of you whom I have worked with for giving me the opportunity to work with JLPW. I am extremely pleased and grateful for it.



Visiting Internship Programme

JLPW's internship programme is designed to allow interns from across the world to experience life as a lawyer and gain an insight into the real world of legal practice. In 2022, JLPW was pleased to host three interns from Kobe University, Japan at our Kuala Lumpur office, which are Chisa Yano, Manami Mori and Megumi Kinoshita.

Chisa Yano's Reflection

The experiences I had as an intern in JLPW were irreplaceable and precious to me. I was asked to prepare a legal due diligence report for a client intending to invest in a start-up company. I believe that this will greatly help my future career as a business consultant.

Also, the corporate team kindly taught me what I did not understand. I believe that the opportunity to learn from them in English has helped me improve my English listening skill. During my stay in Malaysia, I visited Putra Mosque in Putrajaya, Kek Lok Tong Temple in Ipoh and Batu Caves in Kuala Lumpur. I am very grateful to everyone in JLPW who took me to such places.



Chisa Yano and Wee Loong
(Corporate Partner)

Manami Mori's Reflection

This internship gave me a special experience that I could not get in Japan and helped me broaden my horizons. Through this internship, I learned the differences between the legal system in Malaysia and Japan, as well as the different styles of work. I was particularly impressed with the working environment where everyone worked happily and harmoniously even though they are always busy.

Alicia who was my team leader gave me legal research tasks which helped me to better understand the practical differences between common law and civil law. Spending time with them, I understood how the multi-ethnic and multi-cultural society live together. It was a fresh experience for me.



Manami Mori and Wee Loong
(Corporate Partner)

Megumi Kinoshita's Reflection

I deeply appreciate this precious internship experience at JLPW. It expanded my academic interest in law and deepened my understanding of legal practice, especially litigation practice in Malaysia.

My supervisors also gave me opportunities to attend client meetings, court hearings and read legal documents. I saw first-hand how the civil procedures that I learnt were carried out. I would also like to express my sincere thanks to all JLPW members for their immense support and kindness throughout the internship. I believe the internship at JLPW will be a valuable asset for my academic studies and my future career.



Rajasurian (Dispute Resolution
Partner) and Megumi Kinoshita



JLPW Events

Firm Luncheons

To us in JLPW, firm luncheons are more than just a midday meal—they are vibrant gatherings that foster connection, collaboration, and a sense of community. JLPW frequently held firm luncheons during festive seasons such as Merdeka Lunch and Christmas & New Year Lunch. Each luncheon is an opportunity for colleagues to come together, share stories, and forge stronger relationships. With delicious cuisine and a relaxed atmosphere, these events nourish both appetites and the spirit of teamwork, leaving everyone inspired and energised, well rested and motivated to work more diligently.



Sports Committee



With a majority of us working from home since the pandemic, it can be a challenge to foster the same level of camaraderie as before. As part of the firm's efforts to promote a healthy lifestyle and bring everyone together, the firm's Sports Committee hosts a wide array of sports activities (Frisbee, ping pong, bowling, tennis etc) weekly for lawyers and staff to participate and interact with one another to foster greater personal bonds.

At JLPW, we value building a conducive work environment through camaraderie and friendship. Not only does this make us do better work, we work and succeed as a team as well.

Team Building & Seminars

At JLPW, our unwavering commitment lies in the welfare of our firm. We prioritise the well-being of our employees, nurturing a supportive environment that encourages growth and fosters success. We also strive to create an environment where each individual feels valued, supported, and connected. Through team-building activities, seminars by external trainers and mental health professionals such as Ms Lavender Tan on Mental Wellness and Mr SG Cheong on Emotional Intelligence, as well as initiatives promoting work-life balance, we cultivate a sense of belonging and foster personal and professional growth.



JLPWLEGAL

Jeff Leong, Poon & Wong was founded in 1999. Our founding partners were part of the regional cross-border team of a leading law firm in South East Asia with extensive experience in cross-border investments, joint ventures, mergers and acquisitions and capital markets. From 2001 to 2011, we were affiliated with an international law firm operating across many jurisdictions within Asia Pacific region. From an initial team of 3 founding partners in 1999, we have prospered and grown to more than 40 lawyers today.

JLPW CROSS BORDER ASIA

Our Office

Kuala Lumpur, Malaysia

Our Affiliate Offices

Mustafa Kueh And Tai Advocates, Sarawak, Malaysia

Chin Lau Wong & Foo, Kota Kinabalu, Sabah

JLPW Legal Services, Myanmar

JLPW Vinh An Legal, Vietnam

Brigitta I. Rahayoe & Partners, Indonesia

Ocampo & Manalo, Philippines

Sheikh & Chowdhury, Bangladesh

Meng & Associates, Phnom Penh, Cambodia

Trinaya Legal, New Delhi, India

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