

**IN THE COMPETITION APPEAL TRIBUNAL
IN FEDERAL TERRITORY OF PUTRAJAYA, MALAYSIA
IN THE MATTER OF APPEAL NO. 8 OF 2022**

**BETWEEN
VENTURE NUCLEUS (M) SDN BHD
(APPELLANT)
AND
COMPETITION COMMISSION
(RESPONDENT)**

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**PRESIDING MEMBERS OF THE
COMPETITION APPEAL TRIBUNAL**

- 1. DATO' A AZIZ BIN A RAHIM**
 - 2. DATUK SERI DR. VICTOR WEE ENG LYE**
 - 3. MR. MOHD RAFEE BIN MOHAMED**
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GROUND OF DECISION

Date: 17.11.2022

INTRODUCTION

[1] The matter before the Tribunal is about the objection by the respondent i.e., the Competition Commission against the appellant i.e., Venture Nucleus (M) Sdn Bhd filing of appeal out of time and pray for the said appeal to be struck off.

[2] The appellant is one of the five appellants who had filed appeals against the Commission's decision dated 27 June 2022. The appellant's appeal was filed on the 5 August 2022.

THE FACTS

[3] On 27 June 2022 the respondent issued a decision that found the appellant and seven other parties (who are not relevant here) have infringed section 4 of the Competition Act 2010 (the Act) by participating in a bid rigging. The appellant was penalised by financial penalty of RM320,848.46 to be paid within 30 days from the date of the decision.

[4] Though the decision by the Commission was dated 27 June 2022, the decision was never pronounced on that date by the Commission in public hearing in the presence of all the appellants. Instead, on 01 July 2022, learned counsel for the appellant informed the Tribunal that he received a phone call from an officer of the Commission by the name of Puan Umami Kalthum Ibrahim requesting the appellant to send the name of the appellant's representative by 04 July 2022 to collect the written notice and the decision by 05 July 2022.

[5] On 05 July 2022 the representative of the appellant's solicitor collected the written notice and the decision from the respondent's office. Subsequently the appellant's solicitor filed the notice of appeal with the Tribunal on 05 August 2022.

[6] Under section 51(2) of the Act a notice of appeal to the Tribunal shall be made in writing within 30 days from the date of the decision of the Commission and a copy of the notice of appeal shall be served on the Chairman of the Commission.

[7] Thus, the respondent contends that the filing of the notice of appeal by the appellant on 05 August 2022 is out of time by nine days from the date of the decision and that 04 August 2022 was the last day for filing of the notice of appeal. Alternatively, the respondent contends that even if the date of the collection of the decision i.e., on 05 July 2022 is taken as the material date the appellant to have known about the decision, the filing of the notice of appeal by the appellant on 05 August 2022 is out of time by at least a day by virtue of section 51(2) of the Act.

[8] The appellant however contends that the last date to file the notice of appeal was on 05 August 2022.

THE SUBMISSIONS BY THE PARTIES

[9] Counsel for the respondent argued that the timeline to file the notice of appeal in section 51(2) of the Act must be construed strictly and that the Tribunal has no power to abridge or extend the time limit. It was further submitted that the power of the Tribunal under section 57(1)(g) of the Act is not applicable because regulation 13(1)(n) of the Competition (Appeal

Tribunal) Regulations 2017 (“the Regulations”) provides that the Tribunal may give directions relating to extension or abridgment of any time limit specified in the Regulations regardless of the expiration of the time limit **other than** the time limit for the filing of the notice of appeal. (Emphasis is ours)

[10] However, the Tribunal noted that time limit for filing of notice of appeal is nowhere mentioned in the Competition (Appeal Tribunal) Regulations 2017. The time frame for the filing of the notice of appeal is only mentioned in section 51(2) of the Act.

[11] On the other hand, the appellant’s counsel submitted that the last day to file the notice of appeal was 05 August 2022. He said by his own computation, in accordance with the provisions of the Act, this is the correct date. Further he informed the Tribunal that as a precautionary measure he called up the Tribunal’s office and spoke to one of the staff there. He alleged that the said staff informed him that the last date to file the notice of appeal was 05 August 2022. He further submitted that the situation regarding the filing of the notice of appeal in this instant is not covered by section 51(2) of the Act. He argued that this is so because the written decision by the Commission was dated 27 June 2022 but was only made known to the appellant on 05 August 2022.

[12] Further, learned counsel for the appellant submitted that the Tribunal has the power to extend time for the filing of the appeal. He said there are special circumstances for the Tribunal to do so. Moreover, he argued that the power of the Tribunal under section 57(1)(g) can be invoked to do this. He argued that the prohibition in regulation 13(1)(n) does not apply in this case because the time was never mentioned in the

Regulations. The time to file the notice of appeal is provided for in section 51(2) of the principal Act. Thus, his argument is that regulation 13(1)(n) of the Regulations being a subsidiary legislation cannot be inconsistent with the provision of the principal Act by restricting the powers of the Tribunal to give directions pursuant to section 57(1)(g) of the Act.

TRIBUNAL DETERMINATION AND FINDINGS

[13] We have heard the parties' oral submissions and we have also read the written submissions filed by them. All things considered, we are of the opinion that the objection by the respondent is valid, and we therefore unanimously allow the objection and accordingly the appeal by the appellant which was filed on 05 August 2022 is hereby struck off. Our reasons for this decision are as follows:

[14] The first issue that need to be decided is the material date for last day of filing of the appeal. We have two contentious dates. The respondent said the material date is 04 August 2022; but the appellant disagreed. The appellant said the material date is 05 August 2022. So, who is correct and which of the two dates is the material date?

Section 51(2) of the Act (Act 712) reads:

“a notice of appeal shall be made in writing to the Commission Appeal Tribunal within thirty days from the date of the decision of the Commission and the appellant shall give a copy of the notice to the Chairman of the Commission”.

Reading this provision literally it would mean that the last date for filing of the appeal is to be counted from the date of the decision by the Commission. This date should be the date that is written on the written decision of the Commission that is 27 June 2022. Counting from this date (it is inclusive because the section says '*...from the date of the decision...*') the last date to file the appeal would be on 26 July 2022, being thirty days from the date of the decision of the Commission. However, we think that this is not fair to the appellant. Though the decision was dated 26 June 2022, the appellant have sight of the decision only on 05 July 2022 when its solicitor was asked to collect the written decision from the Commission.

[15] We also noted that section 40(2) of the Act states that "*the commission shall, within fourteen days of it making a decision ...notify the person affected by the decision*". The appellant is indeed a person affected by the decision and should be notified. In our view when the office of the Commission called the appellant solicitors to collect the written decision by 05 July 2022, the Commission had complied with the requirement. But, as we mentioned earlier, and for the sake of justice, we think that mere compliance with this section as to notification does not warrant the computation of the last date to file the appeal to be taken from the date of the decision. This is because at the date of the notification or the receipt of it, the appellant did not know what the decision is exactly and its reasonings or contents to enable the appellant to make an informed decision whether to appeal against the decision. This can only be done when and after the appellant, and its solicitors, have sight of the actual decision and take a proper legal advice as to the prospect of an appeal.

[16] We also noted that under regulation 3(1) of the Regulations, the filing of the notice of appeal under the Act and the Regulations is not a simple matter of filing one page notice of appeal as commonly done in the civil court of law. Regulation 3(1) requires a detail notice of appeal to be prepared and filed and to include among other things:

- The date of the decision appealed against and the substance of the decision in summary,
- A clear and concise statements of fact,
- The grounds of appeal together with the particulars of fact or law which the Commission is alleged to have erred,
- A succinct argument of fact or law supporting each ground of appeal, and
- The relief, or the direction if any, sought by the appellant.

To enable the appellant to do all the above, we are of the view that the appellant or its solicitors must have received, read and analysed the actual decision and the reasonings for the decision by the Commission.

[17] Therefore we are of the view that the fair and material date for the last day of filing of the appeal ought to be computed, in this case, from the date the appellant or its solicitors have had sight of the actual decision of the Commission that is 05 July 2022 when the decision was collected from the office of the Commission; and not from the date of the decision itself that was printed or stated on the document of the written decision. Hence, the last day, in our opinion, to file the appeal in this case is 04 August 2022 as contended by the respondent, being thirty days from the date the decision of the Commission received by the appellant.

[18] On the above finding, the appellant is clearly out of time when the notice of appeal was filed, since it was filed on 05 August 2022.

[19] The next question or issue that we must decide is whether we, the Tribunal, has jurisdiction to extend the time for filing of the appeal. The respondent argued that the Tribunal does not have that power. It was submitted that the time limit under section 51(2) of the Act to file an appeal is absolute and cannot be abridged or extended. It was argued that regulation 13(1)(n) of the Regulations makes it crystal clear that the Tribunal in exercising its power under section 57(1)(g) to give directions cannot override the provision of section 51(2) and give direction to extend the period of filing an appeal. It was further argued that the strict requirement under section 51(2) of the Act for filing of the notice of appeal goes to the jurisdiction of the Tribunal to hear the appeal. For better understanding of this argument, we produce below the provisions of section 57(1)(g) and that of regulation 13(1)(n):

Section 57(1)(g)-

The Competition Appeal Tribunal shall have power - “to generally direct and do all such matters as may be necessary or expedient for the expeditious decision of the appeal”.

Regulation 13(1)(n)-

The Tribunal may give direction under paragraph 57(1)(g) of the Act at any time, whether at a case management or otherwise, on its own motion or on the request of any party, as may be necessary or expedient for the expeditious decision of the

appeal, which includes directions relating to – “the extension or abridgement of any time limit in these regulations regardless of the expiration of the time limit other than the time limit for the filing of the notice of appeal.”

It appears therefore the hands of the Tribunal are tied when comes to giving direction specifically to enlarge or to extend the time limit for appeal.

[20] The respondent’s solicitors supported their argument by referring to a Federal Court’s decision in **Fung Keong Rubber Manufacturing (M) Sdn Bhd v Lee Eng Kiat & Ors** [1961] 1 MLJ 238. In that case the Federal Court was dealing with section 20(1) of the Industrial Relations Act 1967 where a wrongful dismissed workman was seeking reinstatement. The law says he must present his claim for reinstatement within one month of the date of dismissal. The Federal Court said the workman is bound to comply with this requirement as to the time limit and the Court has no jurisdiction to consider the claim if the claim is filed outside this time limit. Learned counsel for the respondent submitted that the provision of section 20(1) of the Industrial Relations Act 1967 is like the provision of section 51(2) of Act 712 – the Competition Act 2010. Section 20(1) of the Industrial Relations Act 1967 reads:

“20(1) where a workman who is not a member of a trade union of workmen considers that he has been dismissed without just cause or excuse by his employer he may, **within one month of the dismissal** make representations in writing to the Director General to be reinstated in his former employment; the representations may be filed at the office of the Director General

nearest to the place of employment from which the workman was dismissed.”

[21] The statutory time limit in section 20(1) Industrial Relations Act 1967 is one month. And the Industrial Court in the case of **Chandran a/l Mariamuthu v United Vehicles Industries Sdn Bhd** [Case No. 30(27)(21)/4-2681/18 Kuala Lumpur] cited to us by counsel for the appellant had said that:

“the statutory time limit prescribed under section 20(1A) of the Industrial Relation Act 1967 is mandatory provision and failure to comply with the same is fatal to an employee’s claim.”

[22] Therefore, the respondent submitted that similar treatment should be accorded to the construction of section 51(2) of the Competition Act 2010 as to the statutory time limit provided therein.

[23] Counsel for the appellant on the other hand submitted that the Tribunal has very broad and wide powers to grant any extension of time; and regulation 13(1)(n) of the Regulations is not applicable in this instant case. He argued that the time frame for filing the notice of appeal to the Tribunal is not provided in the Regulations. It is provided in the Act, specifically in section 51(2). He further argued that the time frames referred to in regulation 13(1)(n) are time frames prescribed in the Regulations. And since the time frame for filing of notice of appeal is not provided in the Regulations but under section 51(2) of the Act, restriction in regulation 13(1)(n) does not cover the extension of time in filing of the notice of appeal. Counsel for the appellant also submitted that regulation 13(1)(a) gives wide and general power to the Tribunal to give directions

as to the '*manner in which the proceedings was to be conducted including any time limit to be complied with in the conduct of a hearing*'. In addition, he submitted that there is no provision in the Act that restricts or limits the power of the Tribunal and that section 57(1)(g) of the Act empowers the Tribunal with all the powers to generally direct and do all matters necessary concerning an appeal. Thus he argued that since the statutory time limit for filing of a notice of appeal is found only in section 51(2) of the Act; and there is no provision in the Act that restricts or constrains the Tribunal from abridging or extending this statutory time limit (this restriction or constraint is found only in regulation 13(1)(n)), the Tribunal has the jurisdiction to extend the statutory time limit for filing a notice of appeal; and that regulation 13(1)(n) of the Regulations cannot contradict section 57(1)(g) of the Act. It was in fact submitted that any regulation that tries to restrict or limit the power of the Tribunal under the Act is void and ultra-vires the Act. To support this last point of his submission, learned counsel for the appellant referred to us the Court of Appeal's decision in **Michael Joseph Carvalho & Anor v Majlis Peguam Malaysia** (Rayuan Sivil No: A-02(A)-167-09/2021). In that case the Court of Appeal was dealing with sections 80(8) and (9) of the LPA and the CF Rules; and the Court said the respondent in that case i.e. Majlis Peguam Malaysia does not have the power to issue the guidelines and whittle down the ambit of sections 80 (8) and (9) of the LPA and restrict the claims only to acts of dishonesty of advocates and solicitors who are sole proprietors.

[24] We think the arguments by learned counsel for the appellant is untenable. The statutory time limit to file notice of appeal provided under section 51(2) of the Act is crystal clear. There are no other provisions either under the said section or the Act as whole that touches on the statutory time limit to file a notice of appeal. There is no provision in the

Act that speaks about abridging or extending the statutory time limit for filing of an appeal.

[25] To say that section 57(1)(g) of Act empowers the Tribunal to extend the statutory time limit under section 51(2) of the Act is, in our view, not correct. The two sections i.e., sections 57 and 51 of the Act, are principal sections of equal standing in the principal Act. The two sections should be read and interpreted harmoniously to achieve the objective of the Act. More importantly, we think that if the statutory time limit for filing of appeal under section 51(2) of the Act is capable of being abridged or extended by the Tribunal, there must be a clear provision in the principal itself for this purpose. Paragraph 36 of the Court of Appeal's decision in *Michael Joseph Carvalho* (supra) cited by the learned counsel for the appellant lends support to this proposition. The fact that the Legislature deems it fit not to provide for such provision is an indication that the statutory time limit provided is to be treated as mandatory. In our view, the Legislature intended that an appeal under the Act must be disposed of as quickly as possible and any delay in filing a notice of appeal in contravention of the statutory time limit in section 51(2) is inexcusable for whatever reason. The general wordings used by the Legislature in section 57(1)(g) when it speaks of expediency in handling of the appeal is a testimony to this objective. This is augmented by the clear wordings of regulation 13(1)(n) of the Regulations. In the same breath we say that the three provisions – section 51(2) and section 57(1)(g) of the Act and regulation 13(1)(n) of the Regulations, read together harmoniously, would support the conclusion that the filing of a notice of appeal to the Tribunal must be done promptly and within the statutory time limit.

[26] Section 57(1)(g) gives the power to the Tribunal to issue directions and do all matters as may be necessary for the expeditious decision of the appeal. At the same time regulation 13(1)(n) says that the Tribunal may give directions as to the extension or abridgement of any time specified in the Regulations regardless of the expiration of the time limit other than the time limit for the filing of the notice of appeal. Two observations may be made as to this provision: first, regulation 13(1)(n) provides in no uncertain term that the Tribunal has the power to extend or abridge the time prescribed in the Regulations even though the time limit has expired. But the Tribunal cannot have such power regarding the extension of the statutory time limit for filing of a notice of appeal under section 51(2) of the Act. Second, we noticed that under regulation 14(2) and regulation 15(1) of the Regulations, there is provided a time limit of 14 days to do the act mentioned under those two regulations. Regulation 13(1)(n) will of course apply regarding any extension or abridgement of these time limits if it becomes necessary or expedient for the Tribunal to decide so. But, as correctly submitted by learned counsel for the appellant there are no provisions in the Regulations that regulate the time limit for filing of appeal except in regulation 13(1)(n) which prohibits the Tribunal from giving any direction to abridge or extend the time limit for filing of a notice appeal. Likewise, there are also no provisions in the principal Act that give the Tribunal the power to override the mandatory requirement to file an appeal within the statutory time limit provided. In other words, there is no escape clause. The Tribunal derives its powers from the written law that is the Act and the Regulations. We can only act if the power is given to us.

[27] In a related argument, learned counsel for the appellant submitted that regulation 13(1)(n) is void and could even be ultra vires section 51(2)

of the Act, because it restricts the power of Tribunal when nothing of it is mentioned in the principal Act. Is that so? To support his argument learned counsel cited the Court of Appeal's decision in *Michael Joseph Carvalho & Anor v Majlis Peguam Malaysia* (supra). However, we do not find this case is of any assistance to the counsel's argument. Sections 80(8) and (9) of the LPA and the issue related thereto as discussed by the Court of Appeal is not like the issue that we have here. In that case the Court of Appeal was dealing with the authority of the Bar Council of Malaysia to issue guidelines purportedly pursuant to sections 80(8) and (9) of the LPA restricting the application of the provisions in sections 80(8) and (9) and made it applicable only to the acts of dishonesty of a certain class of advocates and solicitors. In a gist, sections 80(8) and (9) of LPA give rights (which is a substantive right) to a party who is injured by an act of dishonesty by practising advocates and solicitors to claim for compensation from the Bar Council. The sections however do not make any distinction between the class or type of legal practice whether it is sole proprietorship or partnership. But the guidelines issued by the Bar Council in that case draws the distinction and restrict the claims to acts of dishonesty of advocates and solicitors who are sole proprietors only. This is clearly contravening the intention and objective of the provisions which is to enable an injured party caused by an act dishonesty of an advocate or solicitor to make a claim to Bar Council regardless of whether the advocate or solicitor who committed the act of dishonesty is practising as sole proprietor or partnership. Thus, the Court of Appeal was right to conclude that the Bar Council cannot issue such guidelines because it has no power to do so under those provisions, or any other provisions of the LPA. In our case, the point involved is only procedural relating to the power of the Tribunal to issue directions for expeditious disposal of an appeal. Regulation 13(1)(n) merely states that in giving directions as to

the hearing and disposal of appeals before it, the Tribunal may give direction to abridge or extend any time limit prescribed in the Regulations but cannot give any direction to extend or abridge the statutory time limit for filing of a notice of appeal. As we mentioned earlier in this decision, section 51(2) and 57(1)(g) of the Act and regulation 13(1)(n) of the Regulations must be read harmoniously to give effect to the intention of the Legislature; and that is the expeditious disposal of the appeal by the Tribunal. We therefore reject this argument by learned counsel for the appellant.

[28] However, learned counsel for the appellant raised another argument that the Tribunal could use its discretion to extend the statutory time limit for filing of a notice of appeal under section 51(2) on the ground of exceptional and special circumstances. Learned counsel referred to us Regulation 7(4) of the Singapore Competition (Appeals) Regulations that provides that on the application by the appellant, the Appeal Board may in its discretion extend the time limit for the lodgement of the notice of appeal. Next, he referred to us regulation 9(1) of the UK Competition Appeal Tribunal Rules 2015 that provides the power to the Tribunal to extend the time limit for appeal if the Tribunal is satisfied that the circumstances to do so are special and exceptional. Learned counsel also cited two authorities from UK: the first one is **Hasbro UK Limited v The Director General of Fair Trading** [2003] CAT 1 and the second one is **Prater Limited v Office Of Fair Trading** [2006] CAT 11. On these authorities learned counsel for the appellant strongly urged upon us to adopt this approach and apply the exceptional and special circumstances principle to grant the extension of time for filing of the appeal under section 51(2) of the Act.

[29] We have two answers for those arguments and submissions. The first answer is that in our case the Tribunal derives its powers from the provisions of the Act and the Regulations made thereunder. We have diligently and carefully studied the Act and the Regulations, and we found nothing in either of them that gives the Tribunal the power to apply the principle of exceptional and special circumstances. And unlike the Court of Justices, we the Tribunal do not have the inherent power that can be invoked to do what the appellant is asking us to do – i.e., to extend the statutory time limit for filing of the appeal notice on the ground of exceptional and special circumstances. The second answer is that unlike the position in Malaysia, Singapore and UK legislations as cited by the learned counsel for the appellant have express provisions to grant the extension. Thus, the analogy drawn by the learned counsel for the appellant to support his argument on this point is inappropriate. Even if we assume that the Tribunal has the power to grant the extension on exceptional and special circumstances, we do not find, on the facts of this case, exceptional and special circumstances to exercise the discretion.

[30] Finally, and still on the same point, learned counsel for the appellant argued that by analogy the court of law in Malaysia does exercise its discretion under the Criminal Procedure Code to grant extension of time for filing of a criminal appeal. Learned counsel cited to us section 307 CPC and the High Court's decision in **Satah Nasif bin Ibrahim v Pendakwaraya** [2019] MLJU 1826. Our response to this argument is the same as above. Moreover, the analogy and comparison are also inappropriate because the case and the legal provision referred to are in the realm of criminal law. Here, we are dealing with commercial and business law. In criminal law, besides the express provision of section 307 CPC, the courts are always ready to invoke the inherent power to do

justice because the primary consideration there is the liberty and life of the person charged.

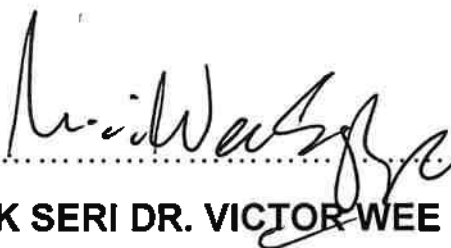
[31] On the foregoing reasoning, the Tribunal finds that the objection by the respondent as to the appellant's filing the notice of appeal out of time is valid and we therefore uphold it and allow the objection. Accordingly, the notice of appeal and the appeal filed by the appellant on 05 August 2022 is hereby ordered to be struck off. Consequential to this decision the appellant stay application will also be struck off.

[32] My other two colleagues, Datuk Seri Dr. Victor Wee Eng Lye and Encik Mohd Rafee Mohamed, who sat together with me on this Appeal Tribunal, have seen and read this decision in draft and they agreed with the findings herein.

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**The presiding members of the
Competition Appeal Tribunal**



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**(DATO' A AZIZ BIN A RAHIM)
Chairman**



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(DATUK SERI DR. VICTOR WEE ENG LYE)



.....
(MR. MOHD RAFEE MOHAMED)

Date: 17.11.2022

Counsel for:

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