IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR
(APPELLATE AND SPECIAL POWERS DIVISION)
APPLICATION FOR JUDICIAL REVIEW NO: WA-25-82-05/2016

In the matter of Order 53 Rules of Court 2012 and other relevant provisions;

And

In the Matter of an application for an Order of Certiorari;

And

In the Matter of Section 25 and Schedule to the Courts of Judicature Act 1964;

And

In the Matter of the Competition Act 2010;

And

In the Matter of the Competition Commission Act 2010;

And

In the matter of the decision of the Competition Appeal Tribunal dated 18.2.2016.

BETWEEN

COMPETITION COMMISSION **...APPLICANT**

AND

1. COMPETITION APPEAL TRIBUNAL
2. MALAYSIAN AIRLINE SYSTEM BERHAD
2. AIRASIA BERHAD **...RESPONDENTS**

JUDGMENT

Introduction

[1] This is the applicant's judicial review application against the decision of the 1st respondent, Competition Appeal Tribunal ('the Tribunal') dated 18.2.2016, seeking the following reliefs :

(i) an order of certiorari to quash the decision of the Tribunal dated 18.2.2016; or

(ii) alternatively, a declaration that the decision of the Tribunal dated 18.2.2016 is illegal, irrational, suffers from procedural impropriety, an abuse of process and/or an error of law, and arbitrary;

(iii) that the Final Decision of the Competition Commission dated 31.3.2014 be reinstated in its entirety;

(iv) that all necessary and consequential directions be given;

(v) that the costs of and occasioned by this application be provided for; and

(vi) such further and other relief and/or directions as this Honourable Court deems fit.

[2] The applicant's grounds for this judicial review application, as stated in the applicant's statement pursuant to Order 53, Rule 3(2) are the following :

(i) the Tribunal misconstrued section 4 of the Competition Act 2010.

(ii) the Tribunal's interpretation of the Collaboration Agreement between the 2nd respondent and 3rd respondent has failed to take into account key factors and is unreasonable.

(iii) the Tribunal's decision was unreasonable that no reasonable authority could ever have come to it and also failed to provide adequately reasoned grounds for its decision.

(iv) that Tribunal has taken into account irrelevant considerations on whether the Collaboration Agreement was implemented.

(v) the Tribunal acted contrary to principle of procedure fairness by failing to consider and take into account the Competition Commission's evidence and submission.

The Salient Facts

[3] The applicant, Competition Commission ('the Commission') was established on 1.4.2011 pursuant to section 3 of the Competition Commission Act 2010 ('CCA 2010') with its function among others, to implement and enforce the provisions of the Competition Act 2010 ('CA 2010').

[4] The Competition Appeal Tribunal ('the Tribunal') was established pursuant to section 44 of CA 2012 and has exclusive jurisdiction to review any decision made by the Commission under sections 35, 39 and 40 of the CA 2010.

[5] Malaysian Airline System Berhad (MAS) the 2nd respondent, is a public listed company which provides both domestic and international flight services. The 2nd respondent commenced its operation since 1.10.1972.

[6] AirAsia Berhad (AirAsia), the 3rd respondent is a public listed company which also provides domestic and international flight services and has commenced its operation since 1996.

[7] Next, AirAsia X Sdn Bhd, (AAX) is the long haul low cost affiliate carrier of the AirAsia Group in which AirAsia as at 30.6.2011 held

19.04% of AAX shares. The majority shareholder is Aero Ventures Sdn Bhd (AVSB) and the majority shareholder of AVSB are Tan Sri Anthony Francis Fernandes and Dato Kamarudin Meranum who are also the directors of AirAsia Bhd.

[8] On 9.8.2011, 2nd respondent (MAS), 3rd respondent (AirAsia Berhad) and AirAsia X Sdn Bhd entered into a Collaboration Agreement (CA) where its purpose among others as stated under ***Clause 3*** which are as follows :

> "***3. OVERARCHING PRINCIPLES FOR COLLABORATION***
>
> *3.1 The parties wish to explore the possibilities of collaboration in order to achieve the following :*
>
> *(a) to be able to utilise each other's respective core competencies, optimise efficiency and increase all parties competitiveness to the benefit of consumers; and*
>
> *(b) to become more able to compete effectively with other industry players."*

[9] The Business Model agreed upon by parties under this Collaboration Agreement as stipulated under ***Clause 5*** are the following :

> "*5.1. Subject to clauses 4 and 9, each party confirms that it intends to focus, or re-focus, as the case may be, on its respective core compentencies in the business segment in which its original business model was or would have been optimised. This may be undertaken by itself, or through a subsidiary or affiliate. For the purposes hereof, an affiliate of a party is a corporation the financial results of which; by virtue of a party's interest in that corporation's equity, that party is entitled to equity account its relevant share of that corporation's financial results.*

5.2. *In the case of **MAS**, **it intends to focus on being a full-service premium carrier ('FSC')**.*

5.3. *In the case of **AirAsia, it intends to focus on being a regional low-cost carrier ('LCC')**.*

5.4. *In the case of **Air Asia X, it intends to focus on being a medium-to-long haul LCC**.*

5.5. *For the purposes of this Agreement, the parties will mutually discuss and agree, within three months from the date of this Agreement, based on value proposition to the market, the appropriate definitions of FSC and LCC for the implementation of the matters under this Agreement.*

5.6. ***MAS intends to review Fly Firefly Sdn Bhd. operations, and MAS's short-houl FSC business may be undertaken by itself and/or through a new MAS subsidiary ('Sapphire')**, and MAS has the flexibility to re-designate capacity, assets and resources from Fly Firefly Sdn Bhd to form Sapphire."*

[10] The Collaboration Agreement also provides the establishment of a Joint Collaboration Committee (JCC) among others, for the purposes of administering and overseeing the said collaboration and to kick start the collaboration process as stipulated under Clause 9 of the Agreement.

[11] On the same day the parties signed the Collaboration Agreement, a share swap arrangement was made whereby Tune Air Sdn Bhd held 20.5% stake in MAS and Khazanah Nasional Berhad held 10% stake in AirAsia. Khazanah Nasional Berhad is the single largest shareholder of MAS with a shareholding of 69.37% whilst Tune Air Sdn Bhd is the largest shareholder of AirAsia with a 12.06% shareholding.

[12] Next, after the date of the execution of this Collaboration Agreement, Fly Firefly Sdn Bhd withdrew its operation from the following routes:

(i) Kuala Lumpur – Kuching.
(ii) Kuala Lumpur – Kota Kinabalu.
(iii) Kuala Lumpur – Sandakan.
(iv) Kuala Lumpur – Sibu.

[13] This Collaboration Agreement has been examined by the Commission but has not conducted any formal inquiry or investigation before the enforcement of the CA 2010.

[14] In any event, on 30.12.2011, a day before the CA 2010 came into force, MAS and on behalf of AirAsia had sent a letter to the Commission notifying MAS and AirAsia's intention to seek an exemption under the CA 2012 in respect of the Collaboration Agreement.

[15] On 24.2.2012, the Commission received a letter of complaint from the Federation of Malaysian Consumer Association (FOMCA) regarding the said collaboration between MAS and AirAsia. The letter states inter alia the following :

"***FOMCA Complaint against Air-Asia X and MAS Share Swap***

Cause for Concern
Share-Swap between Air Asia X and MAS

- *Air Asia's major shareholder, Tune Air Sdn Bhd now holds a 20.5% stake in MAS.*

- *MAS major shareholder, Khazanah Nasional Bhd holds a 10% stake in Air Asia.*

Consequences after the Share-Swap

1. Termination of Firefly to Sabah and Sarawak
- *From 7 times/daily*
- *Elimination of a competitor*

Affecting travellers to Sabah/Sarawak.

2. Cancellation of Flights to London, Paris, Mumbai and New Delhi.

Needs further investigation

3. Comparative analysis on Prices of Services since the Swap

- *Have relative prices been increasing since the SWAP*

4. Review of Airline Routes – Are routes being shared between the 2 airline players to reduce competition and maximize profits."

[16] Next, on 4.4.2012, the Commission issued written notices to MAS and AirAsia pursuant to section 18 of CA 2010, notifying that the Commission was conducting investigation in respect of the Collaboration Agreement dated 9.8.2011 entered by the parties.

[17] In the meantime, on 2.5.2012, the parties to the Collaboration Agreement entered into a Supplemental Agreement and amongst the clauses therein are the following :

(i) **Clause 4.1** – where parties agreed that clauses 5.2, 5.3 and 5.4. of the Collaboration Agreement cease to be operative.

(ii) **Clauses 6.1** – where parties agreed to disband the Joint Collaboration Committee.

[18] On 6.9.2013, having completed the investigation, the Commission issued a Proposed Decision pursuant to subsection 36(1) of CA 2010. In the Proposed Decision, the Commission found that MAS and AirAsia had infringed subsection 4(2)(b) of the CA 2010 by entering into the said Collaboration Agreement which has its object of sharing of market in air transport services in Malaysia and proposed the financial penalty of RM10,000,000.00 on MAS and AirAsia respectively.

[19] Thereafter, pursuant to section 36 and 37 of the CA 2010, MAS and AirAsia were given the right to present their written and oral representation in respect of the Proposed Decision. Oral representation by both parties was heard by the Commission on 15.1.2014.

[20] On 31.3.2014, the Commission handed down its Final Decision which concluded that MAS and AirAsia has infringed subsection 4(2)(b) of the CA 2010 and imposed a financial penalty of RM10,000,000.00 to both MAS and AirAsia.

[21] Dissatisfied with the Commission decision, MAS and AirAsia has appealed against the Commission's Final Decision to the Tribunal pursuant to subsection 51(1) of CA 2010.

[22] The grounds of appeal to the Tribunal are the following :

(i) the Collaboration Agreement had no anti-competitive object and the Commission misinterpreted the Collaboration Agreement;

(ii) the Collaboration Agreement was never implemented;

(iii) the Commission did not establish (and did not even attempt to establish) a causal link between the Collaboration Agreement and route withdrawals.

(iv) the improper retrospective application of the Competition Act;

(v) the Commission should have conducted an effect analysis instead of object analysis;

(vi) procedural fairness; and

(vii) disproportionate and discriminatory penalty assessment.

[23] On 4.2.2016, after hearing both parties, the Tribunal held that based on the terms of the Collaboration Agreement, MAS and AirAsia has not infringed section 4(2) of CA 2010 and as such the Commission's Final Decision was set aside.

[24] Dissatisfied with the Tribunal's decision, the applicant filed this judicial review application.

Findings Of This Court

[25] The position of the law on judicial review now is well settled that the court not only can review the decision making process but is also allowed to delve into the merits of the decision.

[26] In the recent Federal Court case, ***Akira Sales & Service (M) Sdn Bhd v Nadiah Zee bt. Abdullah and another appeal [2018] 2 MLJ 537***, the liberal approach on judicial review in *R. Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145* has been re-emphasized at page 571 as follows :

> "***[45]*** *In the same appeal, Edgar Joseph Jr FCJ (Eusoff Chin in agreement) said that an award could be reviewed for substance as well as for process:*
>
> > *'It is often said that judicial review is concerned not with the decision but the decision making process. (See eg Chief Constable of North Wales Police v Evans [1982] 1 WLR 1155). This proposition, at full face value, may well convey the impression that the jurisdiction of the courts in Judicial Review proceedings is confined to cases where the aggrieved party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock* ***in Council of Civil Service Unions & Ors v Minister for the Civil Service [1985] AC 374****, where the impugned decision is flawed on the ground of procedural impropriety.*
> >
> > *But Lord Diplock's other grounds for impugning a decision susceptible to Judicial Review make it abundantly clear that* ***such a decision is also open a challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinise such decisions not only for process, but also for substance****.*
> >
> > *In this context, it is useful to note how Lord Diplock (at pp 410-411) defined the three grounds of review, to wit, (i) illegality, (ii) irrationality, and (iii) procedural impropriety. This is how he put it :*
> >
> > > ***By 'illegality'*** *as a ground for Judicial Review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those*

persons, the judges, by whom the judicial power of the state is exercisable.

***By 'irrationality'**, I mean what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the courts' exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v Bairstow [1956] AC 14, or irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though undefinable mistake of law by the decision maker. 'Irrationality' by now can stand on its own feet as an accepted ground on which a decision may be attacked by Judicial Review.*

*I have described the third head as '**procedural impropriety**' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decisions. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that the expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.*

*Lord Diplock also mentioned **'proportionality'** as a possible fourth ground of review which called for development."*

[27] Further, the Court of Appeal in ***Dato' Seri Dr. Ahmad Zahid bin Hamidi, Menteri Dalam Negeri, Kementerian Dalam Negeri & Ors v Soo Lina & Ors [2018] 2 MLJ 738*** explained the test of reasonableness in judicial review at page 754 as follows :

"*[39] The test of reasonableness has been the subject of many cases over the decades in other Commonwealth jurisdictions. For example, in dealing with the circumstances under which the court could intervene to quash the decision of an administrative officer or tribunal on ground of unreasonableness or irrationality, Henchy J of the Irish Court in The State (at the Prosecution of John Keegan and Eoin J Lysaght) v The Stardust Victims' Compensation Tribunal [1986] IR 642 set a number of such circumstances in different terms. They are :*

1. *It is fundamentally at variance with reason and common sense.*

2. *It is indefensible for hearing in the teeth of plain reason and common sense.*

3. *Because the court is satisfied that the decision-maker has breached his obligation whereby the 'must not flagrantly reject or disregard fundamental reason common sense in reaching his decision.*

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[41] In Meadows v Minister for Justice Equlity and Law Reform and others [2010] IESC 3 Denham J in her dicta (ratio) set out the following test:

> *'This test includes the implied constitutional limitation of jurisdiction of all decision-making which affects rights and duties. Inter alia, the decision-maker should not disregard fundamental reason or common sense in reaching his or her decision. The constitutional limitation of jurisdiction arises inter alia from the duty of the courts to protect constitutional rights. When a decision-maker makes a decision which affects rights then, or reviewing the reasonableness of the decision: (a) the means must be rationally connected to the objective of the legislation and not arbitrary, unfair or based on orrational considerations; (b) the rights of the person must be impaired as little as possible; and (c) the effect on rights should be proportional to the objective'."*

[28] In addition, a decision which involves an error of law is subject to judicial review as explained by the Federal Court in ***Majlis***

Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor [1993] 3 MLJ 1, where it states :

> "*In our view, therefore, unless there are special circumstances governing a particular case, notwithstanding a privative clause, of the 'not to be challenged, etc' kind,* ***judicial review will lie to impeach all errors of law made by an administrative body or tribunal and****, we would add, inferior courts. In the words of Lord Denning in Pearlman v Harrow School (ibid) at p 70, '...****no court or tribunal has any jurisdiction to make an error of law on which the decision in the case depends. If it makes such an error, it goes outside its jurisdiction and certiorari will lie to correct it.***"

[29] The meaning or error of law has also been explained in the case of ***Syarikat Kenderaan Melayu Kelantan v Transport Workers Union [1995] 2 MLJ 317*** in the following words :

> "***It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law****, for the categories of such an error are not closed.* ***But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations*** *or* ***omits to take into account relevant considerations*** *(what may be conveniently termed an Anisminic error)* ***or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.***"

[30] Next, in a judicial review, the test applicable is the objective test as was held by the Federal Court in the case of ***Titular Ruman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors [2014] 4 MLJ 765*** as follows :

> "*(1) (per Arifin Zakaria Chief Justice)* ***It is trite that the test applicable in judicial review now is the objective test****. In considering whether the Court of Appeal had applied the correct test, it is pertinent to consider the whole body of the judgments of the judges of the Court of Appeal and not by merely looking at the terms used*

in the judgments. The courts will give great weight to the views of the Executive on matters of national security. The Court of Appeal had applied the objective test in arriving at its decision. Had it applied the subjective rest, it would not be necessary for it to consider the substance of the first respondent's decision."

[31] Before I proceed to deal with the merits of this judicial review application, there are preliminary issues raised by the respondents and one of which is the applicant's *locus standi* to commence this proceedings.

[32] On this issue of *locus standi*, it is the MAS and AirAsia's contention that the commission is not clothe with the *locus standi* to file this judicial review application since Malaysian Aviation Commission (MAVCOM) has been established on 1.3.2016 and has the jurisdiction among others to regulate aviation services which includes competition matters.

[33] In relation to this issue, it is instructive to make reference to the Federal Court case of ***Lim Phin Kian v Kho Su Ming [1996] 1 MLJ 1*** in which it has been decided that the right of appeal arises at the date when a judgment, order or decision is given.

[34] In this Federal Court case, the issue is whether an appeal should be brought before the Court of Appeal or the Federal Court after the establishment of the Court of Appeal. The Court of Appeal was created pursuant to the Court of Judicature Act (Amendment) Act 1994 which came into force on 24.6.1994 and has the jurisdiction to hear and decide appeals from the High Court. Prior to this, any

appeals from the High Court were heard by the Supreme Court and later the Federal Court.

[35] When the case came before the Federal Court on 25.9.1994 after the establishment of the Court of Appeal, preliminary objection was raised by the respondent as regards the competency of the appeal. The respondent contended that the appeal should be brought before the Court of Appeal and not before the Federal Court.

[36] As the decision by the High Court was made on the 7.6.1994, before the establishment of the Court of Appeal, the Federal Court decided that it has the jurisdiction to hear the appeal.

[37] The Federal Court held as follows :

> "*(6) (Per **Edgar Joseph Jr FCJ**) Since an appeal is a proceeding by which the correctness of the decision of the court below is under challenge before the appellate court, it can be argued rthat Parliament intended by the enactment of s. 17 that the right of appeal should arise only nwhen a judgment, order or decision is given. Applying a proposive interpretation to s. 17,* ***it is clear that Parliament intended that so long as there is a judgment, order or decision of the High Court, given on or before 23 June 1994, and an appeal against the same has been brought whether on or before or even after such date, it is the Federal Court and not the Court of Appeal which is invested with the jurisdiction to hear and determine the same*** *(see pp 181 and 19A-C).*"

[38] Guided by the principal abovementioned, in the present case, the decision by the Tribunal was on 4.2.2016 and the written grounds dated 18.2.2016 which both were before the establishment of MAVCOM.

[39] In addition, the Commission is the regulator under the CA 2010 which carried out the investigation of this case until the decision was made by the Tribunal on 4.2.2016. MAVCOM was not in existence during the material time.

[40] Further, the Commission's powers and functions under the Competition Commission Act 2010 are wide which can be seen under sections 16 and 17 of the said Act. To appreciate the functions and powers of the Commission, it is relevant to reproduce the said section's which are as follows :

(i) **Section 16 –**

"***Functions of the Commission***

16. The Commission shall have such functions as specified under the competition laws and shall also have the following functions:

(a) to advise the Minister or any other public or regulatory authority on all matters concerning competition;

(b) to alert the Minister to the actual or likely anti competitive effects of current or proposed legislation and to make recommendations to the Minister, if appropriate, for the avoidance of these effects;

(c) to advise the Minister on international agreements relevant to competition matters and to the competition laws;

(d) to implement and enforce the provisions of the competition laws;

(e) to issue guidelines in relation to the implementation and enforcement of the competition laws;

(f) *to act as an advocate for competition matters;*

(g) *to carry out, as it considers appropriate, general studies in relation to issue connected with competition in the Malaysian economy or particular sectors of the Malaysian economy;*

(h) *to collect information for the performance of the Commission's functions;*

(i) *to publish, and otherwise raise awareness among persons engaged in commerce or trade and among the public of, information concerning the competition laws andmaner in which the Commission will carry out its functions under the competition laws;*

(j) *to inform and educte the public regarding the ways in which competition may benefit consumers in, and the economy of, Malaysia;*

(k) *to consider and make recommendations to the Minister on reforms to the competition laws; and*

(l) *to carry on such activities and do such things as are necessary or advantageous and proper for the administration of the Commission."*

(ii) **Section 17 –**

"***Power of the Commission***

17. (1) The Commission shall have the power ***to do all things necessary or expedient for or in connection with the performance of its functions under the competition laws.***

(2) Without prejudice to the generality of subsection (1), the powers of the Commission shall include the power –

(a) *to utilize all the movable and immovable property of the Commission in such manner as the Commission may think expedient, including the raising of loans by mortgaging such property;*

(b) ***to impose penalty for the infringement of the provisions of the competition laws***;

(c) *to impose fees or charges for services rendered by the Commission;*

(d) *to appoint such agents, experts or consultants as it deems fit to assist the Commission in the performance of its functions;*

(e) *to grant loans, scholarships and invances to its employees for such purposes and on such terms as the Commission may determine or as may be approved by the Minister;*

(f) *to pay remuneration, allowances and other expenses of the members of the Commission;*

(g) *to formulate and implement programmes for the proper and effective performance of the Commission's functions, including programmes for human resource development, function and co-operation;*

(h) *to co-operate with any body corporate or government agency for the purpose of performing the Commission's functions;*

(i) *to require the furnishing of information by enterprises to assist the Commission in the performance of its functions; and*

(j) *to do anything incidental to any of its functions and powers.*"

[41] Aside from the functions and powers conferred to the Commission under the Competition Commission Act 2010, the Commission is also provided the following powers under the Competition Act 2010 which among others are as follows :

(i) Power to investigate as provided under section 17.

(ii) Power to require provision of information, provided under section 18.

(iii) Power to retain document as provided under section 19.

[42] The Commission has also issued guidelines to provide guidance in relation to the Competition Act 2010 which are the following :

(i) Guidelines on Complaints Procedures
(ii) Guidelines on Market Definition
(iii) Guidelines on Anti-Competitive Agreements
(iv) Guidelines on Abuse of Dominant Position
(v) Guidelines on Financial Penalties
(vi) Guidelines on Leniency Regime.

[43] In light of the Commission's functions and powers and the investigation which has been conducted on the Collaboration Agreement entered by MAS and AirAsia where the Commission then decided has infringed subsection 4(2)(b) of the CA 2010, the Commission has a real and genuine interest in the subject matter of this case.

[44] In connection to this, Order 53 rule 2(4) provides that any person 'adversely affected' by a decision is entitled to apply for judicial review and to pass the test of 'adversely affected' the applicant *inter alia* has to show the applicant has real and genuine interest in the subject matter.

[45] The Federal Court in the case of ***Malaysian Trade Union Congress & Ors v Menteri Tenaga Air dan Kommunikasi [2014] 3 MLJ 145***, has explained the 'adversely affected' test under Order 53 of the Rules of Court in the following words :

> "*[57] In view of foregoing we are of the view that the view expressed by the Court of Appeal in QSR Brands Bhd v Suruhanjaya Sekuriti & Anor that the 'adverse affected' test was a single test for all the remedies provided for under O 53 of the RHC is to be preferred. Hence the answer to the question posed in this appeal has to be in the negative.*
>
> *[58] However, we are not prepared to accept the appellants' argument that the 'sufficient interest' test under O 53 r 2(4) of the RHC as the two tests do not have the same meaning. Therefore, in determining the locus standi to sue, the court has to exercise caution in applying the English case.* ***In our view for an applicant to pass the 'adversely affected' test, the applicant has to at least show he has real and genuine interest in the subject matter****. It is not necessary for the applicant to establish infringement of a private right or the suffering of special damage.*"

[46] In the circumstances, the Commission is adversely affected by the decision of the Tribunal and as such it has the *locus standi* to commence this judicial review application.

[47] The next preliminary issue raised by the MAS and AirAsia is that the Tribunal's decision is not amenable to judicial review. It is their contention that by virtue of section 44, the Tribunal has exclusive jurisdiction to review any decision of the Commission and further, the Tribunal was presided by a sitting High Court Judge.

[48] ***Section 44*** of CA 2010 provides :

"***44.*** *There is established a Competition Appeal Tribunal, which shall have exclusive jurisdiction to review any decision made by the Commission under section 35, 39 and 40.*"

[49] On this issue, it is trite law that exclusive jurisdiction of a Tribunal conferred by statute, does not affects the High Court supervisory jurisdiction to review the Tribunal's decision when the decision is tainted among others with error of law, irrationality, unreasonableness or procedure impropriety.

[50] In this regard, it is instructive to make reference again to the case of ***Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union*** (supra) where it states :

"*In my judgment, the true principle may be stated as follows. An inferior tribunal or other decision-making authority, whether exercising a quasi-judicial function or purely an administrative function, has no jurisdiction to commit an error of law. Henceforth, it is no longer of concern whether the error of law is jurisdiction or not.* ***If an inferior tribunal or other public decision-maker does make such an error, then he exceeds his jurisdiction****. So too is jurisdiction exceeded, where resort is had to an unfair procedure (see Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis [1995] 1 MLJ 308), or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision.*

It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law

Since an inferior tribunal has no jurisdiction to make an error of law, its decision will not be immunized from judicial review by an ouster clause however widely drafted."

[51] In the same case, the decision by Justice Syed Othman in ***Kannan & Anor v Menteri Buruh Dan Tenaga Rakyat & Ors [1974] 1 MLJ 90***, was quoted with approval which states as follows :

"*From all these authorities, [which included Anisminic Ltd v Foreign Compensation Commission [1969] 2 AC 147], I am inclined to think that* ***the better view of the law is that a plea that the court cannot interfere with a decision by reason of an ouster clause will only be accepted if the decision was reached according to the law. If the decision is not according to law, the court would invariably interfere with it. To my mind, a decision not according to law is no decision at all.*** *In the present case, I would say that the decision of the Minister can be questioned if it can be shown that it was reached as a result of no proper enquiry, or of failure to comply with the prescribed procedure for an enquiry, or if it can be shown that the decision was a nullity for lack of jurisdiction or for failure to comply with the law.*"

[52] Hence, the exclusive jurisdiction conferred to the Tribunal under section 44 of the CA 2010 to hear an appeal, does not exclude this court from reviewing the Tribunal's decision.

[53] Aside from this, although the President of the Tribunal is a sitting High Court Judge, the fact remains that the Tribunal is an administrative body. The Tribunal is merely exercising its administrative functions and powers when it makes any decision in an appeal pursuant to section 44 of CA 2010.

[54] On this issue, the Federal Court of Australia in the case of ***Hussain v Minister of Foreign Affairs & Another [2008] 128 ALD 66***, has

decided that a President of a Tribunal who is also a Federal Court Judge does not change the administrative nature of the Tribunal.

[55] At paragraphs 62 and 63 of the case it states :

> "***[62] It is well settled that the tribunal is an administrative and not a judicial body. Its functions are wholly administrative in character, though it is obliged to act judicially***. *In Drake v Minister for Immigration and Ethnic Affairs [1979] 46 FLR 409 at 414; 24 ALR 577 at 584; 2 ALD 60 at 64, the Full Federal Court confirmed that the general functions conferred on the tribunal are 'plainly administrative'. Bowen CJ and Deane J (with whom Smithers J relevantly agreed) noted that* ***the adoption by the tribunal of some court-like processes did not transform the nature of its functions***. *Their Honours, in a joint judgment, said (at FLR 414; ALR 584; ALD 64) :*
>
> > *'Neither the fact that the Tribunal possesses certain procedural powers ordinarily enjoyed by courts nor the fact that the Tribunal is authorized to decide questions of law arising in proceedings before it means that, in performing these administrative functions, it is exercising judicial power...'*
> >
> > *[63] Their Honours went on to say (at FLR 414-15; ALD 64-5) that* ***the constitution of the tribunal by the presidential member, who also held office as a Federal Court judge, did not alter the administrative character of the tribunal's functions***."

[56] Based on the reasons mentioned above, the decision of the Tribunal is amenable to judicial review.

[57] Moving on to the merits of this judicial review application, I find that this application substantially centred on the interpretation and application of section 4 of the Competition Act 2010.

[58] However, before I proceed further, it is pertinent to understand and appreciate the purpose and objective of the Competition Act 2010 as clearly states at the Preamble of the said act which is the following :

> "*An act to promote economic development* ***by promoting and protecting the process of competition, thereby protecting the interests of consumers*** *and to provide for matters connected therewith. WHEREAS the process at* ***competition encourages efficiency, innovation and entrepreneurship, which promotes competitive prices, improvement in the quality of products and services and wider choices for consumers****."*

[59] The perusal of Hansard (Parliamentary Debate) of 20.4.2010 further explained the purpose of the Competition Act 2010 when the Minister of Domestic Trade, Cooperative and Consumerism *inter-alia* said this:

> "*Pengenalan Rang Undang-Undang Persaingan 2010 (RUUP) ini bertujuan memastikan persaingan yang sihat wujud di dalam pasaran.* ***Ia adalah langkah yang amat sesuai untuk menangani amalan-amalan anti persaingan*** *serta menyediakan perusahaan-perusahaan dalam menghadapi cabaran globalisasi serta liberalisasi.* ***Rang undang-undang ini yang dilihat mampu memberi perlindungan dan kebaikan kepada pengguna di Malaysia dalam menyediakan kepelbagaian barangan dan perkhidmatan pada harga yang lebih kompetitif*** *juga adalah selari dengan hasrat kerajaan dalam memperkenalkan Model Ekonomi Baru sebagai tunjang utama di dalam memacu pertumbuhan ekonomi negara.*"

[60] Hence, it is clear that amongst the main purpose of enacting this act is to protect the interest of consumers *inter-alia* by having a competitive prices and wider choice of products or services for consumers.

[61] Reverting back to the main issue on the construction application of section 4 of Competition Act 2010, section 4(1) provides :

"*(1) A horizontal or vertical* ***agreement between enterprises is prohibited insofar as the agreement has the object or effect of significantly preventing, restricting or distorting competition in any market for goods or services.***"

[62] The words '*agreement*' and '*horizontal agreement*' in subsection 4(1) has been defined under section 2 as follows :

> *"**agreement**" means any form of contract, arrangement or understanding, whether or not legally enforceable, between enterprises, and includes a decision by an association and concerted practices.*
>
> *"**horizontal agreement**" means an agreement between enterprises each of which operates at the same level in the production or distribution chain.*

[63] Further, the word 'market' is defined as follows :

> "*'**market**' means a market in Malaysia or in any part of Malaysia, and when used in relation to any goods or services, includes a market for those goods or services and other goods or services that are suitable for, or otherwise competitive with, the first-mentioned goods or services;*"

[64] Unlike competition law in most jurisdiction, the Competition Act 2010, has a deeming provision which assist the Commission in proving the infringement of ***subsection 4(1)***. The deeming provision is ***subsection 4(2)*** which states :

> "*(2) Without prejudice to the generality of subsection (1), a horizontal agreement between enterprises which* ***has the object to—***
>
> *(a) Fix, directly or indirectly, a purchase or selling price or any other trading conditions;*
>
> *(b)* ***Share market*** *or sources of supply;*
>
> *(c) Limit or control –*

(i) *Production;*
(ii) *Market outlets or market access;*
(iii) *Technical or technological development; or*
(iv) *Investment; or*

(d) *Perform an act of bid rigging,*

is deemed to have the object of significantly preventing, restricting, or distorting competition in any market for goods or services."

[65] The wordings of subsection 4(1) and 4(2) are unambigous, plain and clear and as such it must be given their natural and ordinary meanings. This is trite principle of law as explained, among others, in the Federal Court case of ***Dr. Koay Cheng Boon v Majlis Perubatan Malaysia [2012] 3 MLJ 173*** in the following words :

"***[48]*** *A statute is the written will of the Legislature. It is the fundamental rule of interpretation of a statute that should be expounded according to the intent of Parliament.* ***Courts must use the literal rule where a clear meaning of s statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning****. In the event of the words of the statute being precise and unambiguous in themselves, it is only just necessary to expound those words in their natural and ordinary sense.*"

[66] Likewise in the Federal Court case of ***PP v Sihabduin bin Haji Salleh & Anor [1980] 2 MLJ 273*** where it states :

"*The words of Lord Diplock in an authority cited by my Lord President, Duport Steels Ltd v Sirs, seem to me to be practicularly apt, for* ***'the role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous it is not for the judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning*** *because they themselves consider that the*

consequences of doing so would be inexpedient, or even unjust or immoral."

[67] In this regard, upon reading the plain and clear wordings of subsection 4(1), this provision prohibits a horizontal or vertical agreement between enterprises which has the object **or** effect of significantly preventing, restricting competition in any market for goods or service.

[68] The word 'or' in the words 'which has the object or effect' in this subsection 4(1) requires the reading to be conjunctive.

[69] The Court of Appeal in the case of ***Union Insurance (M) Sdn Bhd v Chan You Young [1999] 1 MLJ 593***, agrees with the interpretation of the word 'or' by the trial judge when the trial judge said this :

"*With the **word 'or'** in the words 'by reason of or in pursuance of a contract of employment' means, to the learned High Court judge, that it **should be read disjunctively. To read it conjunctively, he emphasised, would be doing violence to the word 'or'**. He concluded that in reading disjunctively, the wife could obtain satisfaction as regards the judgment in the first suit against the insurance company by reason of her contract of employment with Tharmarajoo.*

To fortify his reasoning, he stated at p 37 of his judgment as follows:

> ***'The Pocket Oxford Dictionary defines the word 'or' as 'introducing alternatives'. The Britannica World Language Dictionary defines 'or' as 'the alternative expressed by or is emphasised by prefixing to the first member, or adding after the last'. Put in another way, when there are several possibilities 'or' is placed before the last one. This means that when the word 'or' is used there is no choice to be made, between one or the other and not to accept both of them. Thus, the word 'or' appearing in the bracketed words of cl 9 endorsement D reflects the intention of the insurance company to construe the word 'or' as disjunctive and not conjunctive'.***"

[70] Likewise in the Court of Appeal case of ***Eversafe Sdn Bhd v Megarina Sdn Bhd [2006] 4 MLJ 271***, where it states :

> "***[8]*** *We are in agreement with the views and finding of the learned judge when he stated that subparagraphs (a), (b), (c) and (d) and each of them is followed by a comma and the word 'or', and this means that* ***they must be construed disjunctively****."*

[71] As such, in the present case, the Commission only has to prove whether the Collaboration Agreement dated 9.8.2011 entered by MAS and AirAsia either has the object or effect of significantly preventing, restricting or distorting competition in order to establish an infringement of subsection 4(1).

[72] The Commission's case against MAS and AirAsia is premised on the fact that the said Collaboration Agreement has the anti-competitive object. Therefore, it is unnecessary for the Commission to prove anti-competitive effect or to conduct any effect analysis as submitted by MAS and AirAsia.

[73] In determining whether the Collaboration Agreement has anti-competitive object, it is pertinent not only to examine the terms of the Collaboration Agreement but also the factual background before both MAS and AirAsia entered into this Collaboration Agreement.

[74] Before the collaboration between MAS and AirAsia pursuant to the said Collaboration Agreement came into existence, it is an established fact that both are competitors in air transport industry.

[75] MAS has taken an aggressive steps to compete with AirAsia which among others are the following :

(i) **Project Riesling**

(a) On 19.4.2010, MAS in its Board of Directors' Meeting, has decided that Fly Firefly Sdn Bhd ('Firefly') a wholly-owned subsidiary of MAS, would be used to develope a new low cost carrier (LCC) to compete with AirAsia.

(b) At MAS Board of Directors' Meeting on 23.7.2010, an aggressive measures to compete with AirAsia was presented which includes a two pronged approach which were :

(aa) turboprop operations for Peninsular Malaysia and Singapore out of Subang Ship park; and

(bb) narrow body operations within ASEAN and selected points within Asia Pacific.

(c) In addition, two options of overall strategy were also presented before MAS Board of Directors' Meeting which were as follows :

(aa) **'Batman and Robin' Plan** – For Firefly to target routes where MAS cost structure cannot operate profitably and where MAS faced or will face intense

competition from AirAsia. This will assist MAS growth plan.

(bb) **Darth Vader Plan** – For Firefly to target routes where AirAsia has the highest profitability/ frequency and adopt 'cannibalistic behaviour mainly by price differentation'. The objective is to address AirAsia's competition.

(ii) **MAS USD100 million 'War Chest' to compete with AirAsia**

(a) MAS further strategy to compete directly with AirAsia as presented in the Board of Directors' Meeting on 23.7.2010 was to set aside USD100 million as part of 'war chest' to mitigate the impact of a likely price war with AirAsia.

[76] This competition between MAS and AirAsia before the collaboration, was also acknowledged by Member of Parliament, YB Loke Siew Fook, as revealed in Hansard of 20.4.2010, who *inter-alia* said this :

> "***Tuan Loke Siew Fook [Rasah]***: *Terima kasih Tuan Yang di-Pertua, saya turut ingin mengambil bahagian dalam perbahasan peringkat dasar rang undang-undang ini. Pada hemat saya konsep persaingan ini memanglah sesuatu yang baik, dari segi prinsipnya, persaingan memanglah baik.* ***Adanya persaingan dan menggalakkan inovasi, menggalakkan kecekapan, efficiency dan membawa kepada suatu penurunan harga kepada barangan dan perkhidmatan dengan harga yang lebih murah dan lebih banyak pilihan, contoh yang paling klasik persaingan di antara MAS dengan AirAsia.***"
>
> *Dengan adanya persaingan dan pecahnya monopoli MAS dan sektor penerbangan domestik, maka sekarang rakyat Malaysia kalau hendak pergi mana-mana. Dalam negara pun, dalam penerbangan*

domestik pun sudah ada pilihan, harga yang lebih rendah, terutamanya di Sabah dan Sarawak dengan Semenanjung dapat menggalakkan integrasi nasional yang lebih banyak. Lebih ramai penduduk-penduduk sini, rakyat semenanjung pergi ke Sabah, Sarawak dan itu memang kebaikannya."

[77] However, having planned an aggressive strategy to compete with AirAsia, about a year later, MAS has, on 9.8.2011 entered into the Collaboration Agreement with AirAsia.

[78] MAS in its Special Board of Directors' Meeting held on the same day, 9.8.2011, before signing the Collaboration Agreement, has resolved among others the following :

"*Having considered carefully the salient terms and conditions of the draft Collaboration Agreement as presented at this Meeting, the Board unanimously RESOLVED THAT approval be hereby given to the Company to enter into a Collaboration Agreement with AirAsia Berhad and AirAsia X Sdn Bhd.* ***for the purpose of exploring the feasibility of strategic cooperation***."

[79] In this meeting, the Board was also brief by Bain & Co., a management consulting company, with regard to the collaboration with AirAsia. The main points presented were the following :

(i) redeployment of capacity to match demand, especially for premium passengers, through network optimisation and feeding passengers between MAS and AirAsia;

(ii) future coordination of business activities based on customer segmentation and comparative advantage;

(iii) MAS and AirAsia should gain in roughly equal proportion;

(iv) MAS and AirAsia competition leads to unsustainable pricing and the collaboration solution is MAS and AirAsia to coordinate on domestic routes. AirAsia would fly low yield routes while MAS shifted to high yield routes;

(v) a proposal for 17 MAS routes to be redeployed to AirAsia. The other proposal is for route reallocation, in particular the 44 identified overlapping routes. This will result in significant synergy values or financial gain.

[80] Further, in a Special Board of Directors' Meeting of AirAsia X Sdn Bhd, as stated in its minutes of meeting dated 9.8.2011, the collaboration with MAS was aimed to deter irrational competition and to achieve substantial cost saving in the areas of collaboration. Paragraph 3.2.1 of the minutes states the following :

> "*3.2.1.* ***Framework of the Proposed Collaboration***
>
> *3.2.1.1. The proposed Collaboration is the collaboration between the Company, MAS and AAB ('the Parties') was to have a broad framework agreement aimed at enhancing customers' experience and choice. Through the Proposed Collaboration, the Parties were expected to exploit opportunities and derive potential synergies through collaborating on areas such as management, procurement, network and fleet.* ***It was aimed to deter irrational competition and to achieve substantial cost saving in the areas of collaboration****. The Proposed Collaboration was consistent with the Government of Malaysia's ambition to foster public-private partnerships.*"

[81] Having laid down the background of the Collaboration Agreement, I now turn to the salient terms of the said Agreement which are as follows:

(i) ***Clause 1.2*** of the Agreement provides :

> "*Whereas this Agreement is premised on the following :*
>
> *(a)* ***MAS operates an airline business as a full-service carrier, while AirAsia and AirAsia X operate airline businesses as low-cost carriers****.*
>
> *(b) The parties wish to establish a framework under which they will explore possibilities for mutual co-operation in accordance with the terms and conditions set forth in this Agreement."*

(ii) Next, ***Clause 5*** states :

> "***5. BUSINESS MODEL PRINCIPLES***
>
> *5.1. Subject to clauses 4 and 9,* ***each party confirms that it intends to focus, or re-focus, as the case may be, on its respective core competencies in the business segment in which its original business model was or would have been optimised****. This may be undertaken by itself, or through a subsidiary or affiliate. For the purposes hereof, an affiliate of a party is a corporation the financial results of which, by virtue of a party's interest in that corporation's equity, that party is entitled to equity account its relevant share of that corporation's financial results.*
>
> *5.2. In the case of* ***MAS, it intends to focus on being a full-service premium carrier ('FSC').***
>
> *5.3. In the case of* ***AirAsia, it intends to focus on being a regional low-cost carrier ('LCC').***

5.4. *In the case of **AirAsia X, it intends to focus on being a medium-to-long haul LCC**.*

5.5. *For the purposes of this Agreement, the parties will mutually discuss and agree, **within three months from the date of this Agreement**, based on value proposition to the market, the appropriate definitions of FSC and LCC **for the implementation of the matters under this Agreement**.*

5.6. ***MAS intends to review Fly Firefly Sdn. Bhd. operations**, and MAS's shourt-haul FSC business may be undertaken by itself and/or through a new MAS subsidiary ('Sapphire'), and MAS has the flexibility to re-designate capacity, assets and resources from Fly Firefly Sdn Bhd. to form Sapphire."*

(iii) Further, ***Clause 7*** is the provision which ensure no overlapping routes between MAS and AirAsia. It states :

"***7. Flow, Feed***

7.1. Subject always to clauses 4 and 9, MAS and AirAsia shall as soon as practicable:

*(a) assess the viability of enabling selective interlining passengers transiting from AirAsia points of origin to MAS flights, **where MAS** (and/or Sapphire, as the case may be) **does not operate any overlapping route**; and*

*(b) assess the viability of enabling selective interlining for passengers transiting from MAS (or Sapphire, as the case may be) points of origin to AirAsia flights, **where MAS** (and.or Sapphire, as the case may be) **does not operate any overlapping route**;*

and if either of clauss 7.1 (a) or (b) is assessed as viable, agree on a plan to implement the same in the shortest possible time frame to achieve operational feasibility.

7.2. *It is envisaged that such interlining shall be conducted for a group of selected routes initially and, if successful, may be expanded further across the networks of MAS and AirAsia, and possibly even AirAsia X,* ***provided there is no existing overlapping route by MAS*** *and/or Sapphire in such an interlining arrangement.*

7.3. *The intent of this flow or feed traffic arrangement is to ensure maximum connectivity and passenger convenience across the network of MAS (and/or Sapphire, as the case may be), of AirAsia and of AirAsia X,* ***where MAS does not have an overlapping route with AirAsia or AirAsia X*** *in the provision of such flow or feed traffic.*

7.4. *AirAsia shall use commercially reasonable effors to accommodate such interlining arrangements to the extent that its operations and services are not materially and adversely impacted."*

[82] Based on this Collaboration Agreement, in particular clauses 1.2, 5 and 7, there will no longer be any competition between MAS and AirAsia. MAS will concentrate as a full service premium carrier (FSC), AirAsia will focus on regional low-cost carrier (LCC) whilst AirAsia X will focus on medium to long haul LCC. Clause 7 further ensures that there will be no overlapping routes between MAS and AirAsia.

[83] As such, MAS and AirAsia, which has their own routes and area of operation and without having to compete with each other as before, are able to control the pricing of the airlines business such as ticket price which is to the disadvantage of the consumers. This to me, shows that the Collaboration Agreement, viewed in totality, has the anti competitive object which subsection 4(1) prohibits.

[84] In addition, as mentioned earlier, there is a deeming provision under the Competition Act 2010 which further assist the Commission in proving the infringement of subsection 4(1).

[85] Subsection 4(2)(b) as alluded to earlier, *inter-alia* states that a horizontal agreement between enterprises which has the object to share market ***is deemed*** to have the object of significantly preventing, restricting or distorting competition in any market for goods or services.

[86] On this issue of deeming provision, subsection 4(2) is an express statutory provision and a presumption of law enacted by Parliament to assist the Commission in carrying out its duty to prove an infringement of subsection 4(1). It is obligatory to invoke this deeming provision if the prerequisite fact has been established. In the present case, the prerequisite fact is that the agreement has the object to share market.

[87] In the Supreme Court case of ***Amanah Merchant Bank Bhd v Lim Tow Choon [1994] 1 MLJ 419***, the meaning of the words 'shall be deemed' is interpreted as 'shall be regarded as' and further quoting the case of ***R v Westminister Unions Assessment Committee, exp Woodlands & Sons [1917] 1 KB 832***, where Viscount Reading CJ said this :

> "*A notice prepaid and addressed as directed by s 65 if sent through the post 'shall be deemed to have been served and received respectively at the time when the letter containing the sanme would be delivered in the ordinary course of post'. That provision applies to a case where in fact the notice has not been received, otherwise it has no meaning.* ***The intention***

is to treat as a fact something which has not been established as a fact – even something which can be shown not to be a fact. *The section continues: 'and in proving such service or sending it shall be sufficient to prove that the letter containing the notice was properly addressed and prepaid and put into the post'. In my view, when those condition have been performed it must be taken as concluded that the notice has been served and received."*

[88] Next, in the case of ***Attan Ghani v PP [1970] 2 MLJ 143***, Justice Sharma in explaining the deeming provision under section 14 of the Prevention of Corruption Act 1961, clearly said that the provision which contained the presumption of law, makes it obligatory upon the court to raise it if the prerequisite facts has been proven.

[89] Further, the Federal Court in the case of ***Muhammad Hassan v PP [1991] 2 MLJ 493***, described the deeming provision under subsection 37(d) of Dangerous Drugs Act 1952, as a compelling presumption which the court must in law, invoke it upon proof of certain facts. At page 288 of the case, this is what it states :

"*In our view, there is a clear undeniable distinction between the word 'deemed' used in s 37(d) and the word 'found' employed in s 37(da) of the Act.* ***The 'deemed' states of affair in s 37(d) (ie deemed possession and deemed knowledge) is by operation of law and there is no necessity to prove how that particular state of affairs is arrived at. There need only to be established the basic or primary facts necessary to give rise to that state of affairs, ie the finding of custody or control. Such presumptions as under s 37(d) (and, for that matter, the one under s 37(da)) are sometimes described as 'compelling presumptions' in that upon proof of certain facts by a party*** *(in our present case, proof of custody or control in s 37(d) by the prosecution),* ***the court must in law draw a presumption in its favour*** *(ie presumptions of possession and knowledge)* ***unless the other party proves the contrary. Such a presumption has the compelling force of law. It is a deduction which the law requires tha trial court to make.***

On the other hand, the word 'found' in the opening phrase of s 37(da) connotes a finding after a trial by the court."

[90] Reverting to the present case, I find, clauses 1.2, 5 and 7 of the Collaboration Agreement when viewed on its own or together with the background facts alluded to earlier, including the discussion and resolution made in MAS and AirAsia's Board of Directors' Meeting in regard to the collaboration, undoubtedly shows, that the Agreement has the object to share market between MAS and AirAsia. Hence, the deeming provision of subsection 4(2)(b) is applicable, that the Collaboration Agreement has the object of significantly preventing, restricting or distorting competition in airlines services which MAS and AirAsia has not shown to the contrary. As such the infringement of subsection 4(1) of the Competition Act 2010 against MAS and AirAsia has been proven.

[91] In addressing this issue of deeming provision, whilst acknowledging the need to prove that the object of the agreement is to share market, the Tribunal further imposed on the Commission to identify the relevant market.

[92] At paragraph 89 of the grounds of decision, the Tribunal states the following :

"*[89] The Commission did not give* ***any reason or analysis for its decision concluding the the purported object of the CA is market sharing****. Even if it is a deeming provision the onus is on the Commission to establish that the object of the CA is to share the market. It is observed that in the Final Decision the Commission did not or failed* ***'to identify the relevant market'****. Identification of relevant market is integral in any competition inquiry. The case of* ***Europemballage and Continental Can***

Corporation v Commission Case 6/72[1973] ECR 215 *explains the importance of the identification of relevant market.*

> *'... The definition of the relevant market is* ***of essential*** *significance, for the possibilities of competition can only be judged in relation to* ***those characteristic of the products in question by virtue of which those products are particularly apt to satisfy an inelastic need and are only to a limited extent interchangeable with other products'***."

[93] The imposition to identify the relevant market is not the prerequisite in invoking the deeming provision under subsection 4(2). Here, the Tribunal has taken into account irrelevant consideration as well as misapplied subsection 4(2).

[94] Further, by imposing the requirement to identify the relevant market, the Tribunal is putting words in the clear wordings of the statute, particularly under subsection 4(2) of the Competition Act 2010. This have the effect of usurping the powers of the Parliament.

[95] On this issue, the Court of Appeal in ***Public Prosecutor v Yuneswaran a/l Ramaraj [2015] 6 MLJ 47*** states :

> *[66] For the second proposition above,* ***it is trite law that words are not to be read into any provision of a statute unless without that words, the provision of the statute would be completely meaningless*** *(Vickers, Sons and Maxim Ltd v Evans [1910] AC 444, Thein Hong Teck & Ors v Mohd Afrizan Husain and another appeal [2012] 2 MLJ 299 (FC)).* ***Aligned to this proposition is the maxim 'Parliament does not legislate in vain'****. It is for that reason that the court would not allow a provision of statute to be completely meaningless and therefore read words into it, if need be, to give life to it.*
>
> *[67] However, the same cannot be said to art 10(1) (b) of the Federal Constitution.* ***The provision of the article is very clear. Therefore, there is no necessity to read the word 'reasonable' into the article. If the***

court is to do so, it will have the effect of the court usurping the law-making powers of the Parliament."

[96] In addition, the case of ***Europemballage and Continental Can Corporation v Commission Case 6/72*** referred to by the Tribunal can readily be distinguished as the case does not deal with anti competitive agreement but abuse of dominant position in which market definition is pertinent.

[97] The Tribunal at paragraph 90 of its grounds of decision, further states among others, that a simplistic use of a deeming provision upon airlines business may not be proper as the widespread practices among airlines to undertake alliances and code sharing as well as doing maintenance on behalf of others.

[98] As mentioned earlier, in law, the deeming provision must be invoked if the prerequisite facts has been proven irrespective of any business parties are involved without exception including the airlines business. As such, the observation by the Tribunal that the use of the deeming provision upon airlines business is misplaced.

[99] The application of subsection 4(1) and the deeming provision under 4(2) of the Competition Act 2010 has been correctly explained in the ***Guidelines on Chapter 1 Prohibition : Anti-Competitive Agreement*** issued by the Commission which among others are the following:

(i) ***paragraph 1.1.***

"*Chapter 1 of the Competition Act 2010 ('the Act') prohibits anti-competitive agreements between enterprises and anti- competitive decision by associations. Agreements for the purposes of the Act shall include any form of contract, arrangement or understanding between enterprises, whether legally enforceable or not, and includes decisions by associations (such a trade and industry associations) and concerted practices. This is defined under Section 2 of the Act.*"

(ii) ***paragraph 1.2.***

"***Anti-competitive means the agreement which has the object or effect of*** *significantly preventing, restricting distorting competition in any market for goods or services in Malaysia or any part of Malaysia.*"

(iii) ***paragraph 2.14.***

"***Once anti-competitive 'object' is shown, then the MyCC does not need to examine the anti-competitive effect of the agreement.***"

(iv) ***paragraph 2.15.***

"*If an anti-competitive 'object' is not found, the agreement may still breach the Act if there is an anti-competitive effect.*"

(v) ***paragraph 3.25.***

"***Section 4(2) of the Act – Deemed Prohibited Horizontal Agreements.***

3.25. *It is important to note that Section 4(2) of the Act treats certain kinds of horizontal agreements between enterprises as anti-competitive. In this situations, the agreements are deemed to 'have the object of significantly, preventing, restricting or distorting competition in any market for goods or services'. This means for these horizontal agreements, the MyCC will not need to examine any anti-competitive effect of such agreements.* ***The agreements which are deemed to be anti-competitive include****:*

(a) *Fix directly or indirectly, a purchase or selling price or any other trading condition;*

(b) ***Share market** or sources of supply;*

(c) *Limit or control –*

(i) *production;*
(ii) *market outlets or market access;*
(iii) *technical or technological development; or*
(iv) *investment; or*

(d) *Perform an act of bid rigging."*

(v) paragraph 3.26.

"Section 4(2) of the Act also means that enterprises should avoid communicating with competitors about price or engaging in any kind of joint conduct that could restrict competition between them. ***Enterprises should ensure their pricing and marketing decisions are made independently****. To avoid possible future liability, enterprises should ensure that those making decisions on pricing, record the basis on which they make their decisions. Enterprises should ensure that sales and marketing people in the field understand that they should not talk to competitors about price, etc at association meetings or in the parket."*

(vi) Paragraph 3.27.

*"**Horizontal Agreements Deemed To Be Anti-Competitive***

***3.27.** The agreements which are deemed to be anti-competitive include*

3.27.1. Price fixing in the market in which the enterprises compete

This could also include a horizontal price fixing agreement that sets the price in a downstream or upstream market.

Price fixing includes fixing the price itself or fixing an element of the price, such as fixing a discount, setting a percentage or setting the permitted range of prices between competitors.

It could also include setting the price of transport charges (such as fuel charges), credit interest rate terms etc.

Price fixing could also include an agreement or arrangement to indirectly restrict price competition in some way, such as recommended pricing. This could also include agreeing to share price lists before prices are increased either directly or indirectly through an industry or trade association or to require competitors to consult each other before making a pricing decision.

3.27.2. Sharing markets or sources of supply

This could include competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base. *Agreeing to buy only from certain suppliers could also be deemed to be anti-conpetitive.*

Competitors agreeing to specialise in certain product, ranges of products or in particular technologies could also be deemed to be anti-competitive."

[100] Further, at paragraph 91, the Tribunal concluded that the collaboration does not give rise to the agreement having the object of significantly preventing, restricting or distorting competition in any market for goods or services.

[101] This finding of the Tribunal, I find, is against the weight of evidence before the Tribunal which I have discussed earlier.

[102] The other relevant factors which the Tribunal has not given sufficient consideration is the fact that on 30.12.2011, a day before Competition Act 2010 came into effect, MAS and on behalf of AirAsia, in relation to the Collaboration Agreement, has sent a letter to the Commission requesting for an exemption under section 6 or 8 of the said Act. The

reasonable inference here is that MAS and AirAsia from the very beginning, are aware that the Collaboration Agreement has the anti-competitive object.

[103] For ease of reference, sections 6 and 8 of CA 2012 are as follows :

(i) **section 6**.

"***Individual exemption***

6. *(1) An enterprise may apply to the Commission for an exemption with respect to a particular agreement from the prohibition under section 4.*

(2) The Commission may, by order published in the Gazette, grant the exemption if, in the option of the Commission, the agreement is one to which section 5 applies.

(3) An exemption granted under this section is referred to as an 'individual exemption'.

(4) The individual exemption granted by the Commission may be –

(a) subject to any condition or obligation as the Commission considers it appropriate to impose; and

(b) for a limited duration as specified in the order.

(5) An individual exemption may provide for it to have effect from a date earlier than that on which the order is made."

(ii) **section 8.**

"***Block exemption***

8. *(1) If agreements which fall within a particular category of agreements are, in the opinion of the Commission, likely to be agreement to which*

section 5 applies, the Commission may, by order published in the Gazette, grant an exemption to the particular category of agreements.

(2) An exemption granted under this section is referred to as a 'block exemption'.

(3) An agreement which falls within a category specified in a block exemption is exempt from the prohibition under section 4.

(4) The Commission in granting the block exemption may impose any condition or obligation subject to which a block exemption shall have effect.

(5) A block exemption may provide that –

(a) If there is a breach of a condition imposed by the block exemption, the Commission may, by notice in writing, cancel the block exemption exemption in respect of the agreement from the date of the breach;

(b) if there is a failure to comply with an obligation imposed by the block exemption, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement;

(c) if the Commission considers that a particular agreement is no one to which section 5 applies, the Commission may, by notice in writing, cancel the block exemption in respect of the agreement from such date as the Commission may specify;

(d) the block exemption shall cease to have effect at the end of a period specified in the order; or

(e) the block exemption is to have effect from a date earlier than that on which the order is made."

[104] Aside from this, on 2.5.2012, MAS, AirAsia and AirAsia X had entered into a Supplemental Agreement which among others, deleting clause 9 pertaining to the establishment and functions of the Joint Collaboration Committee and parts of clause 5, which relates to the business model agreed by parties in the Collaboration Agreement. This too, fortified the inference that MAS and AirAsia has knowledge of the anti competitive object of the Collaboration Agreement.

[105] The Tribunal has also decided that the Collaboration Agreement is only a conditional agreement and would only be enforceable if detailed anti trust analysis is conducted and all legal requirements are complied with.

[106] Firstly, the Tribunal has failed to consider the definition of agreement under section 2 of the Competition Act 2010 that includes any agreement whether or not legally enforceable. The definition of agreement is reproduced here again which is as follows :

> *"'**agreement**' means any form of contract, arrangement or understanding, **whether or not legally enforceable**, between enterprises, and includes a decision by an association and concerted practices."*

[107] In the present case, what important most, is whether the Collaboration Agreement is an agreement as defined under section 2 and has the anti-competitive object which is prohibited under subsection 4(1).

[108] By having a clause in the Collaboration Agreement that the terms in the agreement are subject to antitrust analysis and fulfillment of other legal requirements, does not alter the fact that if it has anti-competitive object, it is still an infringement of subsection 4(1).

[109] Be that as it may, based on the established facts, it cannot be said that the Collaboration Agreement is a conditional agreement which is unenforceable at the material time.

[110] In this Collaboration Agreement, there are time lines to be adhered to and actions to be taken where some of which has been carried out by parties. The relevant clauses *inter alia* are as follows :

(i) **Clause 6.2** of the agreement requires parties to discuss and agree on a plan to collaborate **within 6 months** from the date of the Agreement.

(ii) **Clause 9** – parties agreed to establish a Joint Collaboration Committee (JCC) which shall meet not less than once a quarter year and the first meeting shall be convened as soon as practical after the date of the agreement. This JCC was in fact has been established.

(iii) **Clause 5** – provides the business model which MAS and AirAsia has to focus on and Clause 5.6 *inter alia* states that MAS intends to review Fly Firefly Sdn Bhd operations. Consequently, after the execution of this Agreement, Fly Firely withdrew from the following routes and leaving AirAsia the sole low cost carrier :

(a) Kuala Lumpur – Kuching
(b) Kuala Lumpur – Kota Kinabalu
(c) Kuala Lumpur – Sandakan
(d) Kuala Lumpur – Sibu.

This action clearly consistent with clause 5 of the Collaboration Agreement and supports the Commission contention that the Agreement has the anti-competitive object.

Although, MAS contends that this withdrawal from the said routes is purely on economic or financial reason, it does not alter the fact that the withdrawal action has fulfilled the agreement between MAS and AirAsia under clause 5 and the result of which has the anti-competitive object.

[111] Further, the fact that parties to the Collaboration Agreement dated 9.8.2011 has entered into a Supplemental Agreement dated 2.5.2012 which *inter alia* to delete certain clauses of the Collaboration Agreement, only shows that the Collaboration Agreement is not a conditional agreement and only enforceable when certain action has been taken or certain laws has been fulfilled.

[112] Additionally, after the execution of the Collaboration Agreement, on the same day, 9.8.2011, a share swap arrangement was entered between Tune Air Sdn Bhd and Khazanah Nasional Berhad in which Tune Air Sdn Bhd held 20.5% stake in MAS and Khazanah Nasional Berhad held 10% stake in AirAsia. This action clearly is in pursuant to the collaboration which has been agreed by MAS and AirAsia.

As such, to say that the Collaboration Agreement has never been implemented is against the evidence before the Tribunal and such relevant evidence has not been taken into account in its proper contexts.

[113] To sum up, I find, the Collaboration Agreement by MAS and AirAsia has infringed subsection 4(1) of the Competition Act 2010 and MAS and/or AirAsia has not relieved its liability under ***section 5*** of the same act which provides :

> "*Notwithstanding section 4, an enterprise which is a party to an agreement may relieve its liability for the infringement of the prohibition under section 4 based on the following reasons :*
>
> *(a) There are significant identifiable technological, efficiency or social benefits directly arising from the agreement;*
>
> *(b) The benefits could not reasonably have been provided by the parties to the agreement without the agreement having the effect of preventing, restricting or distorting competition;*
>
> *(c) The detrimental effect of the agreement on competition is proportionate to the benefits provided; and*
> *(d) The agreement does not allow the enterprise concerned to eliminate competition completely in respect of a substantial part of the goods or services.*"

[114] I also find the penalty imposed by the Commission in its Final Decision is proportionate with the serious offence of infringing subsection 4(1) of the Competition Act 2010.

Conclusion

[115] Having considered all the issues raised in this application and all the cause papers including the relevant documents, I find the decision of the Tribunal dated 18.2.2016 is tainted with error of law and unreasonableness.

[116] In the circumstances, the Tribunal's decision is set aside and the Final Decision of the Commission dated 31.3.2014 is reinstated.

[117] MAS and AirAsia are to pay costs of RM10,000.00 each to the Commission and costs is subject to payment of allocatur fee.

DATED THIS 20TH DECEMBER 2018

[NORDIN BIN HASSAN]
JUDGE
HIGH COURT SPECIAL AND APPELLATE POWERS
KUALA LUMPUR HIGH COURT.

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