IN THE COMPETITION APPEAL TRIBUNAL AT PUTRAJAYA
IN THE STATE OF FEDERAL TERRITORY OF PUTRAJAYA, MALAYSIA
APPEAL NOs. 7, 4, 5 & 6 OF 2022

BETWEEN

CALIBER INTERCONNECTS SDN BHD & THREE OTHERS
(APPLICANTS/APPELLANTS)

AND

COMPETITION COMMISSION
(RESPONDENT)

.....

PRESIDING MEMBERS OF THE COMPETITION APPEAL TRIBUNAL

1. **DATO' A AZIZ BIN A RAHIM (CHAIRMAN)**
2. **DATUK SERI DR. VICTOR WEE ENG LYE**
3. **MR. MOHD RAFEE BIN MOHAMED**

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GROUNDS OF DECISION

(An interlocutory decision in relation to the stay application filed by the Applicants/Appellants)

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Introduction

[1] These are applications by all four applicants/appellants for a stay order of the Competition Commission's decision dated 27 June 2022, pursuant to section 53 of the Competition Act 2010 ("the Act"). Each of the applicants/appellants has filed a separate application for stay. But the Tribunal decided to hear them all together.

The four applicants/appellants are as follows:

(i) Caliber Interconnects Sdn Bhd (appellant in appeal No. 7/2022) ("*Caliber*");

(ii) Basenet Technology Sdn Bhd (appellant in appeal No. 4/2022) ("*Basenet*");

(iii) Novatis Resources Sdn Bhd (appellant in appeal No.5/2022) ("*Novatis*"); and

(iv) Silver Tech Synergy Sdn Bhd (appellant in appeal No. 6/2022) ("*Silver Tech*").

[2] On 27 June 2022 the respondent found all the above four applicants/appellants had engaged in anti-competition conduct by participating in bid rigging in a bidding for the award of a contract pursuant to *sebut harga* by National Academy of Arts, Culture and Heritage of Malaysia ("*ASWARA*") and thereby had committed an infringement of section 4 of the Act.

[3] All the applicants/appellants have appealed against that decision; and pursuant to the filing of the appeals all the applicants/appellants now filed these applications for stay.

Brief facts

[4] On 18 July 2016 *ASWARA* sought quotations for four (4) *sebut harga* on its website. They are as follows:

- *Sebut harga A – perkhidmatan membekal, menghantar, memasang, menguji dan mentauliah serta menyenggara (dalam tempoh Jaminan) peralatan sistem bekalan kuasa bersepadu dan backup data;*

- *Tender A – perkhidmatan membekal, menghantar, memasang, menguji dan mentauliah serta menyelenggara (dalam tempoh jaminan) peralatan dan perisian pengkomputeran untuk pembelajaran makmal animasi 2D (2D animation lab), graphic production dan HD projector;*

- *Sebut harga C – perkhidmatan membekal, menghantar, memasang, menguji dan mentauliah serta menyelenggara (dalam tempoh jaminan) perkakasan ICT fakulti animasi dan multimedia; dan*

- *Sebut harga B – perkhidmatan penyelenggaraan active directory untuk ASWARA (configuration Microsoft windows 2008 server, diagnose & troubleshooting active directory problems & configure*

virtual server backup, support for active directory, maintain & support network domain name server).

[5] All the above applicants/appellants and two other parties (i.e. *Tuah Packet Sdn Bhd* and *Venture Nucleus (M) Sdn Bhd* who are not parties to this proceeding) submitted quotations for *Sebut harga A*. *ASWARA* accepted *Caliber*'s bid for *Sebut harga A*. Thereafter the Commission received information from *ASWARA* regarding alleged bid rigging arrangement between *Caliber* and *Tuah Packet* (who is not a party here and not an appellant in this case) in relation to *Sebut harga A*. The Commission then commenced an investigation under section 15 of the Act; and on 4 March 2018 served the proposed decision dated 26 February 2018 on all the applicants/appellants as well as on *Tuah Packet Sdn Bhd*. This proposed decision was eventually made final by the Commission on 27 June 2022 and given to the parties on 05 August 2022. The final decision has minor amendments, but these amendments are not significant to these applications or the appeals. The gist of the Commission findings can be seen by referring to paragraphs 345 and 349 of the Commission's decision dated 27 June 2022 which are produced below:

"345. Therefore, the commission finds there is a strong and convincing evidence, on balance of probabilities, that an infringement of section 4 prohibition had been committed; and this we have elaborated on in the foregoing paragraphs".

"349. As explained above, the commission considers that all infringement took place in the supply of relevant services at ASWARA as below:

I. *Sebut harga A;*

II. *Tender A;*

III. *Sebut harga C; and*

IV. *Sebut harga active directory."*

[6] On the finding of the infringement the Commission imposed a financial penalty of various amounts as between the applicants/appellants. The financial penalties yet to be paid by the applicants/appellants.

Submissions and arguments by the parties in this application.

SUBMISSIONS BY CALIBER

[7] For *Caliber's* appeal and stay of decision application, only *Sebut harga A* is relevant. There was a total of fifteen (15) bidders involved in *Sebut harga A*. The Commission made two findings of infringement by *Caliber*. The first is that there was an alleged bilateral bid rigging arrangement between *Caliber* and *Tuah Packet Sdn Bhd*, another party who had participated in the bidding for *Sebut harga A* but not successful. The second finding is that there was an alleged separate bid rigging arrangement coordinated by *Novatis* together with *Basenet, Silver Tech* and *Venture Nucleus*. Counsel for *Caliber* submitted that only the first finding is relevant to his client case. *Caliber* expertise is in relation to the installation of cabling an electrical works for the UPS system but insufficient expertise to implement the backup system required by *ASWARA*. *Tuah Packet Sdn Bhd* on the other hand has expertise in backup systems and servers.

[8] Both *Caliber* and *Tuah Packet* submitted their bids for *Sebut harga A*. However, *Tuah Packets* bid was lower than the bid by *Caliber*. *Tuah Packets* bid was RM433,353.00 while *Caliber* bid was RM467,727.00. Despite this, *Caliber* bid was accepted.

[9] On being awarded the contract for *Sebut harga A*, *Caliber* approached *Tuah Packet* for proper estimation of *Tuah Packet* quotation in order to carry out the subcontract works on the backup systems and servers.

[10] It was submitted that the alleged period of infringement identified by the Commission for *Sebut harga A* is 16 days starting from 18 July 2016 to 2 August 2016. This period is not in dispute.

[11] In the Commission's decision, the Commission found that *Caliber* and *Tuah Packet* had entered cover bidding-cum-subcontracting relationship arising from the principle that competitors who agree not to bid or agree to submit a losing bid in exchange of receipt of a subcontracting agreement has infringed section 4(2) (d) of the Competition Act 2010 ("the Act")

[12] The Commission's decision is an administrative decision and not a final decision because there is a venue for review of the decision through the appeal filed to the appeal Tribunal. Also, there is no urgency in this case for punishment to be meted down as the purported infringement in question lasted only 16 days, six years ago in 2016 and has long since ceased.

[13] *Caliber's* business is primarily relying on government contracts and projects. Therefore, if the decision is not stayed and *Caliber* is blacklisted and suspended, it would have a direct impact on the survival of *Caliber's* business and *Caliber* would suffer immense prejudice and may no longer be a going concern by the end of the appeal – the appeal would be rendered nugatory. It was further submitted that if the stay is not granted the effect is that the Commission's decision essentially prohibits *Caliber* from conducting any business and is a death sentence to the company. The result would be that *Caliber* would suffer irreparable harm and would be impossible to reverse to *Caliber's* business position before the Commission decision if the appeal is successful. There would be reputational harm to *Caliber's* business.

[14] Learned counsel for *Caliber* also submitted that there are strong merits to *Caliber's* appeal. He said the finding by the Commission was flawed because there was no agreement to enter a cover bid in this case due to the simple reason that *Caliber's* winning bid was higher than *Tuah Packet's* bid of RM433,353.00. It was argued that in a cover bidding agreement, it is the lowest bid that wins, and the unsuccessful party with the higher bid is compensated. In this case it is the opposite. Learned counsel for *Caliber* further submitted that the Commission has not shown in its decision that there exists a cartel between the 15 parties that bided for and fixed *Sebut harga A*. It was argued that the period of infringement was from 18 July 2016 to 2 August 2016 and there was no alleged subcontracting agreement prior to this period or during the period. There was no evidence to this effect shown by the Commission. It was argued that the alleged subcontracting agreement, if there is one, could have only been entered into on or after 7 September 2016 when the letter of

acceptance was issued; and this date falls outside the period of infringement.

[15] It was also submitted that the Commission has erred in the interpretation of several crucial statutory provisions of the Act relevant to the Appeal and had erred in the computation and calculation of the alleged infringement period, hence the computation of the financial penalties imposed on the Caliber which it was submitted disproportionate and erroneous.

[16] Lastly learned counsel for *Caliber* submitted that the Commission was unable to show any nexus or connection between *Caliber* and the other bidders that *Caliber* is the instigator in the bid rigging of *Sebut harga A*.

[17] All the above submissions learned counsel for *Caliber* said shows that there are strong grounds of appeal in favour of *Caliber*.

[18] Another point for consideration, learned counsel for *Caliber* submitted, is that the balance of equities tips in favour of *Caliber* when one considers the errors made by the Commission in its decision and the irreparable harm and prejudice that *Caliber* would suffer if stay is not granted. In addition, it was argued that granting the stay would not have any negative impact on public interest simply because the alleged infringement is not on going and had ended a long time ago.

SUBMISSIONS BY BASENET

[19] Learned counsel for *Basenet* submitted that there are special circumstances in this case for a stay to be granted.

[20] It was argued that the decision by Commission against *Basenet* as to the infringement is unusual, strange and unreasonable. It was submitted that the Commission had based its finding against *Basenet* for the infringement based on irrelevant considerations by considering three post-infringement conducts. These three alleged post-infringement conducts were detailed in the learned counsel written submissions dated 23 September 2022 at paragraphs 18 to 43.

[21] Next, learned counsel for *Basenet* submitted that *Basenet* was unfairly implicated by act of third party through the preparation and submission of a forged quotation which learned counsel highlighted in paragraph 45 of his written submissions dated 23 September 2022. Learned counsel also detailed the evidence that *Basenet* submitted to the Commission as to the fraudulent and sham and forged quotation in paragraphs 46 to 50 of his written submissions of the same date. It was submitted that the Commission had failed to give due consideration to this evidence, except the issue of forged signature which learned counsel submitted that it was based on the Commission own comparison of signature without any evidence from handwriting experts. Thus, it was argued that there is serious issues of fraud and forgery for trial that gives rise to special circumstances.

[22] Besides, learned counsel for *Basenet* submitted that the balance of interest lies in favour of granting the stay. Without the stay, learned

counsel said, *Basenet* would be seriously prejudiced as a going business concern particularly as to its reputation and ability to bid for further project. The damage and harm that will befall *Basenet* if no stay is granted would be irreparable and non-compensable, learned counsel submitted. There is no provision in the Act that empowers the Tribunal to award any compensatory damages if the appeal is successful. There is no recourse to financial compensation by way of an award of costs. On the other hand, learned counsel submitted that the granting of a stay would not prejudice the Commission and that public interest is also not affected; in fact, it was argued that it is in public interest to grant the stay considering the unusual and unreasonable manner in which the Commission arrived at its decision against *Basenet.*

SUBMISSIONS BY NOVATIS AND SILVER TECH

[23] *Novatis* and *Silver Tech* are represented by the same counsel, so we will deal with the submissions on these two applications together.

[24] In the case of *Novatis,* learned counsel submitted that there are special circumstances for a stay to be granted. He argued that *Novatis* is subject to the Treasury Circular 1.6 and Circular 1.8 ('the MOF circulars') which came into force on 1 June 2022. The MOF circulars is about regulating companies that are directly or indirectly involved in governmental procurements; and any company found in breach of the Act may have its registration with MOF revoked for a period of maximum five years, blacklisted, suspended and barred from participating in or accepting bids issued by the enterprise during the period of suspension. Learned counsel submitted that *Novatis* depends predominantly on public sector procurement for its business with approximately 99% of its

contracts being governmental projects. Currently, learned counsel submitted, *Novatis* has six ongoing government projects/contracts yet to be completed with an approximate total value of RM56 million. Learned counsel argued that if a stay is not granted *Novatis* faces a real and present risk of having its registration revoke under the MOF circulars, blacklisted and barred from participating in any bids for governmental procurement. He further submitted that this would cause irreparable harm to *Novatis* existing and future business. Further, learned counsel said, if *Novatis* registration is revoked and the company is suspended it would not be able to complete the obligations under the existing governmental contracts.

[25] Learned counsel for *Novatis* also submitted that there are merits in its appeal that was filed to the Tribunal. He argued that the Commission made an erroneous finding and drew the wrong inference from the circumstantial evidence and failed to demonstrate that the evidence led to no other plausible explanation other than three separate bilateral collusions between *Novatis*, *Silver Tech* and *Venture Nucleus*. He submitted that the Commission had failed to take into consideration all relevant evidence before it that shows there is no any underlying concerted effort between the bidding parties that can prove there was collusion amongst them to rig the bid in *ASWARA*'s *Sebut harga A*. Learned counsel had detailed the various aspect of the evidence that was allegedly misconstrued by the *Commission* in arriving at its decision, at paragraph 5.2 to paragraph 5.9 of his written submissions dated 23 September 2022.

[26] As in the case of *Caliber* and *Basenet,* learned counsel for *Novatis* also submitted that there is no prejudice to the public or to the Commission if a stay is granted.

[27] In the case of *Silver Tech*, learned counsel repeated most of the points of submission and issues that he had canvassed for *Novatis.* In addition, he submitted that *Silver Tech* currently has four ongoing government contractual obligations worth a total of approximately RM2.25 million. He also submitted that there are procedural improprieties on the part of the Commission when the Commission raised for the first time and without notice to the applicant/appellant the issue concerning three separate bilateral agreements between the applicant/appellant, *Novatis, Basenet* and *Venture Nucleus.* He submitted that the applicant/appellant was never given the opportunity to be heard or respond to this issue during oral or written representations. It was submitted that the final decision by the Commission was made by members of the Commission who are different from the panel that heard the appellant/applicant representations under section 37 of the Act.

[28] Finally, as in the case of the other three applicants/appellants, learned counsel for *Novatis* submitted that there is no prejudice to the public or the Commission is a stay is granted.

REPLY BY THE COMMISSION/RESPONDENT

[29] In reply to the above submissions by the applicants/appellants, learned counsel for the respondent submitted that the principle to be applied in any stay application, as determined by decided cases, is that the applicant must show special circumstances. He further submitted that

in this case all the four applicants/appellants have not shown any special circumstances in their cases to warrant a stay to be granted. It was submitted that the need to make payment of the financial penalty pending appeal and irreparable harm suffered by the infringing enterprises per se could not justify the granting of a stay. Likewise, it was further submitted that reputational harm and merit of the case is also not a sufficient ground for stay.

[30] Learned counsel for the respondent also argued that the threat or risk of being suspended de-listed by MOF under the MOF's Circulars 1.6 and 1.8 and thereby will deprive the applicants/appellants from participating and bidding for government's contracts is misconceived and misplaced. In his written submission, learned counsel categorically denied there was a real, tangible and imminent threat that the applicants/appellants would be suspended and blacklisted following the press statement given by the respondent's CEO on 05 July 2022. On this argument also learned counsel for the respondent submitted that the applicants/appellants contention that the appeal would be nugatory if no stay is given is misconceived.

[31] The above submissions by learned counsel for the respondent are relevant and applicable to all four applicants/appellants in this case generally. We will address the specific points raised by each applicant/appellant vis-à-vis the respondent submissions as and when is necessary to do so later in this decision.

TRIBUNAL'S OPINIONS AND FINDINGS

[32] As we mentioned earlier, all these four applications for stay were made pursuant to section 53 of the Act. The section reads:

> *"53(1) Pending the decision of an appeal by the competition appeal tribunal, a decision of the commission shall be valid and enforceable except where a stay of the decision of the commission has been applied for by the appellant and granted by the competition appeal tribunal.*
> *(2) An application for a stay of decision shall be in writing and shall be made to the competition appeal tribunal on or after the day on which the notice of appeal has been filed with the competition appeal tribunal."*

[33] It is obvious from cursory reading of the section, there is no mention of the basis or principles upon which the Tribunal can grant a stay. The section speaks only of the time when to file the application for stay, how it is to be filed and to whom it should be filed. Nevertheless, it is also obvious that the power to grant a stay is an absolute discretion of the Tribunal. But at law, discretion must be exercised judiciously and on sound principle of justice for all parties.

[34] The section was discussed and analyzed in two earlier cases by this Tribunal (but of different corum). These are the case of *Chubb Insurance (Malaysia) Bhd & Others v Competition Commission* [2021] 6 CLJ 918 and *Dagang Net Technologies Sdn Bhd* v *Competition Competition* (Competition Appeal Tribunal Appeal no.1 of 2021).

[35] As we mentioned earlier the Act and the Regulations made under it is silent as to what principles to be applied by the Tribunal in deciding whether to grant a stay when faced with such application as the present. The Tribunal is not a court of law and as such cannot resort to the court rules which clearly contain provisions relating to stay applications before the court of law. Thus, in our opinion, we can address the lacunae by resorting to best practices which can assist the Tribunal to do justice between the parties. In this regard we find guidance from the Court of Appeal decision in *Malaysian Airline System Berhad & Another Appeal* v *Competition Commission* [2022] 1 CLJ 856, in an appeal against the decision of the Commission. In its decision the Court of Appeal ruled, inter alia, that the Malaysian Competition Commission is a quasi-judicial body. As an extension of that rule, we say that so is the Tribunal simply because an appeal from the decision of the Commission lies with the Tribunal; and the Tribunal is established under the same legislation as that of the Commission. The Tribunal's function is to determine, in any appeal that arises from the decision of the Commission before it, the correctness of that decision. That makes the Tribunal an arbiter of facts and law that falls within its jurisdiction. A quasi-judicial body is a body which is not established under any law relating to the judiciary but nevertheless is legally constituted under a given statute or legislation and by its constitution is given the power to decide over question of facts, and sometimes it has to wrangle itself with legal issues and question of law surrounding the facts which require its decision that are in dispute between two or more parties, and which dispute is within its jurisdiction. That being the case, we can safely look to the practices by the court of law in handling a stay application to distil what are the factors to consider and what principles to apply in granting or refusing a stay application. We

believe this is the approach taken by the Tribunal in *Chubb* (supra) and *Dagang Net* (supra) cases.

[36] In *Chubb* (supra), the Tribunal had discussed and considered several decisions by the courts as to the applicable principles and factors in deciding a stay application. The Tribunal concluded, at paragraph 31 of that case, that '*the law in Malaysia is clear that the test for a stay application, whether in the court process or in a quasi-judicial process, is special circumstances test.*'

[37] We agree with this conclusion.

[38] However it is interesting to note that in *Chubb*'s case, the Tribunal also said that '*...the tribunal is ready and willing to consider public interest and applicant's interest over and above the special circumstances test in determining a stay application in view of the legal proposition enunciated in Godfrey Philipa (M) Sdn Bhd.*'

[39] In *Godfrey Philips (Malaysia) Sdn Bhd* v *Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam) Kementerian Kesihatan, Malaysia* [2011] 9 CLJ 670, the applicant filed for judicial review and sought for certiorari and mandamus orders to quash a decision made by the respondent *Timbalan Ketua Pengarah Kesihatan (Kesihatan Awam)* the regulatory body over the applicant's product in refusing to accept or approve the applicant's declaration of the retail selling price of the applicant's new tobacco product. At the same time the applicant also applied for a stay of the respondent's decision.

[40] A point to note about the *Godfrey Philip's* case is that the decision by the respondent is about a commercial decision by the applicant to have the price of its new tobacco product being approved by the respondent. In addressing this issue, and regarding the stay application in that case, the Court is prepared to consider not only the public interest but also the interest of the applicant whether it will suffer irreparable harm if stay is not granted. Thus, we may say that irreparable harm is one of the species or categories of special circumstances. However, it has been said that the categories of special circumstances are never closed. Each case has its own set of facts and may be different from other cases. So, what constitutes special circumstances in one case can be different from another case. Here we are dealing with commercial enterprises, maybe in the category of small and medium enterprise, which play a significant contributory role to the growth of the nation's economy in terms of providing employment and services require by the society. As such in considering the factors that constitute special circumstances special attention must be given to their economic role and not just stereotype the special circumstances. The special circumstances must be peculiar to what these enterprises are and what effect will the enforcement of the Commission's decision have on their survival.

[41] On the above note we will now proceed to examine the arguments and submissions by the parties as summarized in earlier part of this decision; and decides whether there is special circumstance in these applications to grant a stay.

[42] But first we must clear our mind as to what is meant by 'special circumstances' at law. The Federal Court in *Kosma Palm Oil Mill Sdn Bhd & Others v Koperasi Serbausaha Makmur Bhd* [2003] 4 CLJ 1 said that

special circumstances must be special under the circumstances as distinguished from ordinary circumstances. The Federal Court further said that the circumstances must be something exceptional in character, something that exceeds or excels in some way that which is usual or common.

[43] It also had been said in another case by the Court of Appeal that special circumstances are circumstances that go to the enforcement of the judgement or decision and not to the merits of the case on appeal or the validity or correctness of the judgement of the decision.

[44] From these pronouncements by the superior courts of law we can deduced that special circumstances must be extra-ordinarily special and unique in its character; and it must be related or attributed to the enforcement of the judgment or decision.

[45] With these principles in mind, we will consider the first ground of objection by the respondent to these stay applications. As submitted by the respondent, upon finding that the applicants/appellants had committed an infringement under the Act, the Commission imposed a financial penalty on each of the applicants/appellants. This is true. Learned counsel for the respondent also submitted that if it is purely monetary judgement or decision and the enforcement of it will go only to the payment of monies or penalties by the applicants/appellants as in these applications, such situation is not a special circumstances. We agree with this submission, and we need not spend any more time on it. Moreover, the applicants/appellants in these applications do not seriously argue this point. They gave us the impression that they are able and willing to pay the penalties imposed on them. Yet the applicants/appellants said there

are other grounds to consider in granting the stay order in this case. We are now going to consider these other grounds.

[46] From our reading of the applicants/appellants written submission and our understanding of their counsels' submissions we find that there are only two other grounds that merits our consideration.

[47] The first ground is whether the applicants/appellants will suffer irreparable harm or damage if a stay is not granted. Learned counsel for the respondent submitted that damage to reputation is not a special circumstance. We agree with this proposition. However, in our opinion if the irreparable harm or damage goes to the functioning of the applicants/appellants as business entities it is quite a different thing. If a stay is not granted and the applicants/appellants are to shut down or scale down their business operations because of some actions taken by the respondent to enforce the decision of the Commission the real loser would be the public and the consumers simply because the market will be less competitive after a few players have been excluded from the market. Thus, the impact of the closure of the applicants/appellants in the market and economic sector where they operate their businesses by providing services of which they have the technical expertise will be negative. It is true that new market players may enter the market and compete healthily, but we also need a policy that will nurture existing mature market players and make them grow stronger for the good of the economy generally.

[48] All the applicants/appellants submitted that they rely primarily on government's contracts and procurements. And if they were forced to shut down or being blacklisted, they may not be able to recover even if their appeals were to be successful. For example, learned counsel for *Novatis*

said in his written and oral submissions that *Novatis* depends predominantly on public sector procurement for its business with approximately 99% of its contracts being governmental projects. Currently, learned counsel submitted, *Novatis* has six ongoing government projects/contracts yet to be completed with an approximate total value of RM56 million. Likewise, in the case of *Silver Tech*, currently it has four ongoing government contractual obligations worth a total of approximately RM2.25 million. With that kind of ongoing business, at least in the case of *Novatis* and *Silver Tech*, it will be unfortunate if they were to be suspended and blacklisted because the loser will be the government who had given them the contracts. In this regard, we will echo the words of the High Court in *Godfrey Philips (Malaysia) Sdn Bhd* (supra) that the Court was willing to consider the applicant's interest over and above the special circumstances; a proposition which was adopted and approved by this Tribunal (of different corum) in the *Chubb's* case (supra).

[49] The respondent's counsel dismissed this argument by the applicants/appellants by submitting that the applicants/appellants have not offered any shred of evidence showing what contracts, if any, they have with the government agencies. Learned counsel for the respondent further submitted that the assertion by the applicants/appellants that they rely mainly on government's contracts for their business is a bare assertion. Thus, it was argued that the applicants/appellants have failed to prove their assertions. However, we have seen as shown above that currently the appellant/applicant *Novatis* and appellant/applicant *Silver Tech* have under their arms government's contracts worth millions of ringgit. The respondent has not categorically denied this. The respondent also has not shown any evidence that besides government's contracts, the applicants/appellants have been active and able to procure contracts

from sources other than government's agencies especially after the Commission had pronounced its decision.

[50] Another consideration we have in mind in relation to this issue of irreparable harm or damage to the applicants/appellants is the rippling effects that may emerge if the applicants/appellants are forced to shut down or downscale their business operations following the execution of the decision of the Commission. Such rippling effects could be in the form layoffs of employees by the applicants/appellants due the scaling down or shutting down of their business operations. This will, in turn, has effect on the labour market and unemployment situation in the country; not to mention the social problems that may come with it.

[51] So, in our opinion why kill the goose that lay the golden egg when we can consider other option or solution. Moreover, in this case the period of alleged infringement was short and over. It is *fait accompli*. The granting of a stay would not harm the *Commission* or the public.

[52] We also want to say this: the respondent's counsel submitted that the applicants/appellants fear or worry about being blacklisted and therefore will lose all opportunities to procure further government's contracts is misconceived and misplaced. This fear or worry by the applicants/appellants arose from the fact that the Ministry of Finance, Malaysia ("MOF") has issued two circulars – Circular 1.6 and Circular 1.8 – that regulate the procurement of public or government's contracts. Amongst other things, the two MOF circulars provide that if a government contractor is found engaged in unhealthy practices in procuring a government contract such as price rigging and corruption, the contractor can be blacklisted and suspended. It is undisputed fact that after the

pronouncement of the Commission, the respondent's CEO gave a press statement. In that press statement it was made known that the Commission would take action to report the applicants/appellants to MOF under the two circulars for engaging in unhealthy practice namely bid rigging to obtain the *ASWARA*'s contract. Learned counsel for the respondent argued that there is nothing in the press release that suggests action would be taken against the applicants/appellants; as such the applicants/appellants have misconstrued the intention of the respondent's press release.

[53] In our opinion the threat of being blacklisted and the risk of being suspended under the two MOF Circulars are not illusionary. It is a real threat and risk. This is the risk that the applicants/appellants are not prepared to take because it could affect their future business operations. Hence the stay application. We have stated our views above as to what is the possible scenario that could happen to the applicants/appellants if they are blacklisted and suspended, and what effect it could have on the market. We must reiterate that we are dealing with competition law that envisages an open and competitive market with the market players fighting for their share of the market in a healthy competition playing by certain set of rules that keep the playing field level for every player, big or small; new or established. Therefore, we must look at the broader picture and try to reach a reasonable decision that goes well with a healthy competitive market.

[54] The second and final ground that we will consider is whether there are merits in the appeals filed by the applicants/appellants.

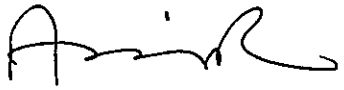
[55] In earlier paragraphs of this decision, we have referred to some paragraphs in the written submissions by the applicants/appellants where counsels have given details of the alleged errors and considerations made by the Commission in arriving at its decision of 27 June 2022. We have gone through these submissions, and in our opinion the applicants/appellants have raised some serious issues of fact and law that merit further consideration during the appeal proper.

[56] The law as to matter of the merits of the case in a stay application is well settled and clear. The legal proposition is that merits of appeal, on its own, does not constitute special circumstances. Nevertheless, the presence of merits in an appeal taken together with the circumstances and consequences that could flow from the enforcement or execution of the Commission's decision as we have mentioned above, could be considered as special circumstances. Moreover, if there are serious issues of fact or law or both being raised on appeal that require reconsideration and if accepted would likely lead to the success of the appeal, but the serious issues are not given a consideration as to their worthiness to be argued fully and extensively at the hearing of the appeal simply because we apply the law cut and dry and dismissed them, the appeal if successful would be nugatory – because by then the applicants/appellants would be probably be out of business and no longer active players in the market that we try so hard to make it competitive. The applicants/appellants would have also lost their competitive edge if they re-enter the market after being successful in the appeal.

[57] Taking this view and the views that we have elaborated earlier in this decision, we are of the opinion it would justify a stay of the enforcement of the Commission decision. We so order accordingly.

For the record this is our unanimous decision.

The presiding members of the
Competition Appeal Tribunal



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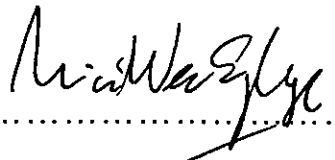
(DATO' A AZIZ BIN A RAHIM)
Chairman



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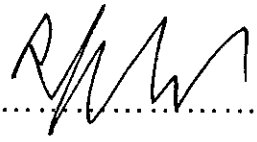
(DATUK SERI DR. VICTOR WEE ENG LYE)



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(MR. MOHD RAFEE MOHAMED)

Date: 27 October 2022

Counsel(s) for applicants/appellants:

1. **CALIBER INTERCONNECTS SDN BHD** (Appeal No. 7/2022)	: Manshan Singh (Counsel) Tham Zhi Jun Angela Hii Hui Chi Tetuan Skrine
2. **BASENET TECHNOLOGY SDN BHD** (Appeal No. 4/2022)	: Jeremy Ooi (Counsel) Tetuan Shook Lin & Bok
3. **NOVATIS RESOURCES SDN BHD** (Appeal No. 5/2022)	: Wong Weng Yew (Counsel) Nicole Leong Tetuan Wen & Co
4. **SILVER TECH TECHNOLOGY SDN BHD** (Appeal No. 6/2022)	: Wong Weng Yew (Counsel) Nicole Leong Tetuan Wen & Co

Counsel(s) for the respondent in all four applications:

COMPETITION COMMISSION	: Jason Teoh Choon Hui (Counsel) Khong Siong Sie Nicholas Lai Weng Keong Hashimah binti Abdul Halim Ashlyn Lau Hui Qi Kavin Raaj a/l Veerasamy Sherine Chan Shin Yuh Tetuan Jason Teoh & Partners