DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN KUALA LUMPUR
(BAHAGIAN KUASA-KUASA KHAS)
PERMOHONAN UNTUK SEMAKAN KEHAKIMAN NO: WA-25-210-04/2022

Dalam Perkara Keputusan Suruhanjaya Persaingan bertarikh 16 Februari 2021;

Dan

Dalam Perkara Rayuan Dagang Net Technologies Sdn. Bhd. kepada Tribunal Rayuan Persaingan, Rayuan No. TRP 1/2021, bertarikh 17 Mac 2021;

Dan

Dalam Perkara Keputusan Tribunal Rayuan Persaingan bertarikh 11 Januari 2022 menolak penggantungan perlaksanaan Pemohon;

Dan

Dalam Perkara Keputusan Tribunal Rayuan Persaingan bertarikh 11 Mac 2022 menolak permohonan penarikan diri Panel Tribunal Rayuan Persaingan Pemohon;

Dan

Dalam Perkara Seksyen 10, 51, 53, 56, 57, 58 Akta Persaingan 2010;

Dan

Dalam Perkara Dagang Net Technologies Sdn Bhd. untuk kebenaran memohon semakan kehakiman bagi mendapatkan

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pengisytiharan bahawa Keputusan Tribunal Rayuan Persaingan bertarikh 11 Mac 2022 adalah tidak rasional dan tidak munasabah dan tidak wajar dari segi prosedur;

Dan

Dalam Perkara berkaitan Dagang Net Technologies Sdn Bhd. untuk kebenaran memohon semakan kehakiman bagi suatu perintah Certiorari untuk membatalkan Keputusan Tribunal Rayuan Persaingan bertarikh 11 Mac 2022;

Dan

Dalam Perkara Aturan 53 dan Aturan 92 Kaedah 4 Kaedah-Kaedah Mahkamah 2012;

Dan

Dalam Perkara Seksyen 25 dan Jadual kepada Akta Mahkamah Kehakiman 1964.

ANTARA

DAGANG NET TECHNOLOGIES SDN. BHD.
(NO. SYARIKAT.: 177974-T) **... PEMOHON**

DAN

1. TRIBUNAL RAYUAN PERSAINGAN

2. SURUHANJAYA PERSAINGAN **... RESPONDEN-RESPONDEN**

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Judgment

Introduction

1. The Applicant filed an application for leave to commence judicial review proceeding **(Enclosure 1)** under Order 53 of the Rules of Court 2012 **(ROC)** seeking inter alia the following orders:-

   1.1 That the Applicant be granted leave by this Honourable Court to apply for Judicial Review pursuant to Order 53 rule 3 of the ROC for the following reliefs and/or orders:

   (a) A declaration that the decision of the 1st Respondent dated 11.3.2022 is irrational and unreasonable;

   (b) A declaration that the 1st Respondent's Panel consisting of:

   (i) Dato' Asmabi binti Mohamad;

   (ii) Datuk Dr Mohd Gazali bin Abas; and

   (iii) Tuan Mohd Rafee bin Mohamed.

   be recused from hearing the substantive appeal of Competition Appeal Tribunal, TRP Appeal No. 1/2021;

   (c) An order of certiorari to quash the decision made by the 1st Respondent dated 11.3.2022;

   (d) Consequent to the grant of the orders at paragraphs (a) to (c) above, an order that the 1st Respondent upon receiving this order gives effect to the same forthwith;

   (e) Cost of this application be borne by the Respondents; and

   (f) Such further and/or other relief that this Honourable Court deems fit, just and proper and/or otherwise appropriate to be granted.

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1.2 That the Applicants be given leave to file further and/or additional affidavits as deemed necessary by the Applicant for the purpose of the substantive hearing of this judicial review;

1.3 That pursuant to Order 92 Rule 4 of the ROC and/or the inherent powers of this Honourable Court, all the proceedings related to the hearing of the Competition Appeal Tribunal Appeal No. TRP 1/2021 be stayed pending the disposal of the substantial hearing of this application before this Court;

1.4 Cost of this application and/or ancillary costs be in the cause; and

1.5 Such further and/or other relief that this Honourable Court deems fit, just and proper and/or other wise appropriate to be granted.

2. The Application is supported by a Statement under Order 53 rule 3(2) of the ROC and an Affidavit in Support affirmed by Wan Ahmad Syatibi bin Wan Abd. Manan on 12.4.2022.

3. After the hearing, I dismissed the Applicant's Application (Enclosure 1). This judgment contains the full reasons for my decision.

Background Facts

4. The background facts of the Application based on the Statement, Affidavit in Support and written submission of the Applicant can be summarized as follows:-

Applicant

5. The Applicant is a private limited company engaged in the development, management and provision of business to government (B2G) E-Commerce services and computerization transaction facilitation services.

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6. The Applicant was incorporated on 18.1.1989 and is the wholly owned subsidiary of Dagang NeXchange Berhad (Company No.: 10039-P) (Dagang NeXchange). Dagang NeXchange is a company listed in Bursa Malaysia.

Respondent

7. The 1st Respondent is an independent quasi-judicial body established under section 44 of the Competition Act 2010 **(the Act)** which came into operation on 1.1.2012 with exclusive jurisdiction to review any decision made by the Competition Commission **(the 2nd Respondent)** under sections 35, 39 and 40 of the Act.

8. The 2nd Respondent was established pursuant the Act.

The Complaints

9. There were two complaints lodged against the Applicant to the 2nd Respondent. The first complaint was lodged by Rank Alpha Sdn Bhd **(Rank Alpha)** dated 2.12.2015 and the second complaint was lodged by Titimas Logistics Sdn Bhd **(Titimas)** dated 4.1.2017.

10. Following the complaints lodged by Rank Alpha and Titimas, the 2nd Respondent commenced an investigation under section 15 (1) of the Act into the alleged infringement of section 10 of the Act by the Applicant.

Proposed Decision dated 6.4.2018 (Paragraphs 7 to 10 of the Statement (Enclosure 5))

11. Through a notice dated 10.7.2018, the 2nd Respondent issued a Proposed Decision dated 6.4.2018 against the Applicant **(Proposed Decision)** for engaging in conduct which amounted to an abuse of its dominant position in breach of section 10 (1) of the Act. In

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arriving at the Proposed Decision, the 2nd Respondent made the following findings:-

(a) That the Applicant had refused to supply electronic mailboxes for the submission of trade facilities data to the Sistem Maklumat Kastam via the National Single Window;

(b) As a result of sub-paragraph (a) above, Rank Alpha Sdn Bhd and Wynet Computer Sdn Bhd **(Wynet)** market for Front End Software Solutions for the facilitation has been foreclosed; and

(c) The imposition of an exclusivity clause had the potential effect of raising barriers of entry for Edaran Trade Network under uCustoms market.

12. The Applicant disputed the findings set out in the Proposed Decision and denied infringing section 10 (1) of the Act and submitted its written representations dated 30.8.2018, 25.4.2019 and 29.7.2019 to the 2nd Respondent.

13. The Applicant also submitted oral representation before members of the 2nd Respondent on 16.1.2019, 25.4.2019 and 29.7.2019.

The Decision dated 16.2.2021 (Paragraphs 11 to 13 (c) of the Statement (Enclosure 5))

14. On 26.2.2021, the 2nd Respondent issued the Applicant with a Notice of Finding of an Infringement pursuant to section 40 of the Act which enclosed the Final Decision dated 16.2.2021 **(Decision)**.

14.1 The 2nd Respondent found in the Decision that there was no sufficient evidence to show that the refusal to supply mailboxes had caused significant harm to competition in the market for trade facilitation services. In this premise, the 2nd Respondent found that there was no infringement by the Applicant in relation to the refusal to supply mailboxes.

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14.2 However, the 2nd Respondent found that the imposition of the exclusivity clause on its business partners was capable of having anti-competitive effect in the provision of trade facilitation services in Malaysia, and therefore the Applicant had infringed section 10 (1) of the Act.

15. The 2nd Respondent imposed directions on the Applicant, which included as (a) cease and desist order, (b) and order for the Applicant to enrol its key personnel into a competition law compliance program, and (c) financial penalty of RM10,302,475.98.

16. The Applicant disputes the findings of the 2nd Respondent as set out in the Decision and filed an appeal to the 1st Respondent pursuant to section 51 (1) of the Act on 17.3.2021 **(the Applicant's Appeal).**

Stay Application (Paragraph 14 to 18 of the Statement (Enclosure 5))

17. On the same day, the Applicant filed an application for a stay of the Decision pursuant to section 53 (2) of the Act, pending the disposal of its appeal **(the Stay Application)**.

18. The Stay Application was dismissed by the presiding members of the 1st Respondent on 11.1.2022 **(the Stay Decision).**

19. The Grounds of Decision for the dismissal of the Stay Application was handed over to the Applicant on 17.1.2022 **(the Stay Grounds)**.

20. The decision to dismiss the Stay Application was unanimously arrived at by all three members of the Tribunal who presided over the hearing of the Stay Application. These members are:

(i) Dato' Asmabi binti Mohamad;

(ii) Datuk Dr Mohd Gazali bin Abas; and

(iii) Tuan Mohd Rafee bin Mohamed.

(collectively referred to as 'Presiding Panel')

21. The Applicant has applied for leave to commence judicial review against the Stay Decision made by the 1st Respondent on 11.1.2022 on the grounds that the same was tainted with irrationality and unreasonableness.

Recusal Application (Paragraphs 19 to 32 (iii)) of the Statement (Enclosure 5)).

22. It should also be noted, that during the case management held on 12.8.2021, parties to the proceeding had been informed that the Presiding Panel would be hearing the Applicant's Appeal.

23. Following the review of the Stay Grounds and based on the contents of the Stay Grounds, the Applicant found there to be a real danger of bias if the same Presiding Panel proceeds to hear the Applicant's Appeal.

24. The Applicant, through its solicitors' letter dated 15.2.2022, made an application to the 1st Respondent, seeking the Presiding Panel, who heard, decided and written the Stay Grounds, to recuse themselves from hearing the Applicant's Appeal **(Recusal Application)**

Hearing of the Recusal Application

25. The hearing of the Recusal Application took place on 8.3.2022.

26. The Presiding Members adjourned the Recusal Application for decision.

27. On 11.3.2022, the Presiding Members dismissed the Recusal Application (recusal decision) and no grounds were given and/or read out.

28. Through an email to the 1st Respondent dated 15.3.2022, the Applicant's solicitors requested for the grounds of decision for the dismissal of the Recusal Application.

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29. Through an email dated 16.3.2022, the 1st Respondent informed the Applicant's solicitors that no grounds of decision will be given for the dismissal of the Recusal Application.

Grounds for Judicial Review

30. The Applicant therefore has applied to review the 1st Respondent's decision to dismiss the Recusal Application.

31. The Applicant seeks leave from this Honourable Court to commence the judicial review of the decision by the 1st Respondent in dismissing the Recusal Application.

32. In summary, the grounds are as set out below:

Unreasonableness and irrationality

32.1 No grounds have been provided by the Presiding Panel to explain how the Stay Grounds did not display 'a real danger of bias'.

32.2 No grounds have been provided by the Presiding Panel to explain why the Applicant's Recusal Application has been dismissed.

32.3 In any event, the Applicant takes the position that the Presiding Panel had failed to take into consideration relevant matters when it dismissed the Applicant's submission that there was in fact 'a real danger of bias' which warranted the Presiding Panel to recuse itself from hearing the Applicant's Appeal.

32.4 As such, the Presiding Panel had wrongly exercised its discretion when it dismissed the Recusal Application.

32.5 Furthermore, the Presiding Panel's discretion was impeded by a fetter which led to the unreasonable and irrational dismissal of the Recusal Application.

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Procedural Impropriety

32.6 The process of natural justice calls for there to be no 'danger of bias'. Given that the Recusal Application stemmed from the Stay Grounds, the panel that heard the Recusal Application should have been different from the Presiding Panel.

32.7 The 1st Respondent had failed to direct and do matters which were necessary and expedient in the conduct of the Applicant's Appeal when the Presiding Panel had heard, and subsequently dismissed the Recusal Application.

The Law

33. The Federal Court in **WRP Asia Pacific Sdn Bhd v. Tenaga Nasional Bhd [2012] 4 CLJ 478; [2012] 4 MLRA 257; [2012] 4 MLJ 296** at 303, speaking through Suriyadi Halim Omar FCJ (as he then was) held:

> "...Leave may be granted if the leave application is not thought of as frivolous, and if leave is granted, an arguable case in favor of granting the relief sought at the substantive hearing may be the resultant outcome. A rider must be attached to the application though i.e. unless the matter for judicial review is amenable to judicial review absolutely no success may be envisaged."

34. The test laid down for leave to commence a judicial review in **WRP Asia Pacific Sdn Bhd (supra)** are as follows:

i. whether the subject matter is amenable to judicial review; and if so

ii. from the materials available, whether the application is frivolous and if not thought as frivolous, to consider that the applicant has an arguable case to obtain the relief sought at the substantive hearing.

35. The principles governing applications for leave to commence judicial review proceedings have also been set out in **Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1**

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MLRH 507; [2006] 1 CLJ 927; [2006] 5 MLJ 60 at 69 where Gopal Sri Ram JCA (as he then was) held:

> [10]"...the High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous... So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law or the common law) is non-judiciable."

36. It is trite that the Applicant will have to satisfy the tests propounded in the abovementioned cases to secure the leave to commence the judicial review proceedings. At this stage, the court need not go into the merits of the case, but only to see if the subject matter is amenable to judicial review or whether the application for leave is frivolous.

37. In any event, a judicial review is the discretion of the court, the application for leave to commence judicial review may be allowed in exceptional circumstances as explained by the then Supreme Court in **Government of Malaysia & Anor v. Jagdis Singh [1987] 2 MLJ 185; [1986] 1 MLRA 207; [1987] CLJ REP 110** which held:

> "Held: allowing the appeal: (1) the discretion is still with the courts to act by way of judicial review but where there is an appeal provision available to the applicant, certiorari should not normally issue unless there is shown a clear lack jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice."

Preliminary Objection (PO) by the Putative 2nd Respondent

38. The learned counsel for the Putative 2nd Respondent raised a PO. The PO was premised on the following grounds:-

    (a) The Applicant's failure to make full and frank disclosure in their Application for leave (Enclosure 1); and

    (b) The Applicant's Application for judicial review does not meet the requisite threshold of having an 'arguable case'.

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The decision of the Court

The Applicant's failure to make full and frank disclosure in their Application for leave (Enclosure 1)

39. The Putative 2nd Respondent submitted that the Applicant had failed to make full and frank disclosure in their Application for Leave (Enclosure 1).

40. Having perused the cause papers filed by the Applicant, I find the submission of the Putative 2nd Respondent on this point has merit.

41. It is to be noted that the Applicant had disclosed that there is a judicial review application that has been filed to review the 1st Respondent's decision in dismissing the Applicant's stay application. This application is filed under the Judicial Review Application No: WA-25-194-04/2022 **(Stay JR)**.

42. The Stay JR hearing is fixed for hearing before YA Dato' Amarjeet Singh at BKK-2 on 8.11.2022.

43. However, I find that despite there being an interrelation between the two judicial review application, the Applicant did not disclose the cause papers filed in the Stay JR in these judicial review proceedings.

44. Further, upon perusal of the Stay JR and the Applicant's judicial review application herein **(Applicant's JR)**, I find that in both applications, the Applicant has raised the issue on whether the CAT Panel had "taken into account irrelevant factors" including Applicant's assertion that the CAT Panel had made a determination that "there is an absence of merit" in the appeal proper.

45. This gives rise to a potential multiplicity of decisions between the Stay JR and Applicant's JR.

46. Further, I find myself in agreement with the submission of learned counsel for the Putative 2nd Respondent that in the event the Stay JR is dismissed and/or leave is not granted for the Applicant to proceed with the Stay JR, this would mean that the CAT Panel was

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ultimately correct in its determination of the issues in the Stay Application. Therefore, there can be no 'real danger of bias' arising from the CAT's Stay Decision.

47. I find that the Applicant had failed to produce all material facts and documents and had further engaged in a selective presentation of documents.

48. This can be gleaned from the cause papers filed. The Applicant has failed to exhibit the written submissions exchanged in the Stay Application.

49. In the instant case, the Applicant only exhibited its application for stay at Exhibit D-5 Enclosure 3 on page 506. However, I find that other relevant cause papers such as the parties' subsequent replies to the Stay Application and relevant written submissions were not exhibited.

50. It is my view that the failure to exhibit the written submissions filed in the stay application is crucial as it illustrates that the issue on the "security and technical risks" was raised and formed a crucial part of the Applicant's case. This was duly acknowledged in paragraphs 95 to 106 of the CAT's Grounds of Decision (Stay) (Exhibit D-6, Enclosure 3, on page 559).

51. In contrast, before this Court, I find that the Applicant has only claimed, that its Stay Decision should have been allowed as the terms of MyCC's decision was wide and vague that it would prevent the Applicant from taking steps should alleged security and technical issues arise (see paragraphs 94 and 95 of Enclosure 5 on page 100).

52. It is clear from the above, for this Court to grant leave, the Applicant must produce all relevant and material facts/documents/cause papers before the Court can fully determine if the Applicant had prima facie an arguable case for the relief being sought and that the said application was neither frivolous nor vexatious.

53. I find support in my view based on the Federal Court decision in **Tuan Haji Sarip Hamid & Anor v. Patco Malaysia Berhad [1995] 1 MLRA 536; [1995] 2 MLJ 442; [1995] 3 CLJ 627** when it was held as follows: -

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[1] Any application under O. 53 r. 1(2) must be drafted in such a way as to ensure that it contains all or substantial particulars of the facts and matters on which the applicant intends to rely in support of his application. **The Affidavit in Support** thereof must also be sufficiently **detailed and comprehensive and must exhibit all the relevant documentary exhibits. The contents of the affidavit here left much to be desired so much so that there was insufficient material for the Judge below to have granted leave.**

[2] As **the application for leave to apply for certiorari is made ex-parte, there is a clear duty of disclosure imposed by law on the applicant, the breach of which may result in the order for leave being set aside**. On the facts however, the respondent was not guilty of any non-disclosure.

(emphasis added)

54. Further, in the case of **Mior Rosli bin Mior Mohd Jaafar v. Mahkamah Perusahaan Malaysia & Anor [2010] 12 MLRH 352; [2010] 1 LNS 1539**, Mohd Zawawi Salleh J (now FCJ) held as follows: -

[15] It is not disputed that the **applicant, in his Supporting Affidavit, failed to exhibit the following cause papers or documents which had been before the Industrial Court**: -

54.1 Applicant's statement of case;
54.2 Second Respondent's statement in reply;
54.3 Applicant's bundle of documents;
54.4 Second Respondent's bundle of documents;
54.5 Loose documents respectively marked as 'CO-1', 'CO-2', 'CO-3' and 'CO-4';
54.6 Applicant's witness statement; and
54.7 Second Respondent's witness statement.

[16] **As a result of the Applicant's foregoing failure, the Applicant, in obtaining leave on 24.4.2009 to apply for judicial review, had suppressed and/or failed to declare and produce all material facts and documents, and had further engaged in a selective presentation of documents.**

[17] The Applicant in fact acknowledges his failure at paragraphs 30 of the said Supporting Affidavit.

[18] **At the material time the Court granted leave to the Applicant, it did not have all relevant and material facts/documents/cause papers before it in order to fully determine if the Applicant had prima facie**

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an arguable case for the relief being sought and that the said application was neither frivolous nor vexatious.

(emphasis added)

[See also **Suruhanjaya Perkhidmatan Awam Malaysia v. Noordin Hassan [1996] 1 CLJ 274; [1996] 1 AMR 030; [1995] 2 MLRA 185; [1995] 3 MLJ 495**]

55. Based on the above, it is trite that it is the duty of a person applying for certiorari to show the utmost good faith in the presentation of the material upon which he wishes the Court to rely. Failure to do so, may result in the order for Leave being set aside.

The Applicant's Application for judicial review does not meet the requisite threshold of having an arguable case

56. It is trite law that in order to obtain leave to commence judicial review, the Applicant has to have an arguable case.

57. Having perused the Applicant's cause papers, I find that the nub of the Applicant's entire case rests on the issue of whether the CAT Panel took into irrelevant considerations in the Applicant's Stay Application that would give rise to a 'real danger of bias'.

58. I view that if there was no 'real danger of bias' displayed by the CAT Panel in the dismissal of the Applicant's Stay Application then the Applicant's recusal application (and this resultant application for judicial review) is rendered academic.

59. Further, I noticed that the Applicant's recusal application was based on the belief that the CAT Panel made observations that amounted to a finding that there was no merits to the appeal proper (see **paragraph 11 of Exhibit D-7 of Enclosure 3 on page 593**).

60. However, I find this position ignores the following facts:-

(a) The CAT Panel's Stay Decision was premised on the arguments raised by the Applicant and MyCC during the hearing of the Stay Application. The evaluation of these

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arguments was confined within the context of an application for stay under section 53 of the Act.

(See **CAT's grounds of decision (stay) at paragraphs 65 to 94, 142 to 143 Exhibit D6, Enclosure 3 on pages 539 and 578)**

(b) It is clear that the issue of "security and technical risks" were raised by the Applicant – thus, this was an issue considered and determined by the CAT Panel.

(See **CAT's grounds of decision (stay) at paragraphs 95 to 106. 139, 140, 141, 146 and 158 Exhibit D6, Enclosure 3 on pages 559, 577 and 580).**

61. Having read the CAT's grounds of decision (stay) in totality, I am of the considered view that it cannot lead to the conclusion that the CAT had made findings present in the appeal proper. I find that the CAT Panel confined its findings to the relevant principles regarding stay applications.

62. Therefore, it is my view that the assertion by the Applicant that paragraph 160 of the CAT's Grounds of Decision (Stay) is tantamount to the CAT Panel making a finding that there is no merit to the appeal is without merit. I find that paragraph 160 merely states that the issue on "merits of the appeal' was considered but the CAT Panel did not make an unequivocal finding that the appeal had no merits (See **paragraph 161 of the CAT's Grounds of Decision (Stay) (Exhibit D-6, Enclosure 3, on page 586)).**

63. Therefore, based on the above, it is my considered opinion that there is no 'real danger of bias' evident from the CAT's Grounds of Decision (Stay). The recusal application had no merit to begin with and thus, this judicial review application should naturally fail.

Conclusion

64. I am of the considered view that the Applicant has failed to show an arguable case in order to obtain the order of declaration, certiorari

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and mandamus at the substantive stage. The order sought by the Applicant is frivolous in nature.

65. For the reasons above stated, the objection raised by learned counsel for the Putative 2nd Respondent is allowed.

66. As such, the Applicant's application for leave to commence judicial review proceeding (Enclosure 1) is dismissed with costs of RM2,000.00 subject to the allocator fee.

Dated: 11 November 2022



Ahmad Kamal bin Md. Shahid
Judge
High Court Kuala Lumpur

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Counsels

For the Applicant:	En. Brian Foong Mun Loong (Cik Eolanda Yeo Jin Huay & En. Muhd Hiqmar Danial with him) Tetuan Chooi & Company + Cheang & Ariff, Peguambela dan Peguamcara, No. 39, Court @ Loke Mansion, 273A, Jalan Medan Tuanku, 50300 Kuala Lumpur. (Ruj. Tuan: BF.EY. MHDH.L201700169)
For the Putative 2nd Respondent:	En. Muayyad bin Khairulmaini (Cik June Ong (PDK) with him) Tetuan Lim Chee Wee Partnership Peguambela dan Peguamcara, No. 12-1, Lorong Dungun, Damansara Heights 50480 Kuala Lumpur.

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