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RELEVAN

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RETRENCHMENT IN MALAYSIA: *A COMMENTARY*

// By Chia Swee Yik

This issue seems to be the concern of many employers and employees recently. At the outset, it must be understood that retrenchment (or nowadays, the preferred Voluntary Separation Scheme (VSS)) is essentially a form of termination or dismissal from employment on the ground of redundancy. There are, of course, termination or dismissal from employment on other grounds.

Retrenchment is often viewed as the result of economic downturns, but from another perspective, it is just a step taken as part of a company's day to day operational strategy.

It must be noted that if the employer's decision for retrenchment was exercised or carried out unfairly or unjustly, the said decision may be subsequently challenged by the affected employee(s) in the industrial court.

The recent Industrial Court's decision by his Honourable Lordship, Yang Arif Bernard John Kanny in the case of Nurul Najmi Radzuan & Ors v. T-Systems Malaysia Sdn Bhd, Industrial Court, Kuala Lumpur (Award No. 1042 of 2018) [2019] 1 ILR 108 reaffirms the basic legal principles applicable should retrenchment become inevitable as a result of business realities. The basic legal principles for retrenchment can be summed up as follows:-

1. ***Three issues for determination when it comes to deciding whether a retrenchment was fairly exercised and not tainted with unfair labour practices:-***

(a) firstly, was there a reorganisation by the company and if so was it justified?

(b) secondly, did a redundancy situation arise in the various departments of the company leading to the retrenchment of the claimants?

(c) thirdly, if the answers to (i) and (ii) are affirmative, whether the selection and retrenchment of the claimants were done fairly in compliance with the accepted standards or procedure?

This reaffirms the notion that redundancy or surplus of labour is a precondition for the exercise of retrenchment.

2. ***The Court will look at the Code of Conduct for Industrial Harmony ("CCIH") in determining whether the retrenchment was done fairly.***

Despite not having any legal force, the CCIH may be taken into consideration by the Industrial Court which has the power to take into consideration any agreement or code relating to employment practices between organisations representative of employers and workmen respectively where such agreement or code has been approved by the Minister of Human Resource. This is in fact provided in Section 30(5A) of the Industrial Relations Act 1967.

As was also seen in the case of Pengkalen Holdings Bhd v. James Lim Hee Meng, Industrial Court, Kuching (Award No. 351 of 2000) [2000] 2 ILR 252, despite redundancy caused by the company ceasing business in a particular area, the claimant was held to be unjustly dismissed because of breaches of the CCIH by the company. The court in arriving to the said decision held that:-

'[4] Article 22(c)(ii) of the Agreed Practices annexed to the Code stipulates that should retrenchment be necessary, despite an employer having taken appropriate means to avert or minimise the necessity for the same, the employer should inter alia make provisions for the payment of redundancy and retirement benefits.

[5] There were indeed breaches of the Code of Conduct with regard to the failure of the company to give the claimant adequate notice and to provide compensation for his loss of employment.'

3. *Burden of proof lies on the employer*

It is an established principle propounded in the Federal Court case of Goon Kwee Phoy v. J & P Coats (M) Bhd [1981] 1 LNS 30; [1981] 2 MLJ 129 as well as Bayer (M) Sdn Bhd v. Ng Hong Pau [1999] 4 CLJ 155 that the burden of proof lies on the employer to prove that the decision to reorganise and the subsequent redundancy of the claimants is bona fide.

In other words, it is an established principle of law that an employer seeking to rely on redundancy as a reason for a dismissal must prove it.

Otherwise, the court need not go further as the inevitable conclusion must be that the retrenchment or dismissal was without just cause and excuse.

4. *Backwages*

In awarding backwages, the general principle is that it shall not exceed 24 months and in the case of a probationer, it shall not exceed 12 months. However, paragraph 3 of the Second Schedule of the Industrial Relations Act 1967 states that:

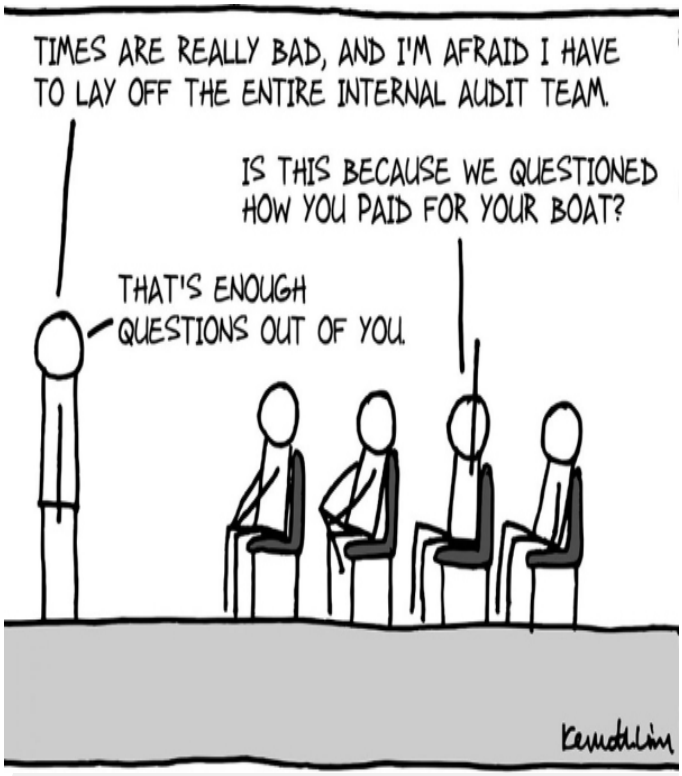
"Where there is post-dismissal earnings, a percentage of such earnings, to be decided by the court, shall be deducted from the backwages given."

It was hghlighted by the court in the Nurul Najmi's case (supra) that it would not be just and equitable, even illogical, that a claimant who diligently seeks alternative employment is awarded a sum less than one who does not, as it would result in the court punishing employees who have found employment post-dismissal by scaling down monetary compensation whilst employees who resist looking for employment are unjustly enriched with a higher scale of monetary compensation without deductions. It was stated that this would surely be against the spirit and intent of the said paragraph 3 of the Second Schedule.

Therefore, the court held that the failure of the dismissed employee to play their part by actively looking for work after having been dismissed from their current employment is also relevant for consideration by the 'court of equity, good conscience and the substantial merits of the case' in scaling down the monetary compensation to be awarded.

Conclusion

Lastly, it must be taken in perspective that knowing the principles of law on retrenchment is not only beneficial to employees to essentially safeguard their right to gainful employment and security of tenure; but will also ensure the employer to exercise the reorganisation or restructuring of the company to ensure its survival and sustainability in a lawful manner.



PERSONAL DATA PRIVACY

// By Chong Wai Kuan

In this current climate plagued by commercial and governmental abbreviations (e.g. CRS, AEOI, MDR, AMLATFA etc.) most of which requires some form of transparency reporting, the enactment of the Personal Data Protection Act 2010 (Act 709) ("PDPA") itself is a positive development. Data is a collection of facts and statistics compiled for reference or analysis. Conceptually, the collection of "personal" data surfs very closely to an invasion of one's privacy particularly when the purpose behind the said collection is unbeknownst.

For instance, an intending property buyer normally starts by approaching a real estate agent. The agent concerned will then request for the intending buyer's name, address and contact details etc. (together forming "personal data") to register the buyer's interest. Once a property is identified, a legal firm appointed by the buyer shall collect and process the personal data in preparation of a sale and purchase agreement. A financial institution will have to be privy to the personal data together with further financial information in their contemplation of giving financing to the buyer. In certain cases, an insurance company will also be in the loop and similarly require the buyer's personal data.

The major concern is that the buyer's personal data has to be disclosed to almost four different parties and the manner of which the personal data is collected and utilised should in this day and age be prudently questioned.

Section 5 of the PDPA lists down seven mandatory protection principles to be complied with by a data user. The following are excerpts of those principles worthy of noting:

Section 6: General Principle

A data user shall not in the case of personal data, process personal data unless the data subject has given his consent. In the case of sensitive personal data (such as, medical information, political or religious belief), there is further protection. The takeaway: consent must always be obtained from the data subject.

Section 7: Notice and Choice principle

A data user shall by written notice inform a data subject, for example, that his personal data is being processed and shall provide a description of the personal data concerned, the purposes for which the personal data is being collected and processed, the data subject's right to request access to and correction of the personal data, such third parties to whom the data user might disclose the personal data, the choices and means for limiting the processing of personal data and the consequences to the data subject if he fails to supply the personal data.

The notice is to be in writing in the National and English languages.

Section 8: Disclosure Principle

A data user must obtain the consent of a data subject before disclosing his personal data to any third party or use it for any purpose not previously consented to.

Section 9: Security Principle

To reinforce the principles of consent, the PDPA lists out stringent statutory procedures and practices for a data user. A data user shall take practical steps to protect the personal data from any loss, misuse, modification, unauthorised or accidental access or disclosure, alteration or destruction by having regard to, among others, the nature of the personal data and consequential harm in such events, the location where the personal data is stored and security measures where the personal data is stored.

Section 10: Retention Principle

Personal data shall not be kept longer than is necessary. So, a data user shall ensure that all personal data is destroyed or permanently deleted if there is no longer any need for it.

Section 11: Data Integrity Principle & Section 12: Access Principle

The onus is on a data user to take all reasonable steps to ensure that the personal data is accurate, complete, not misleading and kept up-to-date. Likewise, a data subject must have access to his own personal data and the right to correct such personal data where necessary.

In summary, the PDPA aims to police the collection and processing of personal data. Data users are cautioned to P-lease D-on't P-oke A-round without adherence to the aforementioned principles, the breach of which invites severe penalty and punishment.

Therefore, know your legal rights and do not be a victim of breach of personal data privacy.

KEEPING UP TO DATE: THE FOUR CORNERS

// Credit to Sharifah Alliana Idid

The Civil Corner

ROSLIZA IBRAHIM v. KERAJAAN NEGERI SELANGOR & ANOR 08(f)-314-05/2018(B)

Background:

The applicant filed an originating summons ('OS') at the High Court, seeking declarations, inter alia, that (i) she was an illegitimate person and one Yap Ah Mooi ('Yap'), a Buddhist, was her natural mother; and (ii) was not a person professing the religion of Islam. Her OS was dismissed by both the HC and the Court of Appeal.

Issue:

The applicant sought leave from the Federal Court to appeal on the following questions:

(a) Where the subject matter of a cause or matter requires a determination of "whether a person is or is not a Muslim under the law" rather than "whether a person is no longer a Muslim", whether the High Court has the exclusive jurisdiction to hear and determine the said subject matter on a proper interpretation of Article 121 and Item 1 of the State List of the Federal Constitution?; and

(b) in the light of Regulation 24 (1) of the National Registration Regulations 1990 and where the truth of the contents of any written application for registration of an identity card or the contents of any identity card is not proven by affidavit or a trial, whether the said contents of status is under section 41 of the Specific Act 1950?

Decision:

The three-member panel of the Federal Court led by Chief Justice Tan Sri Tengku Maimun Tuan Mat granted her leave to appeal against the High Court and Court of Appeal's dismissal of her OS for a declaration that she was Buddhist and not a Muslim.

The Criminal Corner

CHUA KIAN VOON v. MENTERI DALAM NEGERI MALAYSIA [2020] 1 CLJ 747

Background:

The appellant was arrested under s. 3(1) of the Dangerous Drugs (Special Preventive Measures) Act 1985 ('1985 Act'). The investigating officer, assisted by a corporal who acted as an interpreter, recorded a statement from the appellant. Upon further investigation and upon being satisfied that the appellant had been or was associated with activities relating to or involving the trafficking in dangerous drugs, the inquiry officer submitted a report to the Deputy Minister who in turn issued a detention order directing the appellant to be detained for a period of two years at the Pusat Pemulihan Akhlak Simpang Renggam ('the Centre'). The investigating officer, through Constable Tong, told the appellant of his rights to make representation, to be represented by a counsel of his choice and to call witnesses before the Advisory Board ('Board'). The Board, after considering the representation of the appellant, forwarded its recommendation to the Yang di-Pertuan Agong who affirmed the detention order. The appellant filed a writ of habeas corpus which was dismissed by the High Court. Hence, the appeal herein.

Issue:

Whether there was non-compliance with the provisions of, inter alia, the 1985 Act such that the appellant's detention was unlawful.

Decision:

Having found that there were non-compliance with the procedure requirements, the Federal Court allowed the appeal and stated that the procedure requirements must be strictly and faithfully complied with and if there is a failure to do so, a writ of habeas corpus ought to be issued and the detainee released forthwith. The procedural requirements under the 1985 Act serve as a detainee's only safeguards against a breach of his fundamental right since the court is not allowed to go beyond the subjective satisfaction of the Minister.

The Matrimonial Corner

HOONG WAI KIT v. TEH TOONG JOO [2019] 10 CLJ 835

Background:

The petitioner husband ('PH') and the respondent wife ('RW') were legally married and had two daughters, R and P ('children'). Pursuant to a single divorce petition, PH was given custody of R while RW had custody of P. The decree nisi was later varied and care and control of P was given to PH while RW was granted access. Subsequently, RW filed an application to refer the children for psychiatric evaluation on the basis that, inter alia, PH had brainwashed the children to alienate them from her. RW grounded her application on the argument that PH had stopped sending the children to her and contended, inter alia, that the reasoning adduced by PH as contained in the two letters written by the children expressing their refusal in wanting to see her was not acceptable and she believed that the letters were written by the children at the insistence of PH to alienate her from the children.

Issue:

Whether supposition and/or allegation on the part of RW alone would be sufficient evidence of parental alienation.

Decision:

The High Court concluded that regard must be had to the underlying issues and the court could only be persuaded to act upon plausible evidence. Further, the court may have regard to the advice of any person who is trained or experienced in child welfare, but the Judge shall not be bound to follow such advice and where the children are of sufficient maturity, their independent opinion pertaining to the order of access is to be considered.

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The IP Corner

DNC ASIATIC HOLDINGS SDN BHD & ORS v. HONDA GIKEN KOGYO KABUSHIKI KAISHA & OTHER APPEALS [2020] 1 CLJ 799

Background:

The three appeals originated from two High Court suits, namely High Court Civil Suit 22IP-36-07/2014 ('Suit 36') and 22IP-37-07/2014 ('Suit 37') respectively. The plaintiff, Honda Giken Kogyo Kabushiki Kaisha ('Honda'), a Japanese automobile company, claimed ownership over copyright of its motorcycles known as EX-5 or EX-5 Dream ('EX-5'). The copyright was created in 1985 in Japan and EX-5 was launched in Malaysia in 1987. In both suits, Honda prayed for, among others, permanent injunction, order for delivery and damages of copyright infringement. The defendants, in Suit 36, contended that, inter alia, Honda failed to establish that EX-5 drawing was created by its employee, Mr Ichiro Koizumi ('Mr Koizumi') and counterclaimed for, inter alia, a declaration that Honda had no ownership over the copyright. In Suit 37, the defendants claimed that the bike was not similar to EX-5. The High Court Judge ('HCJ') allowed Honda's claim in Suit 36 and dismissed the defendants' counterclaim, whilst, in Suit 37, Honda's claim for damages for alleged infringement by the defendants was dismissed.

Issue:

Whether copyright subsisted in the claimed works and whether Honda owned the copyright; and whether there was infringement of the copyright, assuming that copyright subsists.

Decision:

The Court of Appeal affirmed the HCJ's decision vis-à-vis subsistence and ownership of the copyrights in the claimed works as the appellate court found that Honda had successfully established that the drawing of EX-5 was created by Mr. Koizumi and that the factum that Mr Koizumi was the author of the copyright was significant wherein, the works of an employee is deemed to belong to the employer as encapsulated under s.26(2) of the Copyright Act 1987.

BUSINESS EXPENDITURE DEDUCTIONS

A NEW DEFINED BOUNDARY

// By Choong Kwai Fatt, PhD

Introduction

The deductions of a business expenditure are governed by the Income Tax Act 1967 (the Act) in which the pre-requisites are such that expenditure must satisfy the business object that is 'wholly and exclusively' incurred in the production of a business income. The degree and extensity of an expenditure that is 'wholly and exclusively' incurred is redefined in the recent landmark High Court case of Ketua Pengarah Hasil Dalam Negeri (HDN) v Kompleks Tanjong Malim Sdn Bhd (and Another Appeal) [2019] 1 AMR 393.

This article attempts to analyse the legal principles propounded and quantified the essential tax consequences arising from this new defined boundary.

The legislations

The deduction of business expenditures is provided in s.33 read together with s.39 of the Act. S.33(1) provides:

> *"Subject to this Act, the adjusted income of a person from a source for the basis period for a year of assessment shall be an amount ascertained by deducting from the gross income of that person from that source for that period all outgoings and expenses wholly and exclusively incurred during that period by person in the production of gross income from that source, including …"*

The Court of Appeal in Exxon Chemical (Malaysia) Sdn Bhd v Ketua Pengarah HDN [2003-2005] AMTC 371 refers to the deduction test that comprises of 'wholly and exclusively', 'incurred', and 'in the production of income' as 'the basket' in s.33; the basket being expenditure wholly and exclusively incurred in the production of income.

In Margaret Luping & 2 Ors v Ketua Pengarah HDN [1997-2002] AMTC 2177, the Court of Appeal laid down the legal principles that any expenditure to be deducted as a business expenditure needs to concurrently satisfy both s.33 read together with s.39 of the Act. S.39 provides a list of expenses that are not allowed for deduction even though such expenditures satisfy the 'wholly and exclusively' test in s.33.

together with s.39 of the Act. S.39 provides a list of expenses that are not allowed for deduction, even though such expenditures satisfy the 'wholly and exclusively' test in s.33.

Mokhtar Sidin JCA held on p 2181:

> *"In our view, for a taxpayer to qualify for deduction of any payment or expenditure incurred by him, he must first of all place the payment or expenditure as allowable under s.33 of the Act. He has to justify that the payment or the expenditure incurred by him is an allowable deduction under s.33 of the Act. In the present appeal it is sub-s (1) of that section. If the payment or expenditure is not allowed under s.33(1) of the Act then it would not be allowed as a deduction. On the other hand, if it is allowed as a deduction under s.33(1) of the Act, one has to proceed to the ext step to ascertain whether the payment is caught under s.39(1) of the Act. If it is caught under s.39 (1) of the Act, then it would not be allowed as a deduction though it is allowable under s.33(1) of the Act."*

The Court of Appeal laid down the two-fold test as follows:

(a) First, examine the expenditure that satisfies the basket of s.33; then
(b) further make certain that such expenditure does not fall into the prohibition list in s.39.

'The 'wholly and exclusively' element

In Ketua Pengarah HDN v Kompleks Tanjong Malim Sdn Bhd (and Another Appeal) [2019] 1 AMR 393, the High Court was asked to ascertain whether the revised quit rent assessment imposed by the State Government under the commercial title incurred on a plantation company passed the 'wholly and exclusively' test as stipulated in s.33 of the Act. The High Court referred to the dictionary as guidance and concluded that the word 'wholly' means 'entirely or completely' whilst 'exclusively' means 'solely or completely'. Therefore, the deduction is only applicable to the outgoing expenses where the said expenses are entirely and solely incurred in the production of gross income from that business source.

In Syarikat Pukin Ladang Kelapa Sawit Sdn Bhd v Ketua Pengarah HDN [2012] AMTC 192, the High Court held that for the deduction in s.33, the expenses must fulfill the following two elements and they must be read conjunctively:

(a) The expenses must be wholly and exclusively incurred in that basis year; and

(b) the expenses must be wholly and exclusively incurred in the production of gross income.

In this case, the High Court held that advance rental is not deductible simply because it satisfies (b) but not (a). Advance rental, in its true essence, is the expenses incurred in the future for the production of gross future income and not the current year income. In any year of assessment, only rental relating to the current year fulfils the 'wholly and exclusively' test. In the upshot, advance rental is not deductible notwithstanding it has been paid, which fulfils the 'incurred' test to the land owner.

Rohana Yusuf J held on p 199:

> *"Advance rental cannot be taken in any circumstances to be expenses exclusive and wholly incurred for that basis year because although they are paid in advance, they are actually expenses to be incurred in the future for the production of gross future income. In other words, for the production of the gross income for the basis year in question, the only required rental to be paid is an annual rental. Advanced rental is not required for the purposes of the production of gross income in that basis period and hence cannot be expenses wholly and exclusively for the purpose of the production of gross income in that period."*

These decisions pointed to an irresistible conclusion that in order for the expenses to be deductible, it has to be related to the current year with the sole purpose of production of business income. These are the essence and spirit of the 'wholly and exclusively' test.

Apportionment rule

It is a settled principle that in s.33, 'wholly and exclusively' means an all or none basis, i.e. the expenses are either fully deductible or non-deductible at all. Apportionment of expenditure is never permitted.

In Director General of Inland Revenue v Kok Fai Yin Co Sdn Bhd (2014) MSTC 30-076, the tax authorities attempted to apportion the director's fee paid by the company as the IRB was of the opinion that such excessive director's fee did not fulfil the 'wholly and exclusively' test. The High Court held that the apportionment of the director's fee was not permitted. S.33 operates on an 'all or none' basis. S.33 does not empower the IRB to exercise its discretion in determining what amounts to reasonable director's fees which should have been paid to the directors, and to disallow the excess from deduction under s.33. The director's fee remains as a business decision and any director's fee paid must be accepted as fulfilling the business decision and any director's fee paid must be accepted as fulfilling the business object being 'wholly and exclusive incurred' and thus fully deductible.

In summary, the IRB's action and discretion with regards to the amount paid to each director as director's fee was unreasonably excessive, and having proceeded to deduct a certain portion from the amount and adding the deducted amount back to the gross income of the company is ultra vires in the spirit of s.33.

Tan Sri Dato' Hj Mohd Eusoff b Chin held on p 7927:

> *"My finding is that s.33 of the Act does not empower the appellant (IRB) to consider and determine what reasonable fees should have been paid to the directors by the respondent (company), and to disallow the excess from deduction under that section."*

Practical applications

In Ketua Pengarah HDN v Kompleks Tanjong Malim Sdn Bhd (and Another Appeal) [2019] 1 AMR 393, the crux of the disputes is on the deduction of the quit rent in relation to a plantation income. The company conducted the business of oil palm plantation, deriving its plantation income from the sale of fresh fruit bunches planted on the freehold land, Ladang Kompleks Tanjong Malim, which is situated in Mukim Hulu Bernam, Daerah Hulu Selangor.

The company, of its own accord, applied to the land administrator of Daerah Hulu Selangor to convert the land from being an agricultural land to a commercial land with the intention to enhance its land value. This has resulted in a substantial increase in quit rent assessment and the increase in value was tabulated as follows:

YA	Increased quit rent (RM)
2006	1,057,244
2007	1,056,804
2011	1,015,157

The company claimed that the entire amount of quit rent was an amount which was wholly and exclusively incurred in the production of its plantation income. However, the IRB only allowed the amount of quit rent as previously deducted based on its agricultural land status. In summary, the increase in the quit rent due to the change of land status was not allowed as it has no relevance to the plantation of oil palm. A penalty of incorrect return was levied on the tax undercharged.

Aggrieved, the company appealed before the Special Commissioners of Income Tax (SCIT) and contended that the IRB has no power to apportion the expenditure between its agricultural use and commercial use because the entire value had been, in fact and in law, incurred and paid by the company to the land administration of Daerah Hulu Selangor.

The SCIT concurred with the company's contention and allowed the company's appeal. The SCIT held that the IRB is debarred from apportioning the expenditure, relying on the legal principles propounded by Mohd Eusoff b Chin in Director General of Inland Revenue v Kok Fai Yin Co Sdn Bhd (2014) MSTC 30-076. In effect, the IRB appealed to the High Court for adjudication.

The High Court found that the SCIT had misdirected itself in law based on its findings of the primary facts. The admitted fact by the SCIT was that the purpose of the conversion was to increase the capital value of the land. Therefore, such increase in value for the quit rent cannot be said to have satisfied the 'wholly and exclusively' test as the conversion of the land to commercial land by the company has nothing to do with palm oil production.

Aziziah Nawawi J held on p 403:

> *"Therefore, the conversion of the land to commercial land by the company has nothing to do with the palm oil production, as the conversion of the land category is to enhance the capital value of the land. As the purpose of the conversion to commercial land has nothing to do with the palm oil production, then it cannot be said that the payments of the quit rent premised on commercial land is wholly and exclusively incurred for the palm oil production…"*

In reading the words 'wholly and exclusively incurred', the judge adopted the pragmatic approach that the amount of quit rent incurred based on agricultural basis is deductible even though the sum is paid entirely for the commercial land. The learned judge opined that the IRB was legally right not to allow the full deduction on the quit rent based on commercial land status as it was clearly contrary to the spirit of s.33(1) of the Act. On the same ground, the IRB cannot disallow the entire sum as the company did pay the quit rent for the said land as entitled to deduction under s.33(1). In the upshot, the amount of deduction is restricted to the quit rent based on its agricultural land status.

The High Court in this case propounded the divisible test in applying the meaning of 'wholly and exclusively' and not its rigid interpretation of 'all or none' basis. The factual matrix reveals that the company had incurred a sum for the quit rent on commercial land, nonetheless, a clear sum is divisible between the quit rent on agricultural land and commercial land. The company is only allowed deduction on an amount paid on the agricultural land being an amount wholly and exclusively incurred for the production of plantation income. In carrying out the business of plantation, there is no necessity to convert the land to commercial use.

This decision is entirely in line with the decision of Director General of Inland Revenue v Kok Fai Yin Co Sdn Bhd (2014) MSTC 30-076. In Kok Fai Yin, the director's fees are paid to the directors and they are not divisible in any manner. The director's fee of a company is determined by the shareholders' discretion: a judgmental value which varies from company to company. It can never be objectively determined what amount is considered reasonable

> *The court should not interfere in a business decision and best leave it for the shareholders to decide. The IRB, which is empowered by the Act for a smooth administration and collection of tax, is equally refrained from apportioning the director's fee that is subjective in nature. The payment of the director's fee has to be by reference to the services rendered by the director; and to remain a subjective test where apportionment is never available.*

Therefore, it would continue to operate as an 'all or none' basis.

However, the amount of quit rent collected by the State Government can be objectively determined and measured. The company which has been conducting its plantation business has been consistently paying quit rent based on agricultural land basis and is debarred from claiming quit rent as deduction based on commercial land. In the event the company voluntarily converted the land of its own accord, any increased amount of expenditure would fail to fulfil the 'wholly and exclusively' test as stipulated in s.33.

Conclusion

The 'wholly and exclusively' test in s.33 needs to apply with reference to the business intent and object. To be deductible, it has to be objectively determined. The division of business expenditure is only allowed in a situation where such division can be objectively ascertained as seen in Ketua Pengarah HDN v Kompleks Tanjong Malim Sdn Bhd (and Another Appeal) [2019] 1 AMR 393. In the event it involves subjective ascertainment, such as the director's fee as seen in Director General of Inland Revenue v Kok Fai Yin Co Sdn Bhd (2014) MSTC 30-076, then it would be operated on an 'all or none' basis.

"It doesn't matter how much you scoot around the office in your swivel chair...you can't deduct that as business travel."

KL Bar - Lincoln's Inn Alumni Moot Court Competition

// By Lee Jie Jiun

From 28 to 29 September 2019, the KLBC Young Lawyers Committee organised the inaugural KL Bar – Lincoln's Inn Alumni Moot Court Competition 2019 in partnership with The Honourable Society of Lincoln's Inn Alumni Association, Malaysia at the Kuala Lumpur Court Complex. This competition which witnessed 9 teams of a total of 40 participants was aimed at contributing towards the pursuit of excellence in advocacy amongst law students in Malaysia and to provide them with the experience of making an argument in an actual court setting. Participants were afforded practical tips by the distinguished panel of judges on how to improve their oral and written advocacy after their moot rounds.

The welcome addresses on 28 September 2019 were delivered by our Harleen Kaur (Leena), Kuala Lumpur Bar Committee Chairman for the 2019/2020 term, New Sin Yew, the representative from The Honourable Society of Lincoln's Inn Alumni Association, Malaysia, and Vivian Kuan, the KLBC Young Lawyers Committee Chairperson for the 2019/2020 term. The audience was briefed on the rationale behind the moot question which was modelled after the landmark Federal Court decision of JRI Resources Sdn Bhd v Kuwait Finance House [2019] 3 MLJ 561 ("JRI Resources").

This was followed by a forum on the moot problem which was authored by Tan Hui Wen, Surendra Ananth, and Lim Wei Jiet who were the panelists for the forum which was moderated by New Sin Yew.

The preliminary rounds took place thereafter where all teams presented their case as both the Appellant and Respondent. The memorials of each team were separately judged. Based on a knockout system, the four top-ranked teams in the preliminary rounds qualified for the semi-finals on 29 September 2019 were Team Advanced Tertiary College ("ATC-Brainy Law"), Team University of Malaya ("UM"), Team University Kebangsaan Malaysia ("UKM"), and Team Universiti Utara Malaya ("UUM").

Team ATC-Brainy Law and Team UM advanced to the Grand Final which was judged by a stellar five judge bench comprising of Datuk Dr Prasad Sandosham Abraham, a retired Federal Court judge, Datuk Emeritus Prof. Dr. Shad Saleem Faruqi, Nizam Bashir, Harleen Kaur and Dato' James Chow Kok Leong.

At the end of the battle of wits at the Grand Final, Team ATC-Brainy Law which consisted of Haseena Elaine Kaur A/P Harjit Singh, Low Ming Yung, Melvin Moi Kai Sen, Shalini A/P Ravindranathan, and Subash Jai Devaraj emerged as the Winner of the competition and won a cash prize of RM2,000.00. Team UM represented by Nevyn Vinosh Venudran, Peh Qi Hui, Tan Jia Xin, Lim Ru Yee, Matthew Ooi Xian Wei was ranked as the First Runner-Up and won a cash prize of RM1,000.00.

Team UUM comprising of Anthony Christopher Crimson, Loo Xin Tian, Tan Yoong Chang, Muhammad Khairul Izzan bin Sajali and Lee Yi Huan bagged the Best Team Written Submissions Award whereas Subash Jai Devaraj of Team ATC-Brainy was ajudged as the Best Oralist; both awards came with a cash prize of RM500.00.

All participants received certificates of participation, while the winning teams received their trophies and internship opportunities with the sponsors of the competition, i.e., Chow Kok Leong & Co, Thomas Philip, Shook Lin & Bok and Vignesh Kumar & Associates.

The KL Bar – Lincoln's Inn Alumni Moot Court Competition 2019 was made possible thanks to the support and contribution of The Honourable Society of Lincoln's Inn Alumni Association, Malaysia as well as the generosity from the sponsors. The KLBC Young Lawyers Committee would like to take this opportunity to express their heartfelt gratitude to all esteemed judges for presiding over the moot rounds and to the Kuala Lumpur Court Director for allowing the competition to take place in the Kuala Lumpur Court Complex.

Winner - Team ATC-Brainy Law

LEGAL PROFESSIONAL PRIVILEGE:
NOT JUST A SHIELD

// By Joshua Wu Kai-Ming

The Case Of Tan Chong Kean v Yeoh Tai Chuan & Anor [2018] 2 MLJ 669

Summary: Breach of legal professional privilege grants an aggrieved person a cause of action against his/her solicitor.

The 1st Respondent was the Appellant's solicitor in the preparation of three trust deeds regarding a joint venture with Bukit Gambier Market Point Sdn. Bhd. ('Bukit Gambier') to develop a piece of land. The Appellant instructed the 1st Respondent to destroy all copies of the trust deeds upon completion of the project.

The Respondents then purchased a property in the project, failed to pay the balance purchase price, and were subsequently sued by Bukit Gambier in Sessions Court Suit No 52–3367 of 2008.

The Respondents filed a third-party notice against the Appellant to recover legal fees unpaid by the Appellant. In support of its third-party notice of application, the Respondents exhibited copies of the trust deeds. The Appellant then initiated the current suit against the Respondents for breaching S.126 of the Evidence Act 1950.

The principal issue before the Federal Court was, "(a) whether a breach of s 126 of the Evidence Act 1950 on legal professional privilege by a solicitor gives rise to a cause of action against him by the client to obtain an injunction to restrain any disclosure of confidential information by him or whether, as stated by the Court of Appeal, the client is confined to a complaint to the Advocates and Solicitors Disciplinary Board for breach of solicitor-client privilege?"

The High Court and the Court of Appeal

The learned High Court Judge was of the opinion that, "The trust deeds were generated during the solicitor-client relationship between the [Appellant and the Respondents]" and that "… the [Respondents] are the ones who had misused the confidential information which they kept and has as solicitors for the [Appellant]."

She allowed the Appellant's claim and awarded exemplary damages of RM50,000 on top of general damages which was to be assessed before the registrar.

The Court of Appeal, however, disagreed with the High Court and reversed the latter's decision. The Court of Appeal was "… doubtful whether s.126 of the Evidence Act 1950 can give rise to a cause of action."

It went on to say that, "As a general rule, a breach of any of the sections under the Evidence Act will not give rise to a cause of action per se. S.126 is meant to be a protection given to the solicitors not to disclose information between solicitors and clients as stated in the section to third parties and not among themselves."

Decision

The Federal Court propounded that "S.126 is not a mere rule of evidence. It is a principle of fundamental justice."

The Federal Court unanimously held that "… a breach of [legal professional privilege] entitled an aggrieved party to commence an action including a prayer for an injunction to safeguard the confidentiality of the solicitor-client communication."

The Federal Court allowed the appeal with costs and ordered:

"(a) an injunction to restrain the [Respondents] from disclosure and use of the trust deeds in their possession;
(b) all copies of the trust deeds in the possession of the [Respondents] be delivered up to the plaintiff within seven days from the date hereof;
(c) the [Respondents] are not to retain any facsimile or photocopy of the trust deeds; and
(d) … for damages to be assessed by a High Court Judge in Penang and paid by the [Respondents] to the [Appellant]."

Analysis

Historically, legal professional privilege has always been used as a shield. However, in light of this recent decision, legal professional privilege can now be used as a sword against solicitors who breach the said privilege.

Event Highlight

19th Kuala Lumpur-Selangor Bar Games 2020

The 19th Kuala Lumpur-Selangor Bar Games, hosted by the Kuala Lumpur Bar, was held on 17 and 18 January 2020. Most of the sports were played at the University Malaya Sports Facilities. However, certain sports were played at various other locations, such as, the Pyramid Bowl, Sunway Pyramid, Taylors International School Court, Kota Seriemas Golf & Country Club, Nilai and Forum 19, Petaling Jaya. This year, additional friendly (non-competitive) sports were played such as bowling, ladies 3v3 basketball and table-tennis.

Selangor Bar beat the Kuala Lumpur Bar 5-3 in the overall sports' tally having won at golf, badminton, men's futsal, ladies futsal, and soccer to become the overall champion, lifting the Lall Singh Muker Challenge Trophy. However, members of the Kuala Lumpur Bar showed that they were equally sportive and athletic by winning at netball, volleyball and men's basketball.

Competitive Sports

No.	Sports	Result
1.	Golf	Selangor Bar
2.	Badminton	Selangor Bar
3.	Men's Futsal	Selangor Bar
4.	Ladies Futsal	Selangor Bar
6.	Soccer	Selangor Bar
7.	Netball	Kuala Lumpur Bar
8.	Men's basketball	Kuala Lumpur Bar
9.	Volleyball	Kuala Lumpur Bar

Non-Competitive Sports

No.	Sports	Result
1.	Bowling	Kuala Lumpur Bar
2.	Ladies Basketball	Kuala Lumpur Bar
3.	Table-Tennis	Kuala Lumpur Bar

After a long day of sports and excitement, players, members and supporters alike were treated to a post-games dinner and prize-giving ceremony which was held on the evening of 18 January 2020 at the Poolside, Royal Selangor Club, Bukit Kiara Annexe, Jalan Bukit Kiara, off Jalan Damansara.

BE PART OF OUR STORY

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KLBC Publications Committee 2019/2020

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