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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

Here are updates on some legal developments since the publication of our previous issue of Legal Insights.

On the penultimate day of the last session of the Dewan Rakyat of the Malaysian Parliament in April 2017, the Government deferred the Second and Third Readings of the *Law Reform (Marriage and Divorce)(Amendment) Bill 2016* to the next session of Parliament in July 2017. The reasons for the postponement are discussed in the article, "*Unilateral Conversion in Malaysia – Still at the Brink*" in this issue of our newsletter.

In this issue, we also feature a commentary on *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat* where the Federal Court, *inter alia*, held that the provisions of the Federal Constitution on separation of powers and independence of the judiciary cannot be altered even with a two-thirds majority of Parliament. This decision is undoubtedly one of the most significant decisions by the Malaysian courts in recent times.

In Legal Insights 1/2016, we had reported in "*Kit Kat Needs a Break*" that the English High Court upheld the refusal by the UK Intellectual Property Office to register the three-dimensional shape of the four-finger bar of *Kit Kat* wafer as a trade mark on grounds that it was not distinctive and that the grooves between the wafer fingers served a technical purpose, i.e. to enable the fingers to be separated for consumption. The decision of the High Court was upheld by the English Court of Appeal in May 2017.

In "*Court Rules in Favour of House*", featured in the previous issue of our newsletter, our Court of Appeal dismissed the appellant's challenge against the registration of a foreign judgment for a gambling debt. The appellant's application to the Federal Court for leave to appeal was rejected in May 2017, thus bringing closure to this case.

We hope that you will enjoy reading the articles and case commentaries that we have lined-up for you in this issue of our newsletter.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

CONTENTS

1 Message from the Editor-in-Chief

7 Announcements

ARTICLES

4 The Third Wave

6 Catch Me if You Can

10 Unilateral Conversion in Malaysia – Still at the Brink

16 The Solvency Test

20 Five Tax Implications Arising from the Companies Act 2016

CASE COMMENTARIES

8 Yes X1R, it's a Well-Known Mark – Y-Teq Auto Parts (M) Sdn Bhd v X1R Global Holding Sdn Bhd

12 One Claim or Separate Claims? – AIG Europe Ltd v Woodman

14 Court Thwarts Overzealous Land Acquisition – United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian

18 Doctor Knows Best? – Hii Chii Kok v Ooi Peng Jin London Lucien

LANDMARK CASE

2 Federal Court Reasserts Independence of the Judiciary – Semenyih Jaya Sdn Bhd v Pentadbir Tanah

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FEDERAL COURT REASSERTS INDEPENDENCE OF THE JUDICIARY

Vijay Raj explains the significance of the Semenyih Jaya Case

SECTION 40D – STRUCK DOWN

The Federal Court has, in its recent decision in *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat & Another Case* [2017] 5 CLJ 526, unanimously struck down section 40D of the Land Acquisition Act 1960 ("Act") for being *ultra vires* the Federal Constitution.

Both appeals concerned a challenge to the constitutionality of certain provisions of the Act, including section 40D. One was an appeal by the landowner against a decision of the Court of Appeal and the other, a reference by the Court of Appeal of constitutional questions that arose in the course of an appeal for determination by the Federal Court.

In one of the appeals, the appellant also challenged the Court of Appeal's decision not to recognise its claim for loss of profit as a result of the extinguishment of the business carried out by the appellant on the land that was acquired.

Section 40D, which was introduced by way of an amendment to the Act in 1998, empowered the two valuers (commonly referred to as assessors) who assist a High Court Judge in a Land Reference, to determine the amount of compensation that ought to be awarded in respect of a land acquisition. It reads as follows:

"(1) In a case before the Court as to the amount of compensation or as to the amount of any of its items the amount of compensation to be awarded shall be the amount decided upon by the two assessors.

(2) Where the assessors have each arrived at a decision which differs from each other then the Judge, having regard to the opinion of each assessor, shall elect to concur with the decision of one of the assessors and the amount of compensation to be awarded shall be the amount decided upon by that assessor.

(3) Any decision made under this section is final and there shall be no further appeal to a higher Court on the matter."

The Federal Court held that, by virtue of section 40D, a High Court Judge in a Land Reference could not award compensation which differed from the amount decided by the assessors, and if the assessors themselves differed on the amount, the High Court Judge could only concur with one of them. Tan Sri Datuk Zainun Ali, FCJ, who delivered the judgment of the Federal Court commented:

"Wherefore now stands the Judge? It would appear that he sits by the sideline and dutifully anoints the assessors' decision."

JUDICIAL POWER OF THE FEDERATION

In striking down the provision, the Federal Court held that it is not possible for Parliament to pass laws that have the effect of diluting the exercise of judicial power by the Judiciary because the Federal Constitution vests that power in the Judiciary. The Federal Court described the concept of judicial power as follows:

"Judicial power is the power every sovereign State must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights related to life, liberty or property ..."

Prior to the introduction of section 40D in 1998, there had been a period of time, that is until 1984, when it was not objectionable for judges in Land References to sit with assessors to determine compensation for compulsory acquisitions of land. Those sittings were however held pursuant to older provisions of the Act that were repealed in 1984, and although the assessors played a vital role thereunder in giving advice regarding the amount of compensation which ought to be awarded, the decision on the amount of compensation would ultimately be arrived at by the judges.

CHECK AND BALANCE

The Federal Court took the view that the placement of judicial power in the Judiciary represents an important feature of our democratic system of government because it is the judicial branch of government which is tasked with the duty of checking and balancing the powers vested in the other two branches of government, namely the legislative branch represented by Parliament, and the executive branch represented by the Prime Minister and his Cabinet.

> **"it is not possible for Parliament to pass laws that have the effect of diluting the exercise of judicial power"**

It should go without saying that the judicial branch of government can only be effective as a check and balance if it is independent of legislative and executive influences. Law students learn very early on that the need for an independent judiciary and an effective system of checks and balances is of utmost importance and that that need, forms an integral part of the doctrine of separation of powers which modern democracies aspire to implement.

Although the doctrine and its requirements may seem obvious, the matter however had not been clear-cut in the context of our Judiciary due to an amendment to the Federal Constitution in 1988. The amendment in question was carried out by Act A704 which deleted the reference to the vesting of the judicial power of the Federation in the courts from Article 121(1) of the Constitution. However, according to the Federal Court, the words "judicial power" continued to remain in the marginal note to the said Article, and they currently appear in the shoulder

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note thereof as reflected in the current, reprinted, version of the Federal Constitution. The Federal Court then stated:

"Thus it is clear to us that the 1988 amendment had the effect of undermining the judicial power of the Judiciary and impinges on the following features of the Federal Constitution:

(i) The doctrine of separation of powers; and

(ii) The independence of the Judiciary.

With the removal of judicial power from the inherent jurisdiction of the Judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign. This result was manifestly inconsistent with the supremacy of the Federal Constitution …"

BASIC FABRIC CANNOT BE ALTERED

The matters stated above formed the setting for what is perhaps the most important aspect of the Federal Court's judgment – which is their Lordships' view that it is not permissible for Parliament to amend the basic structure of the Federal Constitution even if the proposed amendment is passed by both Houses of Parliament with a two-thirds majority.

Specifically, the Federal Court said that Parliament does not have power to make amendments to the Federal Constitution that had the effect of undermining the independence of the Judiciary and the doctrine of separation of powers, both of which are basic features of our Constitution. According to Tan Sri Datuk Zainun Ali, FCJ:

"It is worthwhile reiterating that Parliament does not have power to amend the Federal Constitution to the effect of undermining the features as stated in (i) and (ii) above for the following reasons:

The effect of sub-s. 8(a) of the Amending Act A704 appeared to establish Parliamentary supremacy; this consequentially suborned the Judiciary to Parliament, where by virtue of the amendment, Parliament has the power to circumscribe the jurisdiction of the High Court.

Consequentially this has the unfortunate effect of allowing the executive a fair amount of influence over the matter of the jurisdiction of the High Court."

Her Ladyship referred to various decisions where the apex court had rejected the notion of Parliamentary supremacy and in particular to *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2010] 2 MLJ 333, 342 where Gopal Sri Ram FCJ said:

"… Further it is clear from the way in which the Federal Constitution is constructed there are certain features that constitute its basic fabric. Unless sanctioned by the Constitution itself, any statute (including one amending the Constitution) that offends the basic structure may be struck down as unconstitutional."

PROSPECTIVE EFFECT OF DECISION

The Federal Court however clarified that their declaration of the unconstitutionality of section 40D will carry only a prospective effect. In other words, it will not be possible for completed Land Reference cases to be reopened by former landowners, although an exception was made for cases pending at the appellate stage to be revisited if the application of section 40D may have caused prejudice to the appellants therein.

BUSINESS LOSS

Turning their attention thereafter to the facts of the appeal before them, the Federal Court held that the Land Administrator and the High Court failed to award compensation for the extinguishment of the business that had been undertaken on the land by the Appellant at the time of acquisition and consequently, the case was remitted to the High Court for a determination of the appropriate amount of compensation that ought to be awarded on that ground.

Ordering compensation to be paid for the extinguishment of business due to an acquisition of land is itself significant because the First Schedule of the Act, which lays down the principles relating to the determination of compensation in land acquisitions, does not expressly provide for such compensation. However, the Federal Court held that that head of compensation is permissible as it ought to be considered part of the "market value" of the land which had been acquired.

CONCLUSION

The importance of *Semenyih Jaya* lies not in the mere fact that the apex court struck down section 40D of the Act. It is a landmark case in Malaysian constitutional law as it makes it clear that the Federal Constitution contains certain entrenched provisions that even Parliament cannot amend with a two-thirds majority, including for example, those that have the effect of undermining the doctrine of separation of powers and the independence of the Judiciary.

This decision has received widespread praise from members of the legal fraternity and the academia as it affirms the importance of an independent judiciary and the doctrine of separation of powers in forming the bedrock of a truly democratic system of government.

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THE THIRD WAVE

Malaysia launches the framework for digital investment management services

The Securities Commission Malaysia ("SC") has in recent years taken various measures to increase the breadth and depth of the Malaysian capital market by introducing frameworks for new products which leverage on information technology and the digital space.

The first step was taken in 2015 when the SC introduced the framework for equity crowdfunding. This was followed by the launch of the peer-to-peer financing framework in 2016. On 9 May 2017, the SC took the third step by introducing the framework for digital investment management services.

WHAT IS IT?

Digital investment management services, also described as "*robo-advisory*", is of fairly recent origin. It started in the United States about a decade ago and has since spread to the United Kingdom, Canada, Germany and Australia.

According to the SC's media release on 9 May 2017, digital investment management is a fund management business which incorporates innovative technologies into discretionary portfolio management services.

> " digital investment management services ... leverage on technology such as algorithms and automated processes "

Hence, unlike traditional investment management services, digital investment management services seek to leverage on technology such as algorithms and automated processes to execute orders and manage and rebalance investment portfolios with minimal or no human intervention.

In other words, digital investment management services can be aptly encapsulated in the tag line adopted by Canadian robo-advisor, Wealthsimple – "*Investing on Autopilot*".

THE FRAMEWORK

To implement the framework for digital investment management services, amendments were made by the SC to its Licensing Handbook ("Handbook") and Guidelines on Compliance Function for Fund Management Companies ("FMC Compliance Guidelines") on 9 May 2017.

LICENSING MATTERS

As fund management is a regulated activity under the Capital Markets and Services Act 2007, a person who proposes to offer digital investment management services is required to obtain a fund management licence in relation to portfolio management as a digital investment manager under paragraph 2.05(2) of the Handbook. The SC has announced that parties who are interested in providing these services may apply for such licence as from 9 May 2017.

General requirements

The general requirements that have to be satisfied for a fund management licence (including a fund management licence for digital investment management) are set out in Chapter 4 of the Handbook. Among the requirements that are to be satisfied are that the applicant must –

(1) be a company incorporated in Malaysia;

(2) satisfy the fit and proper criteria set out in paragraph 4.01(1) of the Handbook;

(3) have (i) clear lines of responsibility and authority in its organisational structure; (ii) the necessary information technology systems and infrastructure for its business; (iii) adequate systems of internal control; (iv) risk management policies and processes; and (v) policies and procedures for managing conflicts and monitoring of unethical conduct and market abuse; and

> " An applicant for such a licence must ... at all times, (have) a minimum shareholders' fund of RM2.0 million "

(4) ensure that its directors, chief executive officers, managers and controllers are fit and proper and have the requisite qualifications and experience, as set out in the relevant provisions of Chapter 4 of the Handbook.

Specific requirements

Chapter 4 of the Handbook also sets out specific requirements that are to be satisfied by an applicant for a fund management licence for digital investment management services. An applicant for such a licence must -

(1) have a sufficient understanding of the rationale, risks and rules behind the algorithm that underpins its digital investment management business;

(2) ensure at all times that the outcomes provided by its algorithm (i) are consistent with the company's investment strategies; (ii) commensurate with the risk profile of the investor; and (iii) comply with securities laws;

(3) have the system to support the digital investment management

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business, including maintaining a secure environment pursuant to the SC's Guidelines on Management of Cyber Risk and other relevant guidelines;

(4) comply with the digital value proposition, including demonstrating that (i) its digital business model can deliver positive outcomes to its target investors and other target beneficiaries; (ii) the delivery of its services is user-centric; and (iii) the core components of its portfolio management services, including risk profiling and asset allocation and rebalancing, are automated;

(5) have a director who has a minimum of five years relevant experience in fund management and holds a Capital Markets Services Representative's Licence for portfolio management;

(6) have a dedicated compliance officer or a person responsible for compliance; and

(7) have a minimum paid up capital of RM2.0 million and at all times, a minimum shareholders' fund of RM2.0 million.

A holder of a fund management licence for digital investment management services may be wholly-owned by non-Malaysians.

The SC may impose the conditions and restrictions set out in Chapter 7 of the Handbook that are applicable to a holder of a fund management licensee on a holder of a fund management licence for digital investment management services.

Variation of existing licence

A holder of a fund management licence for portfolio management or for boutique portfolio management may apply to the SC to vary its licence to include digital investment management if it satisfies the criteria that apply to digital investment management.

Outsourcing

A holder of a fund management licence for digital investment management services is permitted to outsource its services to a technology provider subject to compliance with the relevant requirements in Chapter 10 of the Handbook.

COMPLIANCE MATTERS

As a general rule, every holder of a fund management licence is required to comply with the FMC Compliance Guidelines. These requirements would also apply to a holder of a fund management licence for digital investment management.

General requirements

The requirements include complying with the 11 core principles set out in Chapter 1 of the FMC Compliance Guidelines, such as conducting its business with integrity, due care, skill and diligence, acting in the interest of its clients, avoiding conflicts of interest, protecting assets of its clients and taking reasonable care to ensure that its affairs are conducted in a responsible manner and with adequate risk management and in compliance with a sound compliance framework.

The board of directors and compliance officer of a holder of a fund management licence are required to comply with their respective responsibilities set out in Chapter 2 of the FMC Compliance Guidelines. The board is also required to establish a risk management framework that commensurate with the licensee's business.

To safeguard the assets of its clients, a holder of a fund management licence is required to appoint a qualified custodian to hold the assets of its clients in trust for them.

Additional requirements

In addition to the general requirements, a holder of a fund management licence for digital investment management is required to comply with the additional requirements set out in Chapter 13 of the FMC Compliance Guidelines. These include an obligation on the licensee's board of directors to ensure that the licensee has the technological capabilities to undertake digital investment management business. The licensee must–

(1) continue to comply with the requirements set out in items (1) to (3) of the specific requirements applicable to an applicant for a fund management licence for digital investment management set out earlier in this article;

(2) conduct at least an annual review on the effectiveness of the governance and supervision of the technology and algorithm underpinning its digital investment management business;

(3) ensure that its risk management framework includes risks related to the digital investment management business;

(4) disclose and display prominently on its platform, all relevant information including the investment strategies used, the fact that an algorithm is used, the function of the algorithm used, the assumption and limitation of the algorithm, the risks inherent in the use of technology and the fees, charges and remuneration for the services provided; and

(5) establish, maintain and implement written policies and procedures including ensuring that (i) the algorithm is

continued on page 22

CATCH ME IF YOU CAN

Will Sen and Nathalie provide insights on what to do if you are a victim of internal fraud

Commercial fraud has been on the rise in recent years. Take the 2012 case where the directors of a now de-listed company were eventually sued for among others, breach of fiduciary duties and misappropriation of funds. Just last year, a former senior manager was charged with 115 counts of corruption charges involving more than RM100 million for issuing unauthorised purchase orders purportedly for the supply of plastic resin to his former employer, a Malaysian unit of an international group of companies.

In light of the current predicament, what are the steps that companies should take upon the discovery of fraud and how can monies be recovered? This article aims to provide a practical guide on some measures which may be adopted in the investigation of fraud and the eventual prosecution of fraudsters.

CORDON OFF THE CRIME SCENE

When fraudulent activity has first been discovered (e.g. large amounts of unexplained transactions found in accounting records), the first step to take is to preserve the evidence. Any documentary evidence of the fraudulent transactions, internal and external emails between employees and between employees and third parties in relation to the suspected fraud should be kept in their original form. This contemporaneous evidence will serve as the foundation upon which a legal case for fraud may be built.

> **“ the first step to take is to preserve the evidence ”**

SEND IN THE SLEUTHS

In order to put the pieces of the puzzle together, companies would have to assemble a team comprising different types of experts for an effective investigation. Firstly, an experienced legal team to work closely with the company's staff to obtain details of the fraud to construct a strong legal case. Secondly, a good forensics consultant who will be able to image computer hard disks and other devices to extract relevant emails and documents showing the mechanics of the fraud, even if the information may appear to have been deleted from the hard-disks. Thirdly, a private investigator to obtain details of the potential fraudsters and their assets.

A CALL TO ARMS

Once fraud has been established, a company may recover damages due to breach of fiduciary duties by directors or employees. It is clear that directors owe fiduciary duties to the company under company law. However, to impose a fiduciary duty on other employees, one must tie the fraudulent actions of the employee to breaches of particular duties that the employee owes to the company, e.g. the duty to act in the best interests of the company, which is usually found in the company's terms of employment or employees' handbook. To tie the fraudsters to the damages claimed, the law will impose a constructive trust which imposes liability upon the fraudsters for the monies or assets wrongly siphoned from the company.

WEAPONS IN THE ARSENAL

Search and freezing orders

After the initial investigations have been completed and the main perpetrators have been identified, the company may apply for search and freezing orders to assist in the legal case. A search order, also known as an *Anton Piller Order*, is an order of court which allows the applicant to search any premises specified in the search order for documents or other items which would assist the applicant's case. For a search order to be granted, there must be a strong *prima facie* case, serious damage to the applicant, and the defendants must have in their possession incriminating documents or items with a real possibility that they may destroy such material if forewarned (see *Arthur Anderson Co v Interfood Sdn Bhd* [2005] 2 CLJ 889).

On the other hand, a freezing order, also known as a *Mareva Injunction* in Malaysia, is an order of court which prevents the defendants from dissipating their assets. For the Court to grant a freezing order, the applicant must show that he has a good arguable case, the defendants have assets within the jurisdiction and there is a real risk of dissipation of such assets (see *Aspatra Sdn Bhd & 21 Ors v Bank Bumiputra Malaysia Bhd & Anor* [1988] 1 MLJ 97).

As soon as a freezing order is granted, it should be served on all banks in Malaysia to ensure that the bank accounts of the defendants will be frozen. Further, it is important to include a mandatory disclosure order to compel the defendants to disclose information regarding their assets by way of an affidavit. It is not a straightforward process to obtain such an order, taking into account that the order may be oppressive. Hence, the applicant must provide an undertaking of damages to the defendant, in the event the plaintiff fails to prove his case. There is also a need to allow for reasonable monthly withdrawal from a defendant's bank account for sustenance purposes, and if the defendant is a company, then sufficient monies for the running of the ordinary course of its business.

Following the money – asset tracing

Asset tracing requires the combined efforts of the company, its legal team, forensic consultant and private investigator. The key wrongdoers may be identified from information and evidence gathered regarding the fraud perpetrated in the company. Next, the information obtained from discovery applications filed against the banks and third parties (elaborated on below) would be analysed by the forensics team to determine the flow of monies from the company out to the fraudsters, and from the fraudsters to third parties.

Monies in banks – you can bank on it

A fraudster may transfer proceeds of the fraud to his bank

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account. He thinks that he may able to hide behind the curtains of bank confidentiality. Not any more.

In the landmark English Court of Appeal decision of *Bankers Trust Co v Shapira* [1980] 3 All ER 353, a specific discovery mechanism against banks was introduced by the Courts. A 'Bankers Trust' application enables discovery against a bank for information against a fraudster – such as bank statements, fund transfer documents, cheque images and bank opening forms. Order 24 Rule 7A of the Rules of Court 2012 also provides for discovery against third parties (which includes banks). The application can extend to bank accounts of fraudsters and other recipients of fraud monies.

Such an application can be filed either pre-action, or post-filing of the suit, depending on the strategy of a plaintiff. The former may be advantageous to ascertain if there is a cause of action against a suspected fraudster. A classic example is if there is an exponential spike in the monies in one's bank accounts, which is likely to be from fraudulent proceeds. As for the latter, this is useful to determine where the proceeds of the fraud went, with a view of eventual recovery if a plaintiff succeeds in his claim.

Monies with friends and family – circling the inner circle

More often than not, monies are remitted to friends and family of a fraudster. Fraudsters prefer to keep the monies away from themselves, but close enough to be tapped into when need be. Hence, friends and family.

A cause of action may be found against these friends and family. To this end, an application for discovery against such third parties (or non-parties), commonly known as the *Norwich Pharmacal* application, can be filed. Such an application was first considered in the landmark decision of *Norwich Pharmacal Co & Ors v Commissioners of Customs and Excise* [1973] 2 All ER 943. This has since been adopted by the Malaysian Courts (see *First Malaysia Finance Bhd v Dato' Mohd Fathi bin Haji Ahmad* [1993] 3 CLJ 329). As in the case of a 'Bankers Trust' application, Order 24 Rule 7A of our Rules of Court 2012 can be resort to for discovery against such third parties.

Monies elsewhere - a breeze to freeze?

The fraudster may have monies in foreign bank accounts and other assets out of the country. This is where the worldwide freezing order comes in. Monies and other assets of a fraudster which are located abroad may be frozen if a plaintiff is able to show the likelihood of dissipation of such monies, pending the outcome of the plaintiff's suit against the fraudster. The legal principles relating to such orders have been recognised by our Courts (see *Metrowangsa Asset Management Sdn Bhd* [2005] 1 MLJ 654).

Criminal investigation – upping the ante

Civil suits and remedies are not the only weapons in the arsenal of a victim of fraud. There is also a criminal element to fraud. A victim of fraud should lodge a police report and where appropriate, to the Malaysian Anti-Corruption Commission for corruption-like offences.

If prosecution is commenced against the alleged fraudster, the victim may also consider participating in the criminal proceedings by holding a watching brief. The victim should also cooperate with the authorities and provide all forms of assistance requested.

DON'T START THE CHASE, IF YOU CAN

This article elucidates the various measures one can take after fraud has occurred. Catching a fraudster is no mean feat, and requires stamina, time, effort and resources to be expanded, over and above losses which have already been suffered. It is critical to maintain vigilance, and insofar as companies are concerned, putting in place an effective system of internal controls and proper compliance mechanisms may reduce the risk of fraud. After all, it is better not to start the chase, if you can.

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ANNOUNCEMENT

SENIOR ASSOCIATE

The Partners are pleased to announce that Bell Boo Hsiu Ting has been promoted to Senior Associate.

Bell is a member of our Corporate Division. She obtained her Bachelor of Laws from Cardiff University in 2005 and her Master of Laws from City University of Hong Kong in 2008. Bell was admitted as an Advocate and Solicitor of the High Court of Malaya in September 2011.

We have no doubt that Bell will continue to make invaluable contributions to the Firm.

YES X1R, IT'S A WELL-KNOWN MARK

Loke Sin Wei highlights the first reported case on well-known trade marks in Malaysia

In line with the Paris Convention for the Protection of Industrial Property, Malaysia introduced the protection of marks which are well-known in Malaysia through the enactment of the Trade Marks (Amendment) Act 2000. To achieve this, new provisions, namely sections 14(1)(d) and 14(1)(e) were introduced to the Trade Marks Act 1976 ("Act").

Section 14(1)(d) of the Act stipulates that a mark shall not be registered if it is identical or so nearly resembles a mark which is well-known in Malaysia for the same goods or services of another proprietor.

Section 14(1)(e) of the Act prohibits the registration of a mark if (i) the mark is well-known and registered in Malaysia for different goods or services from those in respect of which registration is applied for; and (ii) the use of the mark in relation to those goods or services would indicate a connection to the proprietor of the well-known mark and the interests of the proprietor of the well-known mark are likely to be damaged by such use.

In *Y-Teq Auto Parts (M) Sdn Bhd v X1R Global Holding Sdn Bhd & Anor* [2017] 2 MLJ 609, the Court of Appeal reviewed the application of section 14(1)(e) of the Act.

THE FACTS

The 1st Respondent was the registered proprietor and the 2nd Respondent the registered user, of the mark depicted in **Figure 1** ("Respondents' Mark") for goods in Class 4 (industrial oils, greases, other oil lubricants) ("Respondents' Goods").

Figure 1
The Respondents' Mark

Figure 2
The Appellant's Mark

The Appellant was the registered proprietor of the mark depicted in **Figure 2** ("Appellant's Marks") for goods in Classes 7 (air filters, fan belts, oil filters for engines and vehicles), 9 (audio apparatus, batteries for vehicles), 12 (automobiles, vehicles, motor and engines for vehicles) and 35 (advertising, business management, business administration, office functions) and had a pending application for the same mark in Class 25 (clothing, footwear, headgear) ("Appellant's Goods").

The Respondents applied to the High Court for, *inter alia*, an order to expunge and remove the Appellant's Marks from the Register of Trade Marks pursuant to sections 45 and 46 of the Act. It was the Respondents' case that the Appellant's Marks were entries made without sufficient cause or were wrongfully remaining in the Register. The Respondents relied on section 14(1)(e) of the Act to argue that the use of the Appellant's Marks were likely to cause confusion and deception to the public as they were identical to the Respondents' Mark, which is well-known in the same industry, albeit for different goods.

DECISION OF THE HIGH COURT

The High Court elaborated on the four conditions the Respondents must prove, on the balance of probabilities, to rely on section 14(1)(e) of the Act, namely that:

(a) the Respondents' Mark is well-known;

(b) the Respondents' Mark is registered for goods which are not the same as the Appellant's Goods;

(c) the use of the Appellant's Marks on the Appellant's Goods would indicate a connection between the Appellant's Goods and the Respondents' Goods ("connection condition"); and

(d) the Respondents' interests are likely to be damaged by the Appellant's use of the Appellant's Marks ("damage condition").

Whether the Respondents' Mark is well-known

Regulation 13B of the Trade Marks Regulations 1997 sets out the general criteria that may be taken into account to determine whether a mark is well-known in Malaysia:

(a) the degree of knowledge or recognition of the mark in the relevant sector of the public;

(b) the duration, extent and geographical area of any use of the mark;

(c) the duration, extent and geographical area of any promotion of the mark, including advertising or publicity, and the presentation, at fairs or exhibitions, of the goods or services to which the mark applies;

(d) the duration and geographical area of any registrations, or any applications for registration, of the mark to the extent that they reflect use or recognition of the mark;

(e) the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognised as well known by competent authorities; and

(f) the value associated with the mark.

The trial judge took the view that the criteria laid down in Regulation 13B were not exhaustive, but act as guidelines to assist the courts to reach a determination. When deciding whether a mark is well-known, the courts may consider other factors which were not specifically provided for in Regulation 13B. The Court also took the view that the criteria is not mandatory as the provision uses the permissive term "*may*".

The trial judge was satisfied that the Respondents' Mark was a well-known mark as the Respondents had adduced sufficient

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evidence in support thereof, such as (i) the Respondents' Mark was used on the Respondents' Goods in more than 30 countries and had been certified by various established centres, such as the US's National Aeronautics and Space Administration (NASA); (ii) the establishment of a research and development centre and a laboratory in the US for the Respondents' Goods; and (iii) the Respondents' successful enforcement of their rights to the Respondents' Mark via a consent order.

Whether the Respondents' Goods are different

There was no dispute that the Respondents' Goods (i.e. lubricant oil) differed from the Appellant's Goods (i.e. motorcycle parts). Thus the Respondents had satisfied this condition.

The connection condition

The High Court held that this condition would be satisfied if the Respondents could prove any of the following connections:

(a) an 'origin connection', where use of the Appellant's Marks would indicate that the Appellant's Goods emanated from the same source as the Respondents' Goods;

(b) a 'quality connection', where use of the Appellant's Marks would indicate that the Appellant's Goods have the same quality as the Respondents' Goods; or

(c) a 'business connection', where the public may perceive that the Respondents and Appellant were related companies or there is some kind of business relationship between the Respondents and Appellant.

Based on the evidence adduced by the Respondents, the High Court found that there was a connection as to the origin of the goods as a distributor had mistakenly thought that the Respondents' Goods were from the Appellant. The High Court also found a connection in quality in that the relevant public would assume the Appellant's Goods were of the same high quality as the Respondents' Goods.

The damage condition

Lastly, the Court also had to consider the damage condition. The High Court held that the damage condition would be satisfied if the Respondents could prove any of the following:

(a) the Respondents suffered a dilution to their goodwill in Malaysia;

(b) there is a loss in the sales of the Respondents' Goods;

(c) the Respondents were restricted from expanding the use of the Respondents' Mark to goods in the classes in which the Appellant's Marks were registered; or

(d) the Respondents were exposed to the risk of incurring legal liability from purchasers who obtained the inferior goods in the mistaken belief that they had acquired the Respondents' Goods.

The High Court found that the Respondents had proven the damage condition as they had adduced evidence of confusion where (i) a distributor had refused to distribute the Respondents' Goods thinking that they originated from the Appellant; and (ii) purchasers had obtained the Appellant's Goods in the mistaken belief that they had acquired the Respondents' Goods known for their high quality, and these purchasers may claim damages from the Respondents due to the inferior quality of the Appellant's Goods.

As all four conditions had been fulfilled, the High Court held that the Appellant's Marks had been entered without sufficient cause or had wrongfully remained in the Register and ordered that the Appellant's Marks be expunged and removed from the Register.

DECISION OF THE COURT OF APPEAL

The Court of Appeal declined to interfere with the High Court's findings of fact and affirmed the High Court's decision on, amongst others, the following grounds: (i) reading sub-sections 14(1)(a) and 14(1)(e) of the Act together, if the mark complained of would give rise to unfair advantage or impinge the distinctive character or repute of the complainant's mark, the former should be refused registration; (ii) the conclusiveness of a registered mark as provided by section 37 of the Act will not ordinarily be applicable to a mark which has been registered in breach of section 14; and (iii) the High Court had correctly applied the legal principles based on the facts and evidence adduced at trial.

CONCLUSION

This case is noteworthy as it is the first reported Malaysian case which elaborated on the application of section 14(1)(e) of the Act. The case serves as an important development in the law on trade marks in Malaysia as it provides guidance on the applicability and interpretation of provisions in the Act with respect to the protection of well-known marks.

The case also signals that the Malaysian courts may be ready to accept the concept of trade mark dilution.

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UNILATERAL CONVERSION IN MALAYSIA – STILL AT THE BRINK

Trevor Padasian discusses the Law Reform (Marriage and Divorce)(Amendment) Bill 2016

The unilateral conversion of minor children by their converted parent, typically the father, without the consent of the other parent is not unique to Malaysia. However, our multi-racial and multi-religious society is conducive to the increased frequency of this problematic legal phenomenon. This is illustrated well in two recent high-profile cases.

THE INDIRA GANDHI CASE

The first is *Indira Gandhi a/p Mutho v Pengarah Jabatan Islam Perak & Ors* [2013] 5 MLJ 552 ("*Indira Gandhi*"). In this case, the Ipoh High Court *qua* Family Court, in dealing with the unilateral conversion of minor children to Islam by their converted father, was compelled to wade through the complex and thorny interface between civil law and Islamic law in Malaysia. In the event, in a soundly reasoned decision delivered on 25 July 2013, the High Court quashed the minor children's conversion certificates obtained by the converted father (without the knowledge or consent of the non-converting mother) and granted a declaration that the minor children had not been converted.

However, the Court of Appeal [*Pathmanathan Krishnan v Indira Gandhi Mutho & Other Appeals* [2016] 1 CLJ 911 ("*Indira Gandhi on Appeal*")] by a 2:1 majority, albeit with a strong dissent, reversed the High Court decision on 30 December 2015.

Two stand-out issues in *Indira Gandhi* as decided by the High Court were, firstly, the right of the non-converting parent to be heard before the minor children can be converted and, secondly, the Federal Constitution did not take away the powers of the civil High Courts the moment a matter came within the jurisdiction of the Syariah Courts, the latter being merely a creature of state law, without the jurisdiction to decide on the constitutionality of matters said to be within its exclusive purview.

The appeal to the Federal Court was heard in late 2016 but the apex court has yet to issue its decision.

THE DEEPA CASE

In the second case, *Viran Nagapan v Deepa Subramaniam & Other Appeals* [2016] 3 CLJ 505, the Federal Court, although confirming that a converted spouse cannot use his conversion to Islam to escape responsibilities under the Law Reform (Marriage and Divorce) Act 1976 ("Act"), ordered the custody of one of the children to be given to the non-converting mother and custody of the other child to be given to the converted father after interviewing the two children in question. The case arose when that other child had been "taken away" by the father from the mother who had been given custody of both children.

THE PROPOSED AMENDMENTS

With this interface between civil law and Islamic law in Malaysia as a background, Parliament has introduced the Law Reform (Marriage and Divorce) (Amendment) Bill 2016 ("Bill") to address some of the main issues that arise from unilateral conversion. The Bill was tabled for its First Reading before the Dewan Rakyat of the Malaysian Parliament on 21 November 2016 and debate is scheduled to continue when Parliament reconvenes in July 2017.

The Explanatory Statement

According to the Explanatory Statement, the Bill seeks to "*address issues arising out of the conversion to Islam of one party to a marriage.*" The Explanatory Statement further states that the Bill seeks to give the right to the converting spouse to file a petition for divorce under the Act which currently only gives the non-converting spouse the right to petition for divorce. Oddly, no mention is made in the Explanatory Statement of the right of the non-converting spouse in relation to the conversion of the minor children of the marriage.

The Bill addresses two aspects of conversion matters. First, the prohibition of unilateral conversion of minor children and second, the other less controversial matters arising from such conversion, namely the expansion of right of access to the civil courts and succession-related matters.

Access and succession matters

Clause 4 of the Bill proposes to amend section 51(1) of the Act to enable a converted spouse or both a converted spouse and a non-converting spouse to present a petition for divorce. Currently, only a non-converting spouse may do so in the event of conversion to Islam by the other spouse.

In addition, Clause 5 of the Bill introduces a new section 51A to ensure that the next-of-kin of the converted spouse who subsequently dies before the non-Muslim marriage is dissolved will be entitled to the matrimonial assets. Factors which the court is to take into account in making the distribution include the extent of the contributions made towards the acquisition of the matrimonial assets, the debts owing, the duration of the marriage and the needs of the children.

Unilateral conversion prohibited

Clause 7 of the Bill proposes to introduce a new section 88A to the Act. The new provision emphatically and unequivocally states:

"*Where a party to a marriage has converted to Islam, the religion of any child of the marriage shall remain as the religion of the parties to the marriage prior to the conversion, except where both parties to the marriage agree to a conversion of the child to Islam, subject always to the wishes of the child where he or she has attained the age of eighteen years.*"

It has been suggested by certain quarters that if the Bill becomes law, this new provision may in one fell swoop provide a cogent response and resolution to the arguments by the converted spouse in *Indira Gandhi* justifying the unilateral conversion in that case and resolve the issues in dispute therein. The principal arguments in *Indira Gandhi* are as follows:

(1) The fact that the conversion of the father and his children was within the jurisdiction of the Syariah courts which has exclusive authority to decide if a person is a Muslim (relying on

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a Federal Court decision of *Subashini Rajasingam v Saravanan Thangathoray & other appeals* [2008] 2 CLJ 1 ("*Subashini*")) and may not be disputed by the non-converting mother.

(2) The Syariah Courts are of equal standing to the Civil Courts by virtue of Article 121(1A) of the Federal Constitution.

(3) Most problematic of all is the contention that the definition of "parent" in Article 12(4) of the Federal Constitution refers to a single parent. Article 12(3) provides:

"No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own."

Article 12(4) provides:

"For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian."

(4) In the Bahasa Malaysia version (which is the authoritative text by virtue of Article 160B of the Federal Constitution), the word used is "*ibu bapa*" instead of "*kedua ibu bapa*". Therefore, the singular instead of the plural would be operative. This was one of the main planks of reasoning of the Federal Court's majority decision in *Subashini* on 27 December 2007.

The proposed new section 88A is in line with, if not quite reinforcing, the views of the High Court in *Indira Gandhi*, the dissenting Federal Court judge in *Subashini* and the dissenting Court of Appeal judge in *Indira Gandhi on Appeal*. The High Court in *Indira Gandhi* held that the unilateral conversion, amongst others, violated natural justice, the rights to equality and freedom of religion entrenched in the Federal Constitution and international norms and conventions relating to children. According to the dissenting judge in *Indira Gandhi on Appeal*:

"Syariah laws in this country are quite straight-forward and does not infringe the rights of non-Muslims in any manner and a just decision can be reached if counsels [sic] *are sufficiently learned in civil, criminal, constitutional and Syariah law and prepared to balance the rights of the parties and/or judicial principles, not only with the Federal Constitution but also with the Rukun Negara to achieve a just result … The soul of the Rukun Negara is to uphold the rule of law and respect each other's rights and not to simply take refuge on constitutional arguments alone."*

The dissenting Federal Court judge in *Subashini* was of the view that the non-converting wife in that case had the right to prevent the conversion of their children and to apply for an injunction to prevent the conversion.

THE GATHERING STORM

The move to resolve the issues on unilateral conversion by legislation was made public by the Prime Minister Datuk Seri Najib Razak when he announced on 25 August 2016 that amendments will be made to the Act at the next session of Parliament to resolve these problems [*The Sun Daily, 25 August 2016*]. As promised, the Bill was duly tabled for its First Reading in the Dewan Rakyat on 21 November 2016 on the premise that it will be debated by Parliament at its meeting in 2017.

The Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism (MCCBCHST) [*The Sun Daily, 21 November 2016*] and the Human Rights Commission of Malaysia (Suhakam) [*Malay Mail Online, 6 December 2016*] lauded and welcomed the proposed amendments.

Barely a week later, the Perlis State Legislative Assembly amended the State's Administration of the Religion of Islam Enactment 2006 to allow unilateral conversion of children to Islam [*The Star Online, 10 December 2016*]. The Perlis Mufti expressed concern that the amendments by the Perlis State Legislative Assembly went against a *fatwa* issued in 2015 by the Perlis Mufti Department which, according to the Mufti, states that a child of a convert need not embrace but may receive teachings on Islam from the Muslim parent [*The Star Online, 10 December 2016*].

At the same time, the Pahang Mufti said that the Pahang Administration of Islamic Law Enactment 1991 provides that the minor child of a convert is to follow the religion of the parent to whom custody is granted by the civil courts [*The Star Online, 10 December 2016*].

The debate receded as the Malaysian Parliament went into recess in late December 2016, only to resurface when Parliament reconvened in March to April 2017. On 3 April 2017, the Perak Mufti urged the Government to postpone the tabling of the Bill on grounds that the proposed amendment, specifically on unilateral conversion, was unconstitutional and contrary to Islamic laws. The Perak Mufti also claimed that the proposed prohibition of unilateral conversion was against a *fatwa* issued in 2009 which stated that if either a mother or father converted to Islam, their minor children would automatically become Muslims [*The Star Online, 5 and 7 April 2017*].

In a somewhat peculiar response and an affront to the constitutional right of freedom of speech, the Dewan Rakyat Speaker Tan Sri Pandikar Amin Mulia called on those who are not lawmakers to cease issuing statements on matters currently being discussed in Parliament [*The Sun Daily, 4 April 2017*].

The Deputy Prime Minister, Datuk Seri Dr. Zahid Hamidi, in

continued on page 22

ONE CLAIM OR SEPARATE CLAIMS?

Wai Hong and Angela explain the United Kingdom Supreme Court's approach in interpreting an aggregation of claims clause

What does the phrase "a series of related matters or transactions" in an aggregation of claims clause under a professional indemnity insurance policy really mean?

This was the question before the Supreme Court of the United Kingdom in *AIG Europe Ltd v Woodman & Ors* [2017] UKSC 18.

THE MINIMUM TERMS OF THE POLICY

Pursuant to section 37 of the Solicitors Act 1974, the Law Society of the United Kingdom made rules that require solicitors to maintain professional indemnity insurance with authorised insurers. The rules also specify the minimum terms and conditions ("MTC") which such insurance must satisfy, including a prescribed minimum figure for which the solicitors must be insured for any one claim. However, clause 2.5 of the MTC permits the aggregation of claims in the following circumstances:

"The insurance may provide that, when considering what may be regarded as one Claim …

(a) all Claims against any one or more Insured arising from:

(i) one act or omission;
(ii) one series of related acts or omissions;
(iii) the same act or omission in a series of related matters or transactions;
(iv) similar acts or omissions in a series of related matters or transactions
…
will be regarded as one Claim."

> **"it is necessary to first identify the matters or transactions involved and then determine whether the transactions are related"**

THE CLAIMS AGAINST THE SOLICITORS

In 2013, two actions were brought in the High Court in England against two firms of solicitors ("solicitors"). The first action was brought by investors in a project to develop a holiday resort near Izmir in Turkey called the Peninsula Village. The second was brought by investors in a similar project in Marrakech, Morocco.

Both projects were developed by the subsidiaries of a UK company called Midas International Property Development Plc (collectively "developer"). The developer appointed the solicitors to devise a legal mechanism to finance the developments by giving the investors security over the development land. Accordingly, a trust was created for each development with the object of providing security for the investors, who are the beneficiaries under the trust. The funds advanced by the investors would be held by the solicitors in an escrow account and be released to the developer only when the value of the assets held by the trust was sufficient to cover the investment.

In addition to devising the scheme, the solicitors also acted for the developer in relation to the individual investments. The solicitors opened a file for each investment and prepared an agreement between each investor and the developer as well as an escrow agreement between the investor, the developer and the solicitors.

The solicitors released the funds in the escrow account to the developer for the Peninsula Village project in April 2007 and October 2008 and for the Marrakech project, between November 2007 and March 2008. The developer was wound up in November 2009. By then, all monies in the escrow account had been paid out by the solicitors and the two projects could not be completed. Hence the investors filed the actions against the solicitors to recover their losses on various grounds, including breach of contract, breach of trust, breach of fiduciary duty and negligence. In essence, the investors alleged that the solicitors failed to ensure that there was adequate security before releasing the funds to the developer.

THE INSURANCE ACTION

The solicitors sought indemnity under a professional indemnity insurance ("Policy") which they had taken up with the appellant ("insurers") for their potential liability in respect of the two actions. The Policy had been issued on terms that corresponded with the MTC.

Under the Policy, the insurers' liability was limited to £3.0 million in respect of each claim. The aggregate amount claimed by the investors exceeded £10.0 million.

The insurers took the position that the claims under the two actions were "one claim" and commenced proceedings against the solicitors for a declaration that the investors' claims in the two actions to be considered as a single claim under clause 2.5(a)(iv) of the MTC.

The trustees of the Peninsula Village and Marrakech trusts (who represented the beneficiaries of each trust) joined in the proceedings. The trustees contended that none of the investors' claims fall to be aggregated with those of any other investor. Alternatively, they contended that the claims under Peninsula Village and Marrakech could not be aggregated with one another.

THE DECISION OF THE HIGH COURT

The High Court found that all the claims arose from similar acts or omissions, but disagreed that they were "in a series of related matters or transactions". The High Court held that the phrase refers to transactions which were related in the sense

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that the terms were conditional or dependent on each other. As the transactions entered into between the developer and each investor were not dependent, the claims of each investor cannot be aggregated as one claim. The High Court dismissed the insurers' action. The insurers appealed.

THE DECISION OF THE COURT OF APPEAL

The Court of Appeal held that the High Court "went too far" in saying that the transactions had to be dependent on each other. It instead held that upon its true construction, the phrase "in a series of related matters or transactions" means that the matters or transactions must have an "intrinsic" relationship with each other, not an extrinsic relationship with a third factor, even if the third factor was common.

The Court of Appeal allowed the appeal and remitted the action to the High Court to be determined. The insurers criticised the Court of Appeal's decision for introducing an unwarranted qualification into the concept of "related matters or transactions" and appealed to the Supreme Court.

THE DECISION OF THE SUPREME COURT

The Supreme Court observed that the Law Society had amended clause 2.5 of the MTC to include sub-clauses (iii) and (iv) in light of the decision in *Lloyds TSB General Insurance Holdings Ltd v Lloyds Bank Group Insurance Co Ltd* [2003] 4 All ER 43, which held that "one series of related act or omissions" is confined to acts or omissions which "together resulted in each of the claims".

According to Lord Toulson, who delivered the unanimous decision of the Supreme Court, sub-clause (iii) covers multiple claims that arise from the same act or omission whereas sub-clause (iv) covers similar acts or omissions, subject in each case to the important limitation that the act or omission giving rise to the claims must be "a series of related matters or transactions".

His Lordship explained that by requiring that the acts or omissions should have been in a series of related transactions, the scope of aggregation is confined to circumstances in which there is "a real connection between the transactions in which they occur, rather than merely a similarity in the type of act or omission".

The Supreme Court was of the opinion that the Court of Appeal's formula was not necessary or satisfactory due to the uncertainty as to the meaning of the term "intrinsic" in the context of two transactions. Lord Toulson said that sub-clause (iv) consisted of two separate requirements, both of which must be satisfied for the clause to apply. First, the acts or omissions giving rise to the claims should be similar, and second, the acts or omission must be in a series of matters or transactions which are related.

Lord Toulson said that in considering the application of the phrase "a series of related matters or transactions", it is necessary to first identify the matters or transactions involved and then determine whether the transactions are related.

According to His Lordship, the expression "related" implies that "there must be some inter-connection between the matters or transactions, or in other words, that they must in some way fit together". The Supreme Court held that determining whether the transactions are related is an acutely fact sensitive exercise.

The Supreme Court was of the view that the transactions involved an investment in a particular development scheme under a bilateral contract but had an important trilateral component by reason of the solicitors' role as trustees and escrow agents. The trust deed also created a multilateral element by reason of the investors being co-beneficiaries.

According to the Court, the transactions entered into in respect of each development were connected in significant ways. Each set of investors invested in a common development for which monies advanced by them were intended, in combination, to provide capital to the developer. Further, the investors in each development were all participants in a standard scheme and were co-beneficiaries under a common trust.

The Supreme Court found that the above connecting facts, when viewed objectively, led to a firm conclusion that the claims of each group of investors arose from acts or omissions in a series of related transactions. Accordingly, the insurers were entitled to aggregate the claims of the Peninsula Village investors as one claim, and the claims of the Marrakech investors as another.

However, the Supreme Court did not find anything to relate the transactions entered into by the investors in the Peninsula Village project to the transactions entered into by the investors in the Marrakech project. Other than the development companies running both projects being subsidiaries of the Midas Group and the similarity of the legal structure of the projects, both projects were separate and unconnected. Both projects relate to different sites and the respective groups of investors were protected by different trust deeds over different assets. Hence, it was held that based on the facts, the insurers had no right to aggregate the claims of the Peninsula Village investors with those of the Marrakech investors.

The Supreme Court allowed the appeal against the Court of Appeal decision.

continued on page 15

COURT OF APPEAL THWARTS OVERZEALOUS LAND ACQUISITION

Witter Yee examines a recent land acquisition case

On 29 March 2017, the Court of Appeal in a significant decision overturned the High Court's decision and set aside the acquisition of a piece of land in *United Allied Empire Sdn Bhd v Pengarah Tanah dan Galian Selangor & 4 Ors* [2017] MLJU 392. This commentary highlights certain aspects of the judgment by the Court of Appeal.

BRIEF FACTS

United Allied Empire Sdn Bhd ("Appellant") owned 26 acres of development land in Mukim Bestari Jaya, Daerah Kuala Selangor ("Land"). The Appellant had voluntarily reserved a part of that Land measuring slightly less than an acre for the expansion of an existing mosque "*Masjid Ar-Ridwan*" on the site.

The Land became the subject of a land acquisition exercise when the Respondents purported to acquire the whole of the Land under the Land Acquisition Act 1960 ("LAA"). The public purpose of the acquisition was to build a 26-acre mosque. According to the Government *Gazette*, the Land was being acquired for "*Tujuan Tapak Masjid Ar-Ridwan*".

On 22 April 2013, the Appellant applied for leave to commence judicial review to set aside the acquisition and for the return of the Land. On 12 February 2014, the Judicial Commissioner ("JC") allowed the Appellant's application and granted a stay of all further proceedings in the acquisition of the Land pending the disposal of the judicial review application.

DECISION OF THE HIGH COURT

The High Court dismissed the Appellant's application. According to the Appellant, the learned JC had dismissed the application on the ground that the Appellant had not made out a case for judicial review. The Appellant appealed against the High Court's decision to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

In essence, the issues raised before the Court of Appeal were as follows:

(a) Whether the Respondents complied with the requirements of the LAA pertaining to Form A and Form K;

(b) Whether the Appellant's legitimate expectation had been met;

(c) Whether there had been *mala fide* on the part of the Respondents; and

(d) Whether the intended use of the Land corresponded to stated purpose of the acquisition.

Failure to serve Form A on the Appellant

The Appellant argued that under section 4(1) of the LAA, Form A must be issued by the Respondents when undertaking a land acquisition exercise under the LAA. Section 4(1) of the LAA provides as follows:

"(1) Whenever the State Authority is satisfied that any land in any locality in the State is likely to be needed for any of the purposes referred to in section 3 a notification in Form A shall be published in the Gazette".

The Respondents on the other hand contended that there was no mandatory requirement to issue Form A, and relied on the Federal Court case of *Pentadbir Tanah Alor Gajah & 1 Or v Ee Chong Pang & 3 Ors* [2015] AMEJ 404, which had purportedly ruled that Form A under section 4(1) of the LAA was not a mandatory requirement in a land acquisition case.

The Court of Appeal distinguished *Ee Chong Pang* and held that the case did not negate completely what was clearly intended by Parliament as expressed in section 4(1) of the LAA. Datuk Abang Iskandar, JCA, who delivered the judgment of the Court of Appeal, said that *Ee Chong Pang* must be viewed and understood in its proper context. In His Lordship's view, *Ee Chong Pang* decided that Form D may be issued before Form A was issued, but did not decide that Form A need not be issued at all.

The Court of Appeal held that as there is no issuance of Form A by the Respondents, there had been a fatal non-compliance with the requirements of law which rendered the acquisition an illegality.

The issuance of Form K

Abang Iskandar, JCA also agreed with the Appellant's contention that the mere issuance of Form K, without the requisite memorial being endorsed on the register document of title under sections 23 and 66 of the LAA, would be insufficient to effectively or conclusively vest the title of the Land in the State Authority.

The Court of Appeal also overturned the High Court's decision on this point where the JC, relying on the Court of Appeal case of *Ishmael Lim Abdullah v Pesuruhjaya Tanah Persekutuan & Anor* [2014] 7 CLJ 882, held that the title of an acquired land would vest in the State Authority the moment Form K was issued. The Court of Appeal distinguished *Ishmael Lim* on two grounds, namely that the Court in *Ishmael Lim* did not consider:

(1) section 66 of the LAA, which clearly states that lands that are intended to be acquired shall vest in the State Authority only upon the making of the memorial; and

(2) the circular, *Pekeliling Ketua Pengarah Tanah Dan Galian Persekutuan Bilangan No 27/2009* ("Circular 27/2009") issued by the Director General of Lands and Mines which emphasised the mandatory requirement for the making of the memorial.

According to the Court of Appeal, Circular 27/2009, issued pursuant to section 8(e) of the National Land Code 1965, was a

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subsidiary legislation as defined by section 3 of the Interpretation Acts 1948 and 1967 and has the force of law.

Legitimate expectation, mala fide and change in purpose

Abang Iskandar, JCA also noted that the Respondents' affidavit filed in reply to the Appellant's affidavit was "*a curious mix of bare denials, contradictions of themselves and each other, blaming each other or just plain outright failure and/or refusal to answer the points raised*" by the Appellant in its affidavit. His Lordship held that the Respondents' intentional evasive conduct in failing to answer with the required candour in the performance of their public duty constituted conduct which was *mala fide* in the sense that it was done to deny the Appellant of its rightful property.

The Court of Appeal also held that the purpose of acquisition as declared in the *Gazette* was different from the intended use of the Land. The declared purpose of acquisition was for building a mosque. On the other hand, the Respondents admitted that the purpose declared in the *Gazette* was different from the intended use which included the use of the Land as a cemetery and for other buildings, none of which were properly declared in the *Gazette*. In this regard, the Court of Appeal held that the High Court erred when it held that there was no change in the purpose for which the Land was being acquired by the Respondents.

The Court of Appeal agreed with the Appellant that it was not open for the Respondents to freely ignore the existence of the Appellant's legitimate expectation that the Respondents would act in accordance with the discretionary powers or duties lawfully conferred upon them by acquiring only what was needed and nothing more. Abang Iskandar, JCA added, "*It would be incredulous and bordering on the perverse, to compulsorily acquire the entire land area belonging to the Appellant of about 26 acres for the purpose of building a mosque, even if such exercise would include erecting buildings normally associated with a mosque.*"

CONCLUSION

This decision of the Court of Appeal is noteworthy in at least three respects. First, it upholds the fundamental right to property as guaranteed under Article 13 of the Federal Constitution. Secondly, it requires the relevant authority to declare the purpose of a proposed land acquisition in a clear and transparent manner.

continued on page 21

ONE CLAIM OR SEPARATE CLAIMS?

continued from page 13

ANALYSIS

The Supreme Court's decision provides guidance on how the courts should interpret the phrase "a series of related matters or transactions" in an aggregation of claims clause. It is worth noting that the Supreme Court has stated that the word "related" in the phrase "a series of related matters or transactions" does not bear the same connotation as in the phrase "related series of acts or omissions" dealt with by the House of Lords in the *Lloyds TSB* case.

The House of Lords decision in the *Lloyds TSB* case has been applied by the Malaysian High Court in *Tune Insurance Malaysia Bhd & Anor v Messrs K Sila Dass & Partners* [2015] 9 CLJ 93 which considered the phrase "related acts". This case concerned fraud or embezzlement committed by one employee of the insured practice against different parties who were all unrelated.

The High Court in *Tune Insurance* was of the view that the words "related acts" in the phrase "all claims by one or more claimants that arise from one series of related acts …" in an aggregation clause should be interpreted to include "the underlying cause or source or other commonalities underlying the fraudulent acts and embezzlements". The learned Judge was satisfied that the unifying factor in that case was the particular employee, the main perpetrator, who had committed all the fraudulent acts and embezzlements at the insured practice's branch office. Accordingly, the Court held that all claims arising from the misconduct of the employee concerned are to be treated as "one claim".

CONCLUSION

The UK Supreme Court's decision in *AIG Europe Ltd v Woodman and Others* does not bind the Malaysian Courts. However, as the aggregation of claims clause in certain professional indemnity insurance policies in Malaysia contain provisions that are in *pari materia* with clause 2.5(iv) of the MTC, the UK Supreme Court's approach in this case is likely to be followed by the Malaysian Courts when the need to interpret the same provision arises.

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THE SOLVENCY TEST

Chee SiYing discusses a new concept under the Companies Act 2016

The Companies Act 2016 ("CA 2016") introduces the requirement for a solvency test and a solvency statement for certain transactions, namely redemption of preference shares out of capital, reduction of capital by way of special resolution (except for the sole purpose of cancelling share capital which is lost or no longer represented by assets), provision of financial assistance and share buyback.

ELEMENTS OF THE SOLVENCY TEST

The solvency test applicable to the redemption of preference shares, reduction of capital and provision of financial assistance differs from the test applicable to a share buyback. Both tests comprise two components, namely "*cash flow solvency*" and "*balance sheet solvency*".

The solvency test for the redemption of preference shares, reduction of capital and provision of financial assistance is set out in section 112(1) of the CA 2016 and is as follows –

> **"Both tests comprise two components, namely "cash flow solvency" and "balance sheet solvency""**

(1) *Cash flow solvency* – this test is satisfied if (i) immediately after the transaction, there is no ground on which the company is unable to pay its debts; and (ii) either (a) the company will be able to pay its debts as and when they become due during a period of 12 months from the date of the transaction; or (b) if the company is to be wound up within 12 months after the date of the transaction, it will be able to pay its debts within 12 months after the commencement of the winding up; and

(2) *Balance sheet solvency* – this test is satisfied if the company's asset exceeds its liability at the date of the transaction.

The solvency test for the share buyback is found in section 112(2) and 122(3) of the CA 2016 and is as follows –

(1) *Cash flow solvency* – this test is satisfied if the company remains solvent after each buyback during the period of six months after the date of the declaration made under section 113(5) of the CA 2016, in that the company will be able to continue to meet its debts as and when they fall due without any substantial disposition of its assets outside the ordinary course of its business, restructuring its debts, externally forced revisions of its operations or other similar actions; and

(2) *Balance sheet solvency* – this test is satisfied if the share buyback would not result in the company being insolvent and its capital being impaired (that is, when the value of its net assets is less than the aggregate amount of all the shares of the company after the share buyback) at the date of the solvency statement.

The solvency test in relation to redemption of preference shares, capital reduction by special resolution and provision of financial assistance in the CA 2016 is substantially similar to the test in the United Kingdom Companies Act 2006, the Singapore Companies Act (Cap. 50) and the New Zealand Companies Act 1993. The aforesaid companies' legislation do not contain provisions that correspond with the solvency test for share buyback in the CA 2016.

Considerations in applying the solvency test

In applying the solvency test and forming an opinion for the purpose of making a solvency statement, section 113(4) of the CA 2016 provides that a director shall (i) inquire into the company's state of affairs and prospects; and (ii) take into account all liabilities, including contingent liabilities, of the company.

> **"a director shall … take into account all liabilities, including contingent liabilities, of the company"**

THE SOLVENCY STATEMENT

The solvency statement shall (i) be made in a manner as may be determined by the Registrar; (ii) state the date on which it is made; (iii) state the name and bear the signature of each director making the statement; and (iv) be supported by a declaration that the directors have made an inquiry into the affairs of the company.

Number of directors making the statement

The CA 2016 requires a solvency statement relating to a reduction of share capital or redemption of preference shares to be made by all directors of the company. Where the transaction relates to the provision of financial assistance or a share buyback, the statement is to be made by the majority of the directors of the company.

Offences regarding solvency statement

A director who makes a solvency statement without having reasonable grounds for the opinion expressed in the statement will be liable on conviction to imprisonment for a term not

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exceeding five years or to a fine not exceeding RM500,000 or to both.

PARTICULAR ISSUES

Redemption of preference shares

A redemption of preference shares out of capital can only be effected after (i) all the directors have made a solvency statement in relation to that redemption; and (ii) a copy of the solvency statement has been lodged with the Registrar.

Reduction of capital

In the case of a reduction of capital by way of a special resolution, a company meets the solvency requirements if (i) all the directors of the company have made a solvency statement in relation to the capital reduction; (ii) the statement is made in the case of a private company, within the time frames specified in sections 117(3)(b)(i) and 117(5) of the CA 2016 and in the case of a public company, within the time frames specified in sections 117(3)(b)(ii) and 117(6) of the CA 2016; and (iii) a copy of the solvency statement has been lodged with the Registrar together with the notice under section 117(1)(a) of the CA 2016 that a special resolution to reduce the share capital has been passed.

For a private company, section 117(3)(b)(i) requires the solvency statement to be made within a period of 14 days ending on the date of the special resolution, and section 117(5) requires (i) where the resolution is to be passed as a members' written resolution, a copy of the solvency statement to be served together with the special resolution, or where the special resolution is to be passed at a general meeting, the solvency statement or a copy thereof to be made available for inspection by members throughout the meeting; and (ii) the solvency statement or a copy thereof is to be made available at the registered office for inspection by any creditor for a period of six weeks from the date of the resolution.

In the case of a public company, section 117(3)(b)(ii) requires the solvency statement to be made within a period of 21 days ending on the date of the special resolution, and section 117(6) requires the solvency statement or a copy thereof to be made available for inspection (i) by members throughout the meeting; and (ii) by any creditor of the company at the registered office for a period of six weeks from the date of the resolution.

Financial assistance

Section 126 of the CA 2016 permits a company, other than a listed company, to provide financial assistance for the purposes of purchasing or acquiring shares in the company or in its holding company or reducing or discharging a liability for such an acquisition if the conditions set out in section 126(2) are satisfied. These conditions include (i) an obligation on the directors who vote in favour of the resolution (being not less than the majority of the directors) to make a solvency statement in relation to the giving of the financial assistance on the same day as that on which the aforesaid resolution is passed; and (ii) a requirement that the assistance is to be given not more than 12 months after the date on which the solvency statement is made.

The company is also required to provide a copy of the solvency statement and other information prescribed in section 126(5) to each member of the company within 14 days from the giving of the financial assistance.

Share buyback

A solvency statement for a share buyback is required under section 113(5) of the CA 2016 to include a declaration by the directors that the share buyback is necessary and is made in good faith in the interest of the company. The Companies Commission of Malaysia has confirmed in an FAQ that based on section 112(2)(b) of the CA 2016, a solvency statement issued in relation to a share buyback is valid for six months.

SOLVENCY TEST IN OTHER JURISDICTIONS

New Zealand

In New Zealand, the solvency test is set out in Section 4(1) of the Companies Act 1993. As in the case of the CA 2016, it embodies cash flow solvency and balance sheet solvency. In assessing whether the test had been satisfied, the New Zealand Court of Appeal in *Petterson v Browne* [2016] NZCA 189 focused on the balance sheet solvency.

In arriving at its decision, the court referred to the company's financial statements and found that the company's current liabilities exceeded its current assets. Further, at the time the payments were made, the company was unable to meet its contingent liabilities i.e. an adjudication claim made pursuant to an indemnity given in favour of a subcontractor. Accordingly, the court held that the solvency test was not satisfied.

United Kingdom

As in the case of the CA 2016, the United Kingdom Companies Act 2006 permits private and public companies to reduce their share capital by way of a special resolution supported by a solvency statement. The case of *BAT Industries plc v Sequana and*

continued on page 23

DOCTOR KNOWS BEST?

Peh Fern and Wen Shan explain why that may no longer be the case for medical advice

The Court of Appeal, the apex court of Singapore, in *Hii Chii Kok v Ooi Peng Jin London Lucien* [2017] SGCA 38 has taken another incremental approach in raising the standard of care, this time in relation to a doctor's duty in advising the patient on medical treatment.

FACTS OF THE CASE

The plaintiff patient sued the defendant surgeon for a misdiagnosis of cancer and for rendering wrong medical advice. The medical tests revealed inconclusive signs of cancerous cells in the pancreas. The doctor recommended, and the patient agreed to a Whipple procedure. The surgery itself was uneventful and the histopathological tests came back with "*no convincing evidence of malignancy*".

Despite usual recovery in the initial post-operative period, about one month after the surgery the patient vomited blood and underwent another surgery where necrotic tissue was found in the stomach due to a leak from the Whipple procedure. The patient's pancreas and spleen were removed.

The patient sued and lost at the High Court which held that the doctor had not fallen below the standard of care in advising the patient. On appeal, the patient contended that the medical advice given to him was inadequate to enable a reasonable patient to make an informed decision. The Court of Appeal was asked to consider the applicability, suitability and relevance of the test in *Bolam v Friern Hospital Management Committee* [1957] 2 All ER 118 ("*Bolam*") specifically in relation to medical advice.

While the Court of Appeal found no negligence on the part of the doctor, the Court saw it fit to modify the judicial approach to the standard of care in the aspect of medical advice. Before we turn to this, it is necessary to briefly discuss *Bolam.*

THE STANDARD OF CARE

For the most part, the combination of two cases sets out the accepted standard of care which is expected of a medical professional. *Bolam* states that a doctor *"is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art"*, and *Bolitho (administratrix of the estate of Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All E.R. 771 ("*Bolitho*") held that the body of opinion set out in *Bolam* had to be logical and defensible.

This combination, which will be referred to in this commentary as the *Bolam and Bolitho Test*, in essence means that a doctor is not negligent if the practice is accepted as proper by a responsible body of medical men skilled in that particular art, and the practice is both logical and defensible. This was adopted by Singapore in *Khoo James and another v Gunapathy d/o Muniandy and another appeal* [2002] 1 SLR(R) 1024.

Historically, *Bolam* was decided in 1957, a time where the principle of beneficence to the patient was prioritised over patient autonomy; in other words, the "doctor knows best". In the decades after *Bolam*, the movement emphasising patient autonomy developed. An early response came from Lord Scarman in *Sidaway v Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] ("*Sidaway*") AC 871 who proposed the development of the doctrine of informed consent in the following terms:

"(1) right to determine what shall be done with his own body. (2) The consent is the informed exercise of a choice, and that entails an opportunity to evaluate knowledgably the options available and the risks attended upon each … The doctor must, therefore, disclose all "material risks"."

His Lordship's reasoning was that *Bolam* was unsuitable where it concerned the doctor's duty to warn of a risk because *"in a medical negligence case where the issue is as to the advice and information given to the patient as to the treatment proposed, the available options and the risk, the court is concerned primarily with a patient's right. The doctor's duty arises from his patient's rights."* It must be emphasised that Lord Scarman's proposition was only in respect of medical advice and information, not diagnosis and treatment. Nevertheless, the majority of the House of Lords held that only one test was warranted and the standard of care could not be seen as separate and distinct; the *Bolam* test soldiered on for three more decades.

It was in 2014 when the English Supreme Court accepted the limits of the *Bolam and Bolitho Test* in *Montgomery v Lanarkshire Health Board* [2015] UKSC 11 ("*Montgomery*"), moving from the doctor's perspective in *Bolam* to a patient's perspective. The Supreme Court introduced the material risk test:

"The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment … <u>The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it.</u>"

Montgomery does not displace the *Bolam and Bolitho Test* but works synergistically with the latter where advice and information are concerned. Adding this test meant the Supreme Court adopted the proposition by Lord Scarman in *Sidaway,* that medical advice is distinct from diagnosis and treatment. It is this aspect of advice and information in relation to the *Bolam and Bolitho Test* that *Hii Chii Kok* considered.

THREE ASPECTS OF MEDICAL CARE

In *Hii Chii Kok,* the Court of Appeal identified that medical care has three distinct aspects: (i) diagnosis; (ii) advice; and (iii) treatment. In practical terms, the doctor begins by assessing the patient with a series of questions and tests; the results are collected, integrated and interpreted by the doctor who then

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informs and advises the patient of his health, treatment options, and associated risks. Finally, if the patient consents to treatment, the doctor proceeds.

Diagnosis and Treatment

The processes of diagnosis i.e. the collection, integration, and interpretation, of disparate pieces of information, and treatment i.e. surgery, prescriptions or therapy - are dependent on the doctor's own ability wherein the patient plays no active role. In these aspects, the Court of Appeal acknowledged the realities of medical practice (i.e. the imperfect and evolving medical knowledge and the frequent impossibility of a definitive diagnosis) are unchanged since *Bolam* and no modification was necessary.

Medical advice – patient autonomy

In the aspect of medical advice, it was acknowledged that societal attitude emphasises patient autonomy, i.e. the right to self-determination trumped beneficence. Evidencing this, the Court of Appeal referred to the Singapore Medical Council's Ethical Code and Ethical Guidelines 2016, holding that it was wrong to ignore the "*seismic shift in medical ethics … in deciding how the realities of the doctor-patient relationship are to be reflected in the applicable legal standards for doctors*".

THE THREE-STAGE TEST

The Court of Appeal concluded that the *Bolam and Bolitho Test* was by itself insufficient to decide if the non-disclosure of information and advice was justified. To assist the *Bolam and Bolitho Test* where the advice aspect is concerned, the Court of Appeal devised a three-stage test ("*Hii Chii Kok Test*") which draws heavily on *Montgomery.*

Stage 1

Firstly, the patient must identify the exact nature of the information alleged not to have been given and why it should have been relevant and material. Materiality is considered from the patient's perspective and reference is made to the quote from *Montgomery* cited above. Regard is given to what a reasonable patient is likely to attach significance to. To aid this, the Court of Appeal cited the list provided by *Dickson v Pinder* [2010] ABQB 269 which provides that relevant information included the diagnosis, prognosis, nature and risks of proposed treatment and the alternatives to the proposed treatment.

It should be stated that unlike *Montgomery* which concerns only information pertaining to recommended treatment and alternatives, the *Hii Chii Kok Test* covers anything relevant and material.

What may be significant is dependent on, first, likelihood and second, severity. A risk likely to transpire should be informed even if the injury is slight. Similarly, an uncommon risk should be warned of where the consequent injury is serious. The duty of the doctor excludes proactively eliciting information involving idiosyncratic concerns of the patient unless so informed, or if the doctor has reason to believe so. The standard of care only extends to idiosyncrasies if the patient has shown particular interest and concern that are relevant to otherwise insignificant information.

Stage 2

The second stage considers whether the doctor was in possession of allegedly relevant material. This brings us back to the *Bolam and Bolitho Test* – "*the question then should be whether he ought to have ordered the test, or apprised himself of the medical knowledge, which would have given him the information – a question best considered under the rubrics of diagnosis or treatment and not advice*". Quite simply, it is negligent if the doctor lacks the information that a responsible body considers relevant.

Stage 3

The third stage considers why the doctor withheld the information and if there is any reasonable justification for doing so. The Court will assume a physician-centric approach and give weight to *"expert evidence of doctors seeking to justify the withholding of such information as a matter of medical practice and judgment will assume some significance"*. The defendant doctor will have to provide reasons and supporting expert evidence which is to be tested under the *Bolam and Bolitho Test.* The Court of Appeal foresaw several instances for justification where:

(a) there is a waiver by the patient;
(b) treatment provided on an emergency basis; and
(c) the doctor claims therapeutic privilege.

The first two instances require no elaboration. In the third, the doctor may claim justification of therapeutic privilege if he reasonably believes that the act of giving particular information may cause the patient serious physical or mental harm with two such examples being patients with anxiety disorders and geriatric patients.

The Court of Appeal has warned against abusing therapeutic privilege, particularly where a doctor considers the choice the patient would make contrary to the patient's best interest.

As a general rule to the *Hii Chii Kok Test*, the doctor is not

continued on page 23

FIVE TAX IMPLICATIONS ARISING FROM THE COMPANIES ACT 2016

Lee Shih and Siong Sie highlight some tax implications for companies

INTRODUCTION

The Companies Act 2016 ("Act") has come into force on 31 January 2017, except for the provisions on registration of company secretaries and corporate rescue. This article will highlight five tax implications on companies as a result of the Act.

1. SME OR NON-SME

The Act's introduction of no-par value shares may have an impact on the preferential tax rates enjoyed by certain small and medium enterprises ("SMEs").

Resident SMEs with a paid-up capital in respect of ordinary shares of RM2.5 million and below at the beginning of the basis period for a year of assessment are taxed at a preferential tax rate of 18% (instead of the normal rate of 24%) for the first RM500,000 of its chargeable income. Such SMEs must not be part of a group of companies where any of their related companies have a paid-up capital of more than RM2.5 million.

With the introduction of no-par value shares, the moneys in the share premium account and capital redemption reserve become part of the company's share capital, subject to a transitional period of 24 months. This merging of share premium and capital redemption reserve may result in some SMEs losing the preferential tax rate once their merged share capital in respect of ordinary shares exceeds RM2.5 million.

> "This merging of share premium and capital redemption reserve may result in some SMEs losing the preferential tax rate"

Losing such preferential tax rate may translate into liability for an additional tax of up to RM30,000.00. Further, there may be a loss of other benefits such as the unlimited claim on special allowances for small value assets and exemption from having to provide an estimate of tax payable for the first two years of operations.

On the other hand, the Act has also introduced a faster method of capital reduction through the solvency statement route. SMEs and other companies may utilise this method of capital reduction to bring themselves within the preferential tax regime. Existing companies with a paid-up capital of more than RM2.5 million may decide to reduce its share capital and then enjoy the tax benefits.

Alternatively, existing SMEs may capitalise the credit balance in the share premium account or capital redemption reserve which is to be merged into the share capital account by issuing fully paid preference shares by way of a bonus issue to maintain the ordinary share capital at RM2.5 million or less.

To-date, the Inland Revenue Board ("IRB") has yet to issue any statement clarifying the implication of the no-par value regime status and whether a company that reduces its capital is prevented from enjoying the preferential tax rates.

2. EASIER GROUP RELIEF

A loss-making company within a group can surrender up to 70% of its adjusted loss to one or more companies within the group which has chargeable income. This is known as the group relief mechanism and helps to reduce the overall tax payable by the group.

To be eligible for group relief, the surrendering company as well as the claimant company must have a share capital of more than RM2.5 million at the beginning of the relevant basis period for a year of assessment.

With the merger of the share premium account and capital redemption reserve, this may be a blessing in disguise for some companies. The consolidated share capital may be automatically increased to more than RM2.5 million without the need to raise additional share capital.

3. THE CONSTITUTION: OBJECTS CLAUSES

In the past, the memorandum of association would have contained objects clauses that limit the business activities that a company could undertake.

The Act allows companies to dispense with objects clauses in order to enjoy the freedom of unlimited capacity. However, companies must be mindful whether the removal of objects clauses would expose them to any potential tax liabilities.

Without the objects clauses, there may be uncertainties in interpreting the tax liabilities of a company when the company engages in certain activities. For example, the income of a property dealer is subject to income tax while the income of an investor of real property, being a capital gain, attracts real property gains tax. In both scenarios, the companies are dealing with real property, yet the gains from the real properties transactions attract different types of taxes.

Apart from the quantitative test set out in the public ruling issued by the IRB, the objects clauses of a company may be crucial to substantiate that the company is an investment holding company ("IHC"). For an IHC, there is a presumption (though not legislated nor is it valid for an indefinite period) that its investment would be long term. Thus, the gains from the realisation of such investments would be a capital gain and not be subject to income tax. The determination is a question of fact. The IRB can deem an IHC to be an investment dealing company and assess the gains as

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business income if the disposals of investments are too frequent or the holding period of investment is short.

In many decided cases, the intention of a company is usually found in the objects clauses of a company as stated in the memorandum of association. Without a constitution that has objects clauses, the company may face an extra hurdle to prove its intention when challenged by the tax authorities.

Additionally, a company now needs to ensure that its nature of business is updated with the Registrar of Companies. The Practice Directive No. 2/2017 issued under the Act explains the mechanism for a company to update the Registrar of any change of its nature of business within 14 days of any such change. It is possible that this public record of the nature of a company's business may be taken into account when considering the treatment of tax liabilities.

4. STAMP DUTY: VALUATION OF UNQUOTED SHARES

Despite the abolition of par value for shares, the IRB has yet to revise its Guidelines on the Stamping of Share Transfer Instruments for Shares that are Not Quoted on the Kuala Lumpur Stock Exchange ("Guidelines").

The Guidelines prescribe the following bases of valuation to be adopted for unquoted shares:

(a) for companies incurring losses, the par value or net tangible assets ("NTA") or sale consideration, whichever is the highest;

(b) for companies making profit, the NTA, price earning multiple/ price earning ratio ("PER") or sale consideration, whichever is the highest.

The IRB may need to reformulate the basis of valuation of shares for assessment of stamp duty payable on share transfer forms unless it is ready to restrict its option to calculate the value of shares to the sale consideration only. The merger of share capital distorts the NTA and PER method as the issued share capital is now a combination of ordinary share capital, share premium and capital redemption reserve.

5. AUDIT EXEMPTION

Under section 267(2) of the Act, the Registrar of Companies may exempt any private company from the requirement to appoint an auditor for each financial year.

As a result of this provision, the Companies Commission Malaysia ("CCM") initiated a public consultation to obtain feedback on the criteria for audit exemption of certain private companies. It was proposed that dormant companies and certain small companies would enjoy audit exemption.

From the public consultation, there was a general support for audit exemption for dormant companies. However, the views were split in relation to extending the exemption to small companies. In particular, the accounting profession highlighted that the proposed exemption would contravene the tax legislation that requires the company's tax returns to be based on audited accounts.

On this issue of audited accounts and tax returns, the IRB had made an announcement on 19 March 2014 that a company can file its tax returns based on final (unaudited) accounts if there are provisions under the Act that exempt a company from submitting audited accounts to the CCM. Similarly, the IRB confirmed this position in a meeting on 19 May 2016 with the accountants and tax practitioners (*Dialog Desire Bil.1/2016*).

If audit exemption is granted for certain private companies, it remains to be seen whether the IRB will continue to affirm the position that it took in 2014 and 2016.

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OVERZEALOUS LAND ACQUISITION

continued from page 15

Thirdly, the Court of Appeal has set the law back on its correct footing by emphasising the importance of section 66 of the LAA and declining to follow *Ishmael Lim.*

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THE THIRD WAVE

continued from page 5

monitored and tested to ensure it is fit for purpose at all times; (ii) access to and the ability to make changes to the algorithm is limited only to authorised personnel; and (iii) ongoing due diligence is conducted on any third party that develops, owns or manages the technology and algorithm used by the licensee.

The compliance officer is responsible for establishing a compliance programme which takes into consideration the unique and specific aspects of the digital investment management business model.

A HAPPY COINCIDENCE?

Less than a fortnight after the launch of the framework for digital investment management, the SC announced that various measures will be introduced in 2017 to enhance the development of the domestic market for exchange traded funds ("ETF"). Among the measures being considered by the SC are reducing the issuers' costs and capital requirements for issuers and the introduction of new products.

As some robo-advisors, such as Betterment, Wealthsimple and Stockspot, invest a large part of the funds under management in ETFs, these measures to boost the domestic ETF market are timely and may assist in the development of the digital investment management sub-sector as well. A happy coincidence or a master stroke in strategic planning?

COMMENTS

According to the SC, the framework for digital investment management services aims to provide investors with a more convenient, affordable and accessible channel to manage and grow their wealth.

Sceptics have expressed doubts that the de-personalised "*robo advisory*" services will find favour with investors. Its proponents have, on the other hand, argued that the low minimum investment threshold and lower fees have made wealth management services accessible to a significantly wider segment of society.

In the final analysis, the success or failure of digital management services will depend primarily on whether the technology used will enable the investment objectives of the investors to be achieved in a reliable and secure manner.

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UNILATERAL CONVERSION

continued from page 11

an immediate response was reported as confirming that the Government "*will stand firm on its decision to legally prohibit the unilateral conversion of children to Islam*" [*The Sun Daily, 4 April 2017*].

However on 5 April 2017, in a remarkable *volte face*, the Second and Third Readings of the Bill were postponed to the next session of Parliament in July 2017 upon a motion proposed by Dato' Sri Azalina Dato' Othman Said, Minister in the Prime Minister's Department.

The Deputy Prime Minister explained that the postponement of the Bill "*was to allow for the bill to be studied in detail and to get feedback from relevant quarters and experts to avoid conflict with existing fatwa and the Federal Constitution.*" He added, "*The government is not backtracking. Although studies have been done, the government's stand is that the Act … needs to be reviewed so that the issue of unilateral conversion no longer becomes a polemic that could be detrimental to the country*" [*The Sun Daily, 6 April 2017*].

It is troubling that no deadline has been specified for the completion of the review of the Bill and consultation and engagement with the relevant stakeholders [*The Sun Daily, 6 April 2017*]. It also remains to be seen whether the proposed new section 88A will be tabled at the forthcoming meeting of Parliament in its existing form or in a modified form.

CONCLUSION

Unless a middle ground that is acceptable to Muslims and non-Muslims is found and incorporated into the proposed new section 88A of the Act, its passage through Parliament will be highly contentious. If passed in its existing form, it is likely to be challenged in the Malaysian Courts on two grounds. First, that the prohibition of unilateral conversion is unconstitutional in view of the interpretation given to Article 12(4) by the majority of the Federal Court Judges in *Subashini*. Second, that the Bill contravenes the provisions of the Islamic Law Enactments and the *fatwa* issued by the muftis of certain States.

The observations of the learned Judicial Commissioner in *Indira Gandhi* apply equally to the proposed amendments in that they do not constitute "*a victory for anyone but a page in the continuing struggle of all citizens to find that dynamic equilibrium in a country of such diverse ethnicities; pursuing peace in less than a homogeneous society, giving space to one another where religious sensitivities are concerned, tolerance and respect to our neighbours in pursuit of the truth and reality.*"

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THE SOLVENCY TEST

continued from page 17

another [2016] EWHC 1686 concerned a challenge to dividends paid by a company to its parent after the directors had resolved that the company would first reduce its share capital for the dividend distribution. The company in question was exposed to long-term environmental liabilities.

The court formed the opinion that where a company had on its balance sheet an estimated provision in respect of a long-term liability, there was no justification for holding that the duty to protect creditors' interests applied for the whole period of the long-term liability. To do so would suggest that the directors are to take account of the creditors' rather than the shareholders' interests when running a business over an extended period. Accordingly, the court found that the directors had validly formed the necessary views when they made the solvency statement.

> **“ the solvency test and solvency statement … impose a duty on directors to act in the interest of … creditors ”**

CONCLUSION

The introduction of the solvency test and solvency statement under the CA 2016 is welcomed as they impose a duty on directors to act in the interest of not only the shareholders of the company but also of its creditors. The requirement for a solvency statement offers a safeguard to creditors against the risk that directors may improperly distribute or otherwise pay company funds to shareholders at the cost of creditors and provides some assurance that the company will be able to pay its debts as and when they fall due within a foreseeable period of time.

Moving forward, it will be interesting to see how the Malaysian courts will interpret the application of the solvency test – will a restrictive approach be adopted to further secure the interests of the creditors or will the courts follow the approach taken by the English court in *BAT Industries plc v Sequana and another*?

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DOCTOR KNOWS BEST?

continued from page 19

required to ensure the patient's comprehension but only to take reasonable care.

COMMENTARY

The Court of Appeal has largely adopted the English Court's approach in *Montgomery*. Essentially, both *Montgomery* and *Hii Chii Kok* acknowledge the limitations of the *Bolam and Bolitho Test*, and have devised the approach to medical advice and information in a very similar fashion. We are grateful for clarity of the *Hii Chii Kok* decision which is especially well-ordered, making for ease of application.

Nevertheless, despite the lengthy judicial opinion, little of *Hii Chii Kok* is novel and no significant change in the processes of medical practice is expected.

Firstly, from a legal perspective, two out of the three aspects in medical care i.e. diagnosis and treatment, and two of the three stages of the *Hii Chii Kok Test* acknowledge the utility of, and retain the *Bolam and Bolitho Test.*

Secondly, *Hii Chii Kok* affirms the principle and value of patient autonomy. But we do not expect to see much change in the daily practice of medicine because the existing practice and the relevant guidelines (such as *The Singapore Medical Council's Ethical Code and Ethical Guidelines (2016 Edition)*) already recognise the importance of patient autonomy; if at all, very little is added in the medical practice realm.

It may not be that *Hii Chii Kok* is ground breaking but rather, the judgment is a step in refining the law and standard of care, cementing the principle of self-determination into the law. It is this affirmation of the principle of self-determination, swinging the approach from the doctor's perspective to the patient-centric approach that makes *Hii Chii Kok* a pivotal decision.

As a side note, *Hii Chii Kok* comes at a time just before the Malaysian Federal Court renders its own decision on the status of *Bolam* in medical negligence. It remains to be seen whether Malaysian law will converge with *Montgomery* and *Hii Chii Kok,* or diverge onto an altogether different path.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

THE FIRM HAS DEVELOPED OVERSEAS TIES THROUGH ITS MEMBERSHIP OF INTERNATIONAL ORGANISATIONS SUCH AS LEX MUNDI, PACIFIC RIM ADVISORY COUNCIL, THE INTER-PACIFIC BAR ASSOCIATION, THE ASEAN LAW ASSOCIATION, THE INTERNATIONAL TRADEMARKS ASSOCIATION AND THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

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