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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

The preceding quarter of 2018 witnessed a momentous event in Malaysia. On 9 May 2018, the 61-year rule of the Barisan National coalition (and its predecessor, the Alliance Party), which had ruled our country since its independence, came to an end when the Pakatan Harapan coalition and parties that support the coalition earned the right to form the government by winning 122 out of the 222 seats in the Dewan Rakyat in the 14th General Elections of Malaysia.

The new Government is still coming to terms with the immense responsibility of governing the country. Drastic cost-cutting measures are being implemented to reduce an alleged RM1 trillion government debt racked up by the previous administration. Multi-billion ringgit infrastructure projects, such as the Kuala Lumpur-Singapore High Speed Rail, the East Coast Railway Link, Mass Rail Transit 3 and Light Rail Transit 3, are being cancelled or reviewed.

A change in government invariably creates uncertainty amongst foreign investors. The cancellation and review of projects that are in the midst of being implemented contributes to that uncertainty, leading to an uncertain investment climate and new investments being withheld. It is hoped that the new Government will soon announce investment policies that will allay the concerns of foreign investors so that lost momentum can be regained in the quest to attract foreign investment.

The new Government has also pledged to maintain the Rule of Law and to weed out corruption. It is hoped that these pledges will be fulfilled so as to improve the lives of every person, local or foreign, in Malaysia.

These are indeed interesting times in Malaysia.

Kok Chee Kheong
Editor-in-Chief

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MALAYSIA: A NEW HOPE (AND SOME LEGAL ISSUES THAT CAME WITH IT)

Nimalan Devaraja recalls some exciting events around the 14th General Elections in Malaysia

May 9, 2018. A day that will be forever etched in the memories of Malaysians who witnessed the 14th General Elections ("GE14"). It was the day on which Malaysians witnessed, for the first time since the country's independence, a change in government. The 61-year-old Barisan Nasional coalition (and its predecessor, the Alliance Party), long synonymous with Malaysia, were ousted from power by the barely two-year old Pakatan Harapan coalition.

While we have witnessed with excitement or trepidation (depending on who is asked) the rise of interesting (and possibly controversial) developments in the Malaysian fabric since the change of government, the period leading up to, and immediately after, GE14 was also not without its share of dramatic events. This article discusses several notable events that took place during this period.

1 MALAYSIAN-1 VOTE?

Delineation is the process of dividing the Federation of Malaysia into Federal Constituencies (222 as of now) and the further division of those Federal Constituencies into State Constituencies (save for the 13 Federal Territories Constituencies) for the purpose of conducting elections.

Article 113(2) ("Article 113(2)") of the Federal Constitution ("FC") mandates the Election Commission ("EC") to review the division of the Federal and the State constituencies and recommend such changes as may be necessary to comply with the provisions of the Thirteenth Schedule of the FC ("Thirteenth Schedule").

On 28 March 2018, a mere six weeks before GE14, the Dewan Rakyat (House of Representatives) approved, by the requisite simple majority, a re-delineation report prepared by the EC. The report had been finalised after the EC had issued two re-delineation proposals, the first in September 2016 and the second in January 2018. The re-delineation report that was approved was controversial for at least two reasons. First, from a timing perspective, it was tabled and approved in the Dewan Rakyat within one day, giving little time for debate notwithstanding the importance of the subject.

Second, the EC's recommendations in the report significantly increased the disparity in the number of voters in some constituencies. For example, the number of voters in the Damansara Federal Constituency increased by 76.16% from 85,401 voters in the previous general election to 150,439 voters for GE14. In comparison, the Sabak Bernam Federal Constituency had 37,126 voters for GE14. This means that a voter in Sabak Bernam has a vote which is equivalent to 4.05 times of a voter in Damansara. The report came under heavy criticism from civil society on grounds that it exacerbated the malapportionment, seemingly in favour of the government of the day.

Critics of the re-delineation report argued that the report went against the principle of "*1 Malaysian-1 Vote*", i.e. that each constituency should have an equal number of voters to allow for equal representation in government. It was also alleged that it did not comply with the guiding principles for re-delineation set out in the FC. We will now take several steps back to consider whether there is any legal basis for these allegations.

When the FC was first introduced on 31 August 1957, the parameters for a re-delineation exercise were set out in Article 116. Article 116(4) of the FC, among others, provided that the number of voters in each constituency shall be approximately equal after making due allowance for the distribution of the different communities and for differences in population density and means of communications but that such allowance shall not exceed 15%.

Article 116(4) was repealed and the parameters governing a re-delineation were transferred to a new Thirteenth Schedule pursuant to the Constitution (Amendment) Act 1962. The new Section 2(c) of the Thirteenth Schedule, among others, provided that the number of voters within each constituency ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the rural districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies "*to the extent that in some cases a rural constituency may constitute as little as one half of the electors of any urban constituency*". This was the start of the erosion of the "*1 Malaysian-1 Vote*" principle as the permitted allowance of deviation had been significantly increased.

In 1973, the words "*to the extent that in some cases a rural constituency may constitute as little as one half of the electors of any urban constituency*" were removed from Section 2(c) pursuant to the Constitution (Amendment) (No. 2) Act 1973. This amendment meant that the EC was free to assign such weightage as it deemed fit to rural constituencies without any clear-cut limitation to the exercise of its discretion.

It therefore can be seen that from the outset, the idea "*one person – one vote*" was not an absolute principle enshrined in the FC as variances were permitted to give weightage to rural constituencies. However, there was, at the birth of Malaysia, an inbuilt safeguard to limit the difference in the number of voters between constituencies to ensure some measure of equality to the power of "one vote" of Malaysians. Unfortunately, this safeguard was removed 45 years ago by the constitutional amendments of 1973.

Even if one accepts that the EC now has unfettered discretion to determine the weightage to be assigned to rural constituencies, it is clear that the significant increase (76.16%) in the number of voters in the Damansara Federal Constituency from the previous general election has unjustifiably increased the difference in the number of voters between that constituency and the Sabak Bernam Federal Constituency, both of which are situated in the State of Selangor. This gives credence to the arguments that the re-delineation report has exacerbated the malapportionment contrary to the envisioned objectives of the exercise.

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While it is impracticable for remote rural constituencies to have the same number of voters as some densely populated urban constituencies due to geographical and accessibility limitations, the "*1 Malaysian–1 Vote*" principle may become slightly closer to reality if the FC is amended to reinstate a permitted variance between these types of constituencies.

As Article 113(2) prescribes an interval of not less than eight years between the completion of one re-delineation review and the commencement of the next review, the next review under that provision can only be commenced in March 2026. Alternatively, the Government may trigger a review under Article 113A of the FC by increasing the number of members in the Dewan Rakyat, which has remained at 222 since 2003. As the number of registered voters has increased by approximately 36% since then, it may now be appropriate to increase the number of members in the Dewan Rakyat. However, this will require the support of not less than two-thirds of the members of the Dewan Rakyat and the Dewan Negara (Senate) as it entails an amendment to Article 46 of the FC.

RM 1,999 < RM 2,000<RM 2,001: THE MAGIC AMOUNT?

Chua Tian Chang, better known as Tian Chua, is a feisty politician. Among the many exploits that brought him fame or infamy, depending on which way one looks at it, was a sit-down protest before a water cannon truck of the riot police, reminiscent of scenes from the protests in Tiananmen Square, biting a policeman and most recently, uttering expletives at a police officer.

Arising from the most-recent incident, Chua was charged and convicted in the Sessions Court for outraging the modesty of a person under section 509 of the Penal Code. Chua was sentenced to a fine of RM3,000, which would have resulted in his disqualification as a Member of Parliament under Article 48(1)(e) of the FC ("Article 48(1)(e)"). On 2 March 2018, on Chua's appeal, the High Court reduced the sentence to RM2,000 which appeared to allow him to avoid disqualification under Article 48(1)(e), and clear the path for him to contest in GE14.

However, Chua was in for a rude shock on nomination day when the returning officer ("RO") rejected his nomination paper as a candidate for the Batu Federal Constituency where he had emerged victorious in the last two general elections. The reason for the disqualification, as reported in the media, was because the RO took the view that notwithstanding the reduction of Chua's fine to RM2,000, Chua was still disqualified. The RO relied on regulation 7(1)(c) of the *Elections (Conduct of Elections) Regulations 1981* which, among others, requires the RO to reject the nomination paper of any candidate on grounds that the candidate is disqualified from being a member of the Dewan Rakyat under the FC.

Article 48(1)(e), the constitutional provision which lies at the heart of this conundrum, disqualifies a person from being a Member of Parliament if he has been convicted of an offence and sentenced to imprisonment for a term of not less than one year or to a fine of ***not less than*** RM2,000. Thus the question is whether "*a fine of not less than RM2,000*" includes or excludes a fine of RM2,000.

From a literal reading of Article 48(1)(e), it seems that a fine of RM2,000 would disqualify Chua from contesting in GE14. However, those in Chua's camp relied, not on a plain reading of the provision, but instead on the Supreme Court case of *Public Prosecutor v Leong Yee Ming* [1993] 2 CLJ 143. In that case, Gunn Chit Tuan CJ (Malaya) upheld the prosecution's appeal against the decision of the High Court to grant bail to a person charged under Section 39A(2) of the Dangerous Drugs Act 1952 ("DDA") despite Section 41B of the DDA prohibiting bail from being granted for offences punishable with imprisonment for more than five years. Gunn CJ (Malaya) considered that the words "*be punished with imprisonment for life or for a term which shall not be less than five years*" in Section 39A(2) of the DDA clearly and unequivocally meant that the offence is punishable with imprisonment for more than five years i.e. five years and one day up to a maximum imprisonment for life, and therefore the offence was non-bailable.

The decision in *Leong Yee Ming* was relied on by the High Court in *Chua Tian Chang v Pendakwa Rakyat* (Rayuan Jenayah No: 41-175-2009), where Chua had appealed against his earlier conviction for biting a police officer. While upholding the conviction, the High Court Judge reduced the fine imposed on Chua from RM3,000 to RM2,000, after taking into consideration the fact that Chua would be disqualified as a Member of Parliament if a higher fine was imposed on him. According to the Judge, the amount of RM2,000 stated in Article 48(1)(e) was just a guideline which would not cause Chua to lose his eligibility automatically, an event which would only occur if the fine was for RM2,001 and above. This position was also relied on by the High Court Judge in Chua's most recent conviction.

Chua's attempt to salvage the situation by filing a suit in the High Court on 2 May 2018 to seek a declaration that he is entitled to contest in GE14 and that his nomination for the Batu Federal Constituency be accepted was unsuccessful as the Court ruled on 4 May 2018 that the challenge should be by way of an election petition pursuant to Article 118 of the FC.

Chua initially appealed against the High Court decision but subsequently withdrew the appeal. According to Chua's counsel, his client proposes to commence new court proceedings to clarify whether he is eligible to stand for future elections and will not challenge the results of the elections in the Batu Federal Constituency which was won by Chua's newly adopted 'protégé',

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MALAYSIA: A NEW HOPE

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P. Prabakaran, a fresh-faced 22-year-old law student who had initially stood as an independent candidate.

Chua's setback in GE14 raises two legal issues. First, whether a fine of RM2,000 imposed on a person upon his conviction triggers off a disqualification under Article 48(1)(e). Second, whether a RO is entitled to disregard the decisions of the High Court and disqualify a candidate's nomination on his own accord. It remains to be seen whether the new proceedings which are to be filed by Chua will address both of these issues or only the first issue.

Earlier news reports have also suggested that Chua had voiced his intention to file a representation to the Attorney General's Chambers for clarification as to whether a Member of Parliament could be disqualified for being fined RM2,000 for an offence. It is unclear whether Chua will still be pursuing this course of action. Even if the Attorney General issues the opinion sought by Chua, the legal effect of such an opinion remains questionable.

THE TUSSLE FOR LEADERSHIP IN KEDAH AND PERAK

Kedah

The Pakatan Harapan coalition won 18 seats in the Kedah State Assembly (50%) while Parti Islam Se Malaysia ("PAS") secured 15 seats and the Barisan Nasional coalition, three seats. This meant there was no party which held a simple majority in the State Assembly.

Article 37(2)(a) of the Kedah State Constitution provides that the Sultan of Kedah shall appoint as Menteri Besar (Chief Minister) a member of the State Assembly who in his judgment is likely to command the confidence of the majority of the members of the State Assembly.

As no single person commanded the confidence of the majority of the members of the State Assembly, the Sultan of Kedah exercised his judgment to appoint Datuk Seri Mukhriz Mahathir of the Pakatan Harapan coalition as the Menteri Besar on the basis that his coalition had the single largest bloc of members in the State Assembly.

While the impasse over the selection of the Menteri Besar has been resolved, it will be interesting to see how the Kedah State Government will function without a majority of representatives in the State Assembly.

Perak

In Perak, no party managed to secure even 50% of the 59 seats in the State Assembly. The Pakatan Harapan coalition won 29 seats (one shy of a simple majority), whilst the Barisan Nasional coalition won 27 seats and PAS weighed in with three seats.

Despite the Pakatan Harapan coalition garnering the most seats, the former Barisan Nasional Menteri Besar of Perak, Dato' Seri Dr Zambry Abdul Kadir, announced two days after GE14 that the Barisan Nasional coalition had obtained enough seats to form the State Government. Dr Zambry also announced that he would be seeking an audience with the Sultan of Perak to be sworn in as the Menteri Besar pursuant to Article 16(2)(a) of the Perak State Constitution by reason that he commands the confidence of the majority of the members of the State Assembly. It was rumoured, although unconfirmed, that the assemblymen from PAS had agreed to support the Barisan Nasional coalition, thus giving them a total of 30 out of the 59 seats in the State Assembly.

However, before Dr Zambry could be sworn in, two assemblymen from the Barisan Nasional coalition declared their support for the Pakatan Harapan coalition. This enabled the Pakatan Harapan Menteri Besar candidate, Ahmad Faizal Azumu, to command a simple majority of 31 seats in the State Assembly as compared to the 28 seats held collectively by the Barisan Nasional coalition and PAS, and consequently be appointed as the Menteri Besar. The Barisan Nasional assemblymen concerned were thereafter sacked by their party (UMNO), with one opting to join Parti Pribumi Bersatu Malaysia, a member of the Pakatan Harapan coalition, while the other remains as an independent for now.

The defection of the two assemblymen seems to be poetic justice as the defection of three assemblymen from Pakatan Rakyat (the forerunner to the Pakatan Harapan coalition) in 2009 led to the collapse of Pakatan Rakyat government and the emergence of Barisan Nasional as the ruling coalition in Perak after the 12th General Elections in Malaysia a decade ago.

THE TALE OF TWO CHIEF MINISTERS, YET AGAIN

Readers of LEGAL INSIGHTS may recall an intriguing piece in Issue 1/2015 entitled "*Bargaining in a Bazaar*" which recounts the dramatic events that occurred in the aftermath of the Sabah state elections in 1985. It was a tale of late night visitors, unwelcomed guests and political intimidation, ultimately leading to a landmark case where the High Court had to determine whether the leader of the defeated United Sabah National Organisation (a component of the Barisan Nasional coalition) or the victorious Parti Bersatu Sabah was the legally appointed Chief Minister of Sabah.

Thirty-three years later, history seems to have repeated itself. As news trickled in of the results of the Sabah state elections early on the morning of 10 May 2018, it became clear that Sabah could have a hung Legislative Assembly. The Warisan/Pakatan Harapan informal coalition and the Barisan National coalition had each won 29 seats. The Sabah STAR party won two seats and effectively assumed the role of "kingmaker".

The leader of Sabah STAR, Datuk Seri Dr Jeffrey Kitingan, threw his support behind the Barisan Nasional coalition. Seizing the opportunity, Tan Sri Musa Aman, the leader of UMNO Sabah had himself sworn in as the Chief Minister in the late hours of 10 May 2018 pursuant to Article 6(3) of the Sabah State Constitution on the basis that he commanded the confidence of the majority of the members of the Legislative Assembly.

However, a few hours later, in the morning of 11 May 2018, news broke that two state assemblymen from UPKO had, together

with their party, pulled out from the Barisan Nasional coalition to throw their support behind the Warisan/Pakatan Harapan coalition, giving the latter a simple majority in the Sabah Legislative Assembly. Adding salt to the wound, four UMNO assemblymen also defected to the Warisan/Pakatan Harapan coalition, giving the informal coalition a 10 seat majority in the Legislative Assembly. Now commanding the confidence of a clear majority of the members of the Sabah Legislative Assembly, the leader of Warisan, Datuk Seri Mohd Shafie Apdal, sent a letter to the Yang di-Pertua Negeri (Head of State) containing the declarations from the assemblymen who supported him.

After meeting the said assemblymen, the Yang di-Pertua Negeri determined that it was now Shafie who had the confidence of the majority of the members of the Legislative Assembly and swore him in as the Chief Minister of Sabah. This was despite denials issued by Musa that he had resigned as the Chief Minister, notwithstanding that he had been commanded to do so by the Yang di-Pertua Negeri.

A constitutional crisis loomed. On the face of it, it seems that Sabah has two concurrent Chief Ministers, appointed two days apart. Drawing parallels with the 1985 crisis, the Yang di-Pertua Negeri lodged a police report alleging that a senior Sabah Barisan Nasional leader had made threats against him in the hours leading up to the swearing in of Musa as Chief Minister.

Musa filed a writ action in Court seeking a declaration that he is the legitimate Chief Minister of Sabah and that the swearing-in of Shafie on 12 May 2018 was unconstitutional. Musa has since withdrawn his writ action and filed a fresh originating summons seeking in essence the same declarations.

The starting point for analysing this battle to be anointed as the Chief Minister of Sabah is Article 7(1) of the Sabah State Constitution, which provides that "*if the Chief Minister ceases to command the confidence of a majority of the members of the Legislative Assembly, then, unless at his request the Yang di-Pertua Negeri dissolves the Assembly, the Chief Minister shall tender the resignation of the members of the Cabinet*".

In *Datuk (Datu) Amir Kahar Tun Datu Haji Mustapha v Tun Mohd Said Keruak & 8 Ors* [1995] 1 CLJ 184, where the issue was whether the then Chief Minister, Tan Sri Joseph Pairin Kitingan, had lost the command of the majority of the Sabah Legislative Assembly, the High Court held that "*the evidence that a Chief Minister ceases to command the confidence of the majority of members of the Assembly for the purpose of Article 7(1) of the Sabah Constitution, may be found from other extraneous sources than to be confined to the votes taken in the Legislative Assembly provided that, that extraneous sources are properly established*".

More recently, a similar situation arose in Perak after the 12th General Elections. There, as alluded to above, the then Chief Minister of Perak, Dato' Seri Ir Hj Mohammad Nizar Jamaluddin, had lost the majority support of the Perak State Assembly following the defection of three of his coalition members which resulted in 31 out of 59 assemblymen supporting the Barisan Nasional coalition. The Sultan of Perak met the 31 assemblymen who confirmed their support for the Barisan Nasional.

The Sultan advised Nizar to resign but instead of doing so, the latter requested for a dissolution of the Perak State Assembly and for fresh elections to be held. The Sultan of Perak declined Nizar's request and appointed Dr Zambry from the Barisan Nasional coalition as Chief Minister.

Nizar commenced legal proceedings, seeking a declaration that he was the rightful Menteri Besar of Perak. The Federal Court in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin v Dato' Seri Dr Zambry Abdul Kadir; Attorney General (Intervener)* [2010] 2 CLJ 925 interpreted Article XVI(6) of the Perak State Constitution (which is similar to Article 7(1) of the Sabah State Constitution) and held, in line with *Datuk (Datu) Amir Kahar,* that "*evidence of loss of confidence in the MB may be gathered from other extraneous sources provided, as stated in Akintola (a decision of the Privy Council that arose from Nigeria), they are properly established. Such sources, we think, should include the admission by the MB himself and/or representations made by members of the LA that the MB no longer enjoys the support of the majority of the members of the LA.*"

Contrary to the decisions in *Datuk (Datu) Amir Kahar* and *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin*, the High Court in *Stephen Kalong Ningkan v Tun Haji Openg and Tawi Sli* [1966] 2 MLJ 187, had earlier held that under Article 7(1) of the Sarawak State Constitution (which is similar to Article 7(1) of the Sabah State Constitution), the lack of confidence in a Chief Minister can be demonstrated only by a vote in the Council Negeri (State Assembly).

Although the Court in *Stephen Kalong Ningkan* expressed reservations as to whether the Governor of the State could dismiss a Chief Minister who refuses to resign, the Federal Court in *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin* unequivocally held that a Menteri Besar who has lost the confidence of the majority of the member of a State Assembly is deemed to have vacated his office if he refuses to resign.

It remains to be seen whether the Court, in the proceedings initiated by Musa, will follow the principles laid down in *Datuk (Datu) Amir Kahar* and *Dato' Seri Ir Hj Mohammad Nizar Jamaluddin* or in *Stephen Kalong Ningkan*. Even if the Court rules in favour of Musa, it may only delay the inevitable given that the informal coalition supporting Shafie now holds a 10 seat majority in the Legislative Assembly.

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FROM FLORICULTURISTS AND BARBERS TO AIRLINES AND INSURERS

Shi Wen and Karyn examine the developments since the inception of the Competition Act 2010

This year marks the 6th anniversary of the Malaysian Competition Act 2010 ("Act"), which came into force on 1 January 2012. The past few years have shown a growing trend of enforcement by the Malaysia Competition Commission ("MyCC"), particularly those relating to cartels.

We observed that the MyCC has, based mainly on third party complaints and even *ex-officio*, conducted investigations into various industries, associations and companies both international and local. In tandem with those investigations, the MyCC has been active in developing guidelines and carrying out studies of several market sectors.

This update provides an overview of the MyCC's investigative trends, policy and enforcement positions, as well as the developments which have occurred in the application of the Act itself.

THE FIRST STEP

When the Act was passed in 2010, companies were given one and a half years to bring their business and internal processes into compliance with the Act. The rationale at the time was that businesses and associations would need time to learn about the Act and adjust their practices accordingly, since there had never been any similar law in Malaysia to address competition issues (apart from the Communications and Multimedia Act 1998). The MyCC went on roadshows and focused on giving talks in an attempt to educate companies – as well as the general public – about the Act and how it was meant to protect consumers in Malaysia. It also issued various guidelines on the application of the Act and the basic concepts of market share.

After the Act came into force, public reaction to the Act and talk of its enforcement remained rather relaxed, and for a brief time it remained to be seen whether and how the MyCC would tackle potential non-compliance.

However, the lull was short-lived; on 23 July 2012, *The Star* newspaper reported that the MyCC was investigating the Cameron Highlands Floriculturist Association ("CHFA") for allegedly fixing prices of flowers sold to distributors and wholesalers. The initial reaction of the CHFA was one of denial, insisting that the rules of the free market meant that the CHFA and its members were entitled to raise flower prices by 10% across the board. However, the tune quickly changed when the MyCC issued its proposed decision in October that same year. On 6 December 2012, the MyCC published on its website that it had issued a decision finding that the members of the CHFA had infringed Section 4(2) of the Act by fixing the purchase price of their products.

This being the first case in which the MyCC issued a decision on infringement, there was no financial penalty imposed. The CHFA was instead instructed to cease and desist the act of fixing prices and to give an undertaking to the MyCC that its members would refrain from any anti-competitive practices in the relevant market. The CHFA was also required to issue a public statement in local newspapers that it had implemented the above. The president of the CHFA publicly apologised on behalf of the association and admitted that neither the CHFA nor any of its members had been aware that their association's decision to fix prices contravened the Act.

GAINING TRACTION

The CHFA's price-fixing behaviour was brought to the attention of the MyCC by the CHFA's own newspaper announcement regarding the decision to raise prices of flowers. One might say it was a case of low-hanging fruit, but it certainly paid off; the media attention which the CHFA case garnered sent a clear signal that the MyCC was ready and willing to investigate and prosecute any party – even small, local associations – who violated the provisions of the Act.

> **"In March 2014, the MyCC issued its first ever decision requiring the offending parties to pay a financial penalty"**

In late 2013, the MyCC investigated the Malaysia India Hairdressing Saloon Owners Association ("MIHSOA") for a similar offence, on nearly the same facts. The association had published in local newspapers that its members were going to raise prices of haircuts by RM2.00. No formal decision was issued, but MIHSOA was required to give the MyCC an undertaking that its members would cease such price-fixing behaviour.

TAKING OFF

CHFA and MIHSOA were far from the only associations to be investigated by the MyCC, which was, by 2014, conducting various investigations parallel to one another. In March 2014, the MyCC issued its first ever decision requiring the offending parties to pay a financial penalty. Malaysia Airline System Berhad ("MAS") and AirAsia Berhad ("AirAsia") were found to be in contravention of Section 4(2) of the Act, by agreeing that MAS, AirAsia and AirAsiaX would each focus on their individual market areas and not enter into or continue to compete in their competitor's allocated market. MAS and AirAsia were fined RM10,000,000 each, bringing the enforcement of competition law in Malaysia to its next major milestone – the imposition of financial penalties.

A string of investigations and decisions quickly followed the MAS/AirAsia finding of infringement. In October 2014, Giga Shipping Sdn Bhd gave an undertaking to the MyCC to cease the imposition of certain exclusivity clauses which would have raised


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competition issues under Section 4 of the Act. Interestingly, the undertaking was given before the MyCC issued its final decision, and in exchange for the undertaking, the MyCC agreed to "*refrain from instituting or taking proceedings against the relevant enterprises involved*".

Shortly thereafter, in January 2015, the MyCC issued a decision finding 24 manufacturers of ice to have infringed the Act by fixing the prices of tube ice and block ice in Kuala Lumpur, Selangor and Putrajaya. The ice manufacturers were collectively fined RM251,950, with individual fines ranging from RM1,080 to RM106,000. Two weeks later, the MyCC issued a decision against 15 members of the Sibu Confectionary and Bakery Association for price-fixing, fining them a total of RM247,730 with individual fines ranging from RM480 to RM102,600.

Other cases investigated during this time included the Pan-Malaysia Lorry Owners Association, and the Malaysia Heavy Construction Equipment Owners' Association. In both cases the MyCC was satisfied with undertakings and did not impose a financial penalty.

In June 2016, the MyCC issued its first decision relating to a Section 10 offence (abuse of dominance). The investigation involved My E.G. Services Berhad ("MyEG"), which was allegedly abusing its dominant position by imposing different conditions on equivalent transactions in the processing of mandatory insurance for online foreign worker permit renewal applications. The MyCC found MyEG guilty of abusing its dominant position and imposed a financial penalty of RM2.27 million.

Around the same time, another decision was issued against four container depot operator companies and an information technology service provider, Containerchain (Malaysia) Sdn Bhd, for operating a cartel in the shipping and logistics industry in Penang – a total fine of RM645,774 was imposed on all enterprises.

RECENT DEVELOPMENTS

MyCC continues to conduct investigations consistently to this day. At the time of writing, there are six (6) findings of an infringement and two (2) proposed decisions issued by the MyCC which have yet to be finalised – one against the Persatuan Insurans Am Malaysia ("PIAM") and its members in late 2017, and another against seven tuition and day care centres operating in the SS19 area in Subang Jaya in February this year.

Of all the cases which the MyCC has investigated to date, three have been challenged: the Competition Appeal Tribunal ("CAT") overturned the MyCC's decision in the MAS/AirAsia case in February 2016, and the case is currently pending judicial review. Both Prompt Dynamics Sdn Bhd (one of the container depot operators) and MyEG appealed their respective cases to the CAT, but were unsuccessful. MyEG has announced that it intended to apply for judicial review as well, but as at the time of writing there have been no developments on that front.

DISCERNING THE TRENDS

Investigations

The MyCC's first few investigations appeared to have arose from publications and news articles by the offending parties themselves, who were not aware that their behaviour was illegal. Since then, the MyCC has had plenty on its plate without relying on enterprises to 'self-report'. Competitors, consumers and even enterprises in the upstream or downstream industries have complained to the MyCC of potentially anti-competitive conduct. In fact, based on statistics published by the MyCC in late 2017, the MyCC had received a total number of 339 third party complaints of which 311 of those complaints were closed. There were only 45 cases initiated by the MyCC of which 41 were closed. There is also the possibility that an enterprise may inform the MyCC of its own anti-competitive behaviour by making an application under the "*leniency regime*". However, based on the cases reported to date, this has yet to occur.

Target Enterprises

From 2014 onwards, the MyCC's investigations appeared to have moved away from small businesses and associations involving everyday goods and services, such as flowers, haircuts and ice, to 'bigger fish', like MAS, AirAsia, MyEG and PIAM. The MyCC's latest proposed decision against the seven tuition and day care centres in Subang Jaya however came as a surprise. It is speculated to be initiated based on a third party complaint and if true, will reaffirm the MyCC's enforcement practice that it will continue to focus and investigate into third party complaints.

From Undertakings to Penalties

When the Act first came into force, the MyCC's decisions imposed relatively little or no financial penalties. This was likely due to a combination of the fact that the infringers were small businesses with relatively small turnover, and also that the Act was in its infancy at the time and these businesses would not have had the resources to ensure that their company and staff underwent competition compliance training. This changed with the MyCC's imposition of a collective fine of RM 20 million in the MAS/AirAsia case, which sent a clear signal to the Malaysian

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THE EYE APPEAL

Wai Hong and Brenda explain a significant decision on medical negligence by the Federal Court

BACKGROUND FACTS

The recent decision of the Federal Court in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and another appeal* [2018] 3 CLJ 427 arose from a medical negligence claim. The patient underwent an eye operation for retinal detachment and bucked on the operating table leading to blindness in one eye.

After a full trial, the High Court held that the surgeon and the anaesthetist (collectively "doctors") involved in the procedure were negligent in the diagnosis and treatment of the patient and in failing to warn the patient of the risks in the operation. The High Court also found the private hospital where the operation was carried out, vicariously liable for the negligence of the doctors. The patient was awarded RM200,000 as general damages and an unprecedented sum of RM1,000,000 as aggravated damages.

The Court of Appeal dismissed the appeals by the doctors and the hospital and affirmed the decision and the award of the High Court. Still dissatisfied with the Court of Appeal's decision, the doctors and the hospital obtained leave to appeal to the Federal Court on various questions of law.

The Federal Court unanimously dismissed the doctors' and the hospital's appeals (collectively "Eye Appeal") and affirmed the High Court's award of damages to the patient. We will now examine the Federal Court's grounds of judgment.

NON-SPEAKING JUDGMENTS AND WHEN TO ORDER A RETRIAL

The doctors raised preliminary objections before the Federal Court in their submissions. They sought an order for a retrial on the ground, amongst others, that the trial judge had given a non-speaking judgment. A non-speaking judgment is when a judge fails to give a reasoned judgment for his conclusions, and merely makes a finding without explaining why he was persuaded to that end.

In its judgment, the Federal Court gave its views as future guidance for the courts below when faced with the same issue.

The Federal Court agreed that the trial judge in the Eye Appeal had indeed given a non-speaking judgment and disapproved of such judgment. However, it went on to say that it does not necessarily follow that the court should always order a retrial. This is because the party seeking the retrial has the burden of proving that there was some substantial wrong or miscarriage of justice by the trial court before such relief can be granted.

The Federal Court cautioned that a retrial should not be easily ordered, and advised the appellate courts to avoid ordering a retrial merely because there was a non-speaking judgment. In such a scenario, the appellate courts have a duty to make their own findings of fact based on the evidence available in the records of appeal.

The Federal Court noted that in the case of the Eye Appeal, the alleged negligence happened in 1999, the trial commenced in 2007 and concluded in 2010, after 23 days of trial and involving 10 witnesses. Accordingly, the Federal Court held that a retrial would unduly prejudice all parties and was contrary to the best interests of justice.

JUDGING THE DOCTORS – WHO DECIDES?

In cases of medical negligence where the evidence involved is often highly technical and complicated, the courts require the assistance of expert witnesses to help them understand the material facts. Where parties in a medical negligence suit produce expert witnesses who are of opposing views as to whether the medical professional in question had performed below a reasonable standard of care, the question as to how this is to be resolved has been long debated in many Commonwealth jurisdictions.

The first question before the Federal Court was this:

"*Whether it is the Bolam test or the test in the Australian case of Rogers v Whittaker [1993] 4 Med LR 79 which should be applied to the standard of care in medical negligence, following, after decision of Federal Court in Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593, conflicting decisions of the Court of Appeal of Malaysia, conflicting decisions of the High Court in Malaysia, and the legislative changes in Australia, including the re-introduction there of a modified Bolam test.*"

The *Bolam* test is essentially a "*doctors know best*" test. The courts must accept the views of a responsible body of men skilled in the particular discipline, even if there exists another responsible body of men with a different view. The rationale behind such a test is that judges, not being medically trained, are not equipped to resolve genuine differences of opinion on matters that are beyond their expertise. The *Bolam* test which originated from the English courts, had subsequently been qualified by the English House of Lords in *Bolitho v City & Hackney Health Authority* [1996] 4 All ER 771 which in effect retained the *Bolam* test but subjected it to the condition that the expert opinion must be capable of withstanding logical analysis.

Meanwhile, the *Rogers* test expounded by the High Court of Australia in *Rogers v Whittaker* positions the court as the final arbiter on the question of whether the standard of care has been breached. Under such a test, the court is not to delegate its judicial function to the medical profession. The *Rogers* test was applied by the Federal Court in *Foo Fio Na*. This led to some uncertainty as to the correct legal test to be applied in Malaysia.

In *Zulhasnimar Hasan Basri & Anor v Dr Kuppu Velumani P & Ors* [2017] 8 CLJ 605 (which was heard together with the Eye Appeal), the Federal Court clarified the position in Malaysian law. The Federal Court in the Eye Appeal reiterated its grounds of judgment in *Zulhasnimar* – that a distinction is to be made between diagnosis and treatment in medicine, and the duty to advise the patient of risks. The former is not within the expertise of the courts and thus cannot be resolved by the courts, whereas


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the latter is an issue of fact that the courts are able to determine.

As such, the *Bolam* test as qualified in *Bolitho* continues to apply to the question of the standard of care in medical diagnosis and treatment, while the *Rogers* test as propounded in *Foo Fio Na* applies to the duty to advise of risks associated with a procedure.

However, it is pertinent to note the *Bolitho* qualification attached to the *Bolam* test. While doctors may know best, the expert opinion before the court must be capable of withstanding logical analysis. If the court finds that it fails to satisfy this criterion, it may hold that such expert opinion is not reasonable or responsible and depart from it.

Indeed, that was what the Federal Court did in the Eye Appeal. During the trial, the patient had produced an expert witness to testify that the doctors had breached the reasonable standard of care. The doctors too produced their own expert witness to testify that they did not breach that standard. The Federal Court analysed the opposing expert evidence and ultimately held that the doctors were negligent in diagnosis and treatment, in addition to failing to warn the patient of risks. This was partly due to inconsistencies in the evidence given by the doctors' expert witness.

In that sense, it can be said that courts have not completely delegated their judicial function in cases of medical negligence. They must still judge the expert evidence on its logical merits, as demonstrated by the Federal Court in the Eye Appeal.

AGGRAVATED DAMAGES IN MEDICAL NEGLIGENCE

The second question of law posed by the doctors to the Federal Court was:

"*Whether aggravating factors should be compensated for as general damages, therefore rendering a separate award of aggravated damages unnecessary, as decided by the English Court of Appeal in Richardson v Howie [2004] EWCA Civ 1127 and explained in Michael Jones' Medical Negligence, 4th Edn. 2008, para 12-011*".

On this issue, the Federal Court noted that aggravated damages have previously been awarded as a separate head of damage in its earlier decision in *Mohd Ridzwan bin Abdul Razak v Asmah bt Hj Mohd Nor* [2016] 4 MLJ 282, although this was not a medical negligence case but concerned the tort of sexual harassment.

The Federal Court went on to hold that there was no reason to exclude this kind of damages from being awarded in medical negligence cases which involve real injury to a person's body.

CAN A HOSPITAL DELEGATE ITS DUTY OF CARE?

The hospital put the following question of law to the Federal Court:

"*Where the doctors are qualified professionals in a private hospital and working as independent contractors by virtue of a contract between the private hospital and the doctors, can the private hospital be held vicariously liable for the sole negligence of the doctors?*"

At the outset, the Federal Court held that the doctors were independent contractors and not agents, servants or employees of the private hospital. As such, the hospital could not be vicariously liable for the doctors' negligence.

Nevertheless, the Federal Court found that the hospital was liable for breach of its non-delegable duty in respect of the anaesthetic services provided to the patient.

In the recent case of *Dr Kok Choong Seng & Anor v Soo Cheng Lin* [2017] 10 CLJ 529, the Federal Court held that the doctrine of non-delegable duty of care as expounded by the English Supreme Court in *Woodland v Swimming Teachers Association and others* [2014] AC 537 could apply to private healthcare institutions. However, the court in *Dr Kok Choong Seng* found that the doctrine did not apply to the facts of that case and the private hospital therein was not liable for the doctor's negligence.

Unlike in *Dr Kok Choong Seng*, the Federal Court in the Eye Appeal held that the *Woodland* test was satisfied in respect of the anaesthetist's negligence, although not the surgeon's. Insofar as the surgeon's negligence was concerned, the Federal Court found that the facts were similar to those of *Dr Kok Choong Seng*, in that the diagnosis and treatment of the patient's eye, including the operation, was arranged between the patient and the surgeon and the hospital had merely provided the facilities and services for the operation. Accordingly, the Federal Court held there was no non-delegable duty of care by the hospital in that respect.

The facts in the Eye Appeal diverged from *Dr Kok Choong Seng* when it came to the anaesthetist's negligence. The Federal Court found the hospital liable for breach of its non-delegable duty to ensure reasonable care in the anaesthetic services provided. The salient facts in the Eye Appeal which led the Federal Court to this conclusion are summarised as follows:

(a) The anaesthetist was the only anaesthetist on duty at the hospital on the day of the operation and was involved in all operations at the hospital requiring general anaesthesia on that day;
(b) The patient was left with no choice of anaesthetist for his operation;

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INTRADAY SHORT SELLING: HERE TO SLAY OR TO STAY?

Addy Herg provides an overview of Bursa Malaysia's latest initiative

INTRODUCTION

On 6 February 2018, the then Prime Minister of Malaysia, Dato' Seri Najib Razak, announced several initiatives to stimulate the Malaysian capital markets, one of which was the introduction of intraday short selling ("IDSS").

IDSS was launched on 16 April 2018 with the necessary amendments being made to the Rules of Bursa Malaysia Securities ("BMS Rules"), Directives issued by Bursa Malaysia Securities Berhad ("Bursa Malaysia") pursuant to the BMS Rules and the Participating Organisations' Trading Manual. A set of Frequently Asked Questions for the BMS Rules in relation to IDSS (Version 1 Apr 2018) was issued at the same time.

WHAT IS IDSS?

IDSS allows a party to sell first and buy the securities later. This enables the seller to profit from the difference in the price at which the securities were sold and the price at which they are subsequently purchased to meet his delivery obligation in respect of the sale, if the price of the securities has declined after they were sold.

> "the seller must close off his sell position with a buy position … on the day on which the short sale is executed"

In an IDSS, the seller must close off his sell position with a buy position in respect of the securities on the day on which the short sale is executed.

A short sale differs from the traditional norm of "buy low and sell high" commonly seen in the stock market, whereby an investor buys securities at a low market price and sells them to make a profit when the market price goes up.

WHO CAN PARTICIPATE IN IDSS?

Any person who is a client of a Participating Organisation ("PO") may participate in IDSS, subject to his compliance with the prescribed requirements under the BMS Rules and any other requirements that may be imposed by the PO.

SUBJECT MATTER OF A SHORT SALE

IDSS may only be carried out in respect of approved securities ("Approved Securities"), which are securities that are declared by Bursa Malaysia to be Approved Securities pursuant to Rule 8.22(5) of the BMS Rules.

The list of Approved Securities for IDSS is identical to that of regulated short selling ("RSS"). The current list of Approved Securities is set out in PO's Circular No. R/R7 of 2018 dated 18 May 2018 (effective 25 May 2018) and consists of 263 securities. The list will be updated twice a year in May and November.

CRITERIA TO BE SATISFIED TO EXECUTE IDSS

In order to execute IDSS, a seller must have, in addition to complying with the requirements specified by his PO –

(1) entered into an agreement to borrow Eligible Securities ("SBL Agreement") or to purchase Islamic Securities Selling and Buying – Negotiated Transaction ("ISSBNT") Eligible Securities ("ISSBNT Agreement") to settle all potential failed trades which may occur in the event that the IDSS is not closed off by the end of the relevant market day;

(2) executed the prescribed risk disclosure statement; and

(3) submitted a written declaration that he fully understands the requirements of the BMS Rules in relation to IDSS, and that he is not associated with the body corporate that issued or made available the Approved Securities in relation to which the short sale is to be entered.

> "IDSS may only be carried out in respect of approved securities"

The requirements in paragraphs (2) and (3) above do not apply to a seller who satisfies the criteria set out in Appendix 2 of Directive No. 8-003, which include, amongst others, licensed banks and investment banks, licensed fund managers, licensed closed-end funds, foreign fund managers and foreign financial institutions.

EXECUTION OF IDSS

IDSS may only be carried out by way of an On-Market Transaction, which is a match of a buy order to a sell order in Bursa Malaysia's Automated Trading System. IDSS must not be executed through a Margin Account or by way of a Direct Business Transaction or On-Market Married Transaction.

All IDSS orders must be executed by a PO on the market day on which the order is placed. Any IDSS order which is unexecuted, in whole or in part, cannot be carried forward to the next market day.

IDSS is not permitted to be executed (a) within 21 days after a takeover announcement involving the Issuer of an Approved Securities; or (b) when the Approved Securities have been declared as Designated Securities under Rule 7.14 of the BMS Rules when expressly directed by Bursa Malaysia.

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FAILURE TO CLOSE OFF A SELL POSITION

In the event the sell position is not closed off with a buy position at the end of the market day on which the IDSS is executed, the seller may perform any of the following -

(1) borrow the securities under an SBL Agreement;

(2) perform a manual buying in process or permit the transaction to be subject to auto buying in;

(3) transfer the securities from another securities account, subject to the transfer rules; or

(4) utilise his existing shares to cover the position.

The failure to close off a sell position with a buy position by the end of a market day is a breach of BMS Rules by the seller notwithstanding that he may have taken any of the actions described above. In such event, the Securities Commission Malaysia may take various actions against the seller, including imposing a penalty that is proportionate to the severity of the breach, but in any event not exceeding RM1 million, or reprimanding the seller.

> **"IDSS may only be carried out by way of an On-Market Transaction"**

SUSPENSION OF IDSS

IDSS may be suspended in the following circumstances –

(1) if RSS is suspended upon any of the following thresholds being triggered -

(a) if the quantity of the total short position of (i) an Approved Securities is 3% of the outstanding shares of the Issuer of the Approved Securities; or (ii) a class of Approved Securities is 3% of the quantity of the outstanding securities of that class of Approved Securities, on a market day;

(b) the aggregated quantity of the total short position of an Approved Securities referred to in paragraph (1)(a) above is at 10% of the quantity of outstanding shares or securities of the Approved Securities;

(2) if the last done price of the Approved Securities falls by more than RM0.15 (for Approved Securities with a Reference Price of less than RM1.00) or 15% (for Approved Securities with a Reference Price equal to or more than RM1.00) from the Reference Price.

IDSS will be suspended (i) for the remaining duration of the market day in the scenarios described in paragraphs (1)(a) or (2) above; or (ii) until the aggregated quantity falls below 10% of the quantity of outstanding shares or securities, which can only occur when there is redelivery of Eligible Securities under a SBL Agreement or of ISSBNT Eligible Securities under a ISSBNT Agreement in the scenario described in paragraph (1)(b) above.

Since its introduction until 30 June 2018, IDSS has been suspended on 42 occasions in respect of 28 Approved Securities, with Unisem being the first on 25 April 2018 and MyEG being suspended the most number of times on five occasions. In all instances, the suspension was due to the price of the Approved Securities falling by more than RM0.15 or 15% from their Reference Price. The suspensions on these grounds are reflective of the recent bearish sentiments on Asian bourses (including Bursa Malaysia) and do not suggest that there has been rampant short selling of Approved Securities.

COMMENTS

The introduction of IDSS will open short selling to a wider group of investors and make the local bourse more interesting as it presents opportunities for making profits from trading securities even in a bearish market.

The safeguards put in place by Bursa Malaysia for IDSS, i.e. the requirement to have an SBL Agreement or ISSBNT Agreement to safeguard against a seller's failure to close off an open position and the circuit-breakers that result in IDSS of an Approved Securities being suspended when specified thresholds are triggered, will prevent undue disruption to the stock market.

IDSS, with its safeguards, is to be welcomed as it adds greater depth and breadth to Malaysia's capital market. Time will tell whether investors will become more sophisticated in their trading strategies by taking advantage of the availability of IDSS.

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DUTIES OF COUNCIL MEMBERS AND CATEGORISATION OF COMMON PROPERTY

Oon Hooi Lin and Melody Ngai discuss a noteworthy case on stratified developments

In the case of *3 Two Square Sdn Bhd v Perbadanan Pengurusan 3 Two Square & Ors; Yong Shang Ming (Third Party)* [2018] 4 CLJ 458, the High Court had the opportunity to consider the categorisation of common property in a stratified development and the duties of council members of a management corporation of such a development.

BACKGROUND FACTS

The plaintiff, 3 Two Square Sdn Bhd, was the developer of a commercial development called 3TwoSquare ("the Development"). The first defendant was the management corporation of the Development ("Management Corporation"), established pursuant to the Strata Titles Act 1985 ("STA") and the second to ninth defendants were council members of the Management Corporation.

The Development comprised six blocks of shop and office lots. The plaintiff remained the proprietor of all the parcels in one of the six blocks ("Crest Tower"), while the remaining parcels in the Development had been sold.

> **"all the areas that are not identified as parcels will automatically be … common property"**

Disputes arose as to the party who was responsible for the maintenance of certain areas and facilities within the Development, including the cooling tower located on the roof of Crest Tower and the toilets and lifts located in Crest Tower ("Disputed Facilities").

The plaintiff contended that the aforesaid responsibility lay with the Management Corporation as the Disputed Facilities formed part of the common property of the Development. The plaintiff sought a mandatory injunction to compel the Management Corporation to maintain the Disputed Facilities. It further sought to make the second to ninth defendants personally liable for what it alleged was a breach of duty by the Management Corporation.

The first to eighth defendants contended that the Disputed Facilities did not form part of the common property of the Development whilst the ninth defendant denied liability on grounds that he had not been involved in the decisions by the Management Corporation.

CATEGORISATION OF COMMON PROPERTY

The first to eighth defendants submitted that the Disputed Facilities did not form part of the common property of the Development as those facilities had not been specifically identified as common property in the strata plan. They relied on sections 10(3) and 10(4) of the STA which specifically required common property to be clearly identified in a proposed strata plan.

The learned judge, referring to section 4 of the STA which defines "common property" as "so much of the lot as is not comprised in any parcel (including any accessory parcel), or any provisional block as shown in an approved strata plan", opined that the STA defines "common property" by exclusion: common property is simply that which is not a parcel. Hence, there is no requirement for labels to be affixed to the Disputed Facilities in order for them to be designated as common property; all the areas that are not identified as parcels will automatically be regarded as common property.

His Lordship further held that sections 10(3) and 10(4) of the STA did not impose a requirement for common property to be specifically labelled in a strata plan in order to be considered as common property. Instead, the labelling requirements in those sections only applied to proposed strata plans to be submitted to the relevant authority in connection with an application for approval for subdivision of a building.

> **"the duty of a council member is not co-extensive as the duty (of) a director"**

The Court also rejected the defendants' contention that the Disputed Facilities were not part of the common property due to the special or exclusive use of those facilities by the plaintiff. According to the Judge, this contention is not supported by the provisions of the STA nor that of other relevant statutes applicable at the material time and is not a concept which is provided for in the relevant legislation.

The Judge also referred to *JMB Silverpark Sdn Bhd v Silverpark Sdn Bhd* [2013] 9 MLJ 714 where it was held that two requirements had to be fulfilled in order for an area to be considered as "common property" under the Building and Common Property (Maintenance and Management) Act 2007 ("BCPA"): the area must be outside a parcel, and must be used or capable of being used or enjoyed in common by all occupiers of the building.

The High Court in the present case noted that the definition in the BCPA refers to "occupiers" rather than "proprietor". Thus, the Disputed Facilities would comprise "common property" so long as they are capable of being enjoyed by the employees and tenants of the plaintiff in Crest Tower, notwithstanding that the plaintiff was the sole proprietor of all the parcels in the tower. The Court further added that the proper categorisation of a facility as common property cannot depend on the identity of the proprietor as it could give rise to an absurd result if a facility


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is not considered as common property on one day (and thus need not be maintained by the management corporation) but would be considered common property once the proprietor sells one of his parcels to a third party.

The Judge emphasised that the BCPA does not apply to the case before him as the management corporation had already been formed (thereby bringing the matter outside the scope of the BCPA and into that of the STA) and added that the reference to the BCPA was to show that the definition of "common property" therein supports his conclusion that the Disputed Facilities ought to be considered as common property.

Accordingly, the Court held that the responsibility for the maintenance and upkeep of the Disputed Facilities fell on the Management Corporation and issued the mandatory injunction requiring the Management Corporation and the council members for the time being to maintain and manage the Disputed Facilities.

DUTIES OF COUNCIL MEMBERS

The plaintiff also sought to make the second to ninth defendants personally liable in their capacity as council members of the Management Corporation for the latter's breach of duty on the basis that individual council members owed a statutory and fiduciary duty to the plaintiff.

> **"The duty is owed to the management corporation and to the proprietors as a whole"**

In the absence of legal precedent in Malaysia on the aforesaid issue, counsel for the plaintiff cited the legal position in other jurisdictions, such as Australia, Sri Lanka and Ontario, Canada, where the fiduciary duty of the office bearers in a corporation that manages stratified property has been considered. After examining the authorities submitted by the plaintiff's counsel, the Judge cautioned that authorities from other jurisdictions are at best only of persuasive value, and that the legal position in Malaysia must take into account local circumstances and be consonant with the context of local legislation.

The Court noted that section 43(1) of the STA, *inter alia*, requires the management corporation to maintain the common property in good and serviceable repair whilst section 34(1)(b) confers the right of user on every proprietor in relation to the common property "*which he would have if he and the other proprietors were co-proprietors*" of such property. According to the Judge, when these provisions are read together, the duty of the management corporation under section 43(1) is owed to all proprietors collectively as they have the right of use of the common property as though they were co-proprietors of such property.

The Judge opined that the duty of a council member is not co-extensive as the duty that is owed by a director to the company of which he is a director. A council member should not be held to the same high standard of care as would be owed by a professional director in a company for the following reasons:

(a) a management corporation established pursuant to the STA differs from a company incorporated under the Companies Act 2016: the former exists simply as a repository of rights that are common to all the proprietors in a development whereas the latter is formed for the purposes of pursuing a particular venture or economic activity;

(b) council members are elected from a much smaller pool of candidates, i.e. proprietors of the parcels in a particular development whereas a for-profit company may select and appoint its directors based on their skill and experience; and

(c) the requirement under the STA that a council member must be a proprietor of a parcel in the development means that a council member would always have a personal interest to advance as he must necessarily be a proprietor.

His Lordship then set out the applicable principles, which may be summarised as follows:

(1) A council member of a management corporation owes a fiduciary duty to act *bona fide* in the interests of the management corporation;

(2) The duty is owed to the management corporation and to the proprietors as a whole but not to individual proprietors;

(3) The nature of the fiduciary duty includes:

  (a) a duty to exercise due care and skill, having regard to the skill and experience of the council member in question; and

  (b) a duty of fidelity or loyalty that requires the council member (i) not to exercise a delegated power to advance a personal interest to the detriment of the management corporation or the proprietors as a whole; and (ii) to disclose any personal interest that he may have in any transaction or undertaking proposed to be carried out by the management corporation;

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WHERE DIFFERENCES MATTER

Aaron Yong provides a primer on the Guidelines on Contracts for Difference

In a move to promote and develop the Malaysian derivatives market, the Securities Commission of Malaysia ("SC") introduced the contracts for difference ("CFD") framework with the issue of the Guidelines on CFD ("Guidelines") together with a list of Frequently Asked Questions for the Guidelines ("FAQ") on 6 April 2018. At the same time, the SC revised its Licensing Handbook ("Handbook") to set out the requirements for the licensing of CFD providers.

Although the Guidelines are only effective on 1 July 2018, it has been released early to enable the industry to familiarise itself with the requirements for offering CFDs.

WHAT IS A CFD?

CFD is defined in the Guidelines as a contract made between a buyer and a seller to gain exposure in the allowable underlying instrument whereby differences in settlement are made through cash payments. The FAQ further clarifies that CFD is a leveraged derivatives product that tracks the price movement of an underlying instrument.

In effect, CFDs are financial derivatives which allow investors to capitalise on price movements of the underlying instruments without having any interest in such instruments.

> **"CFDs are only allowed to be offered based on shares or indices"**

The Guidelines set out some of the key features of a CFD and the requirements which are applicable to a CFD provider in Malaysia.

PRODUCT REQUIREMENTS

Allowable underlying instruments

The Guidelines provide that CFDs are only allowed to be offered based on shares or indices.

If the CFD is based on shares, the shares must either be listed on the Main Board of Bursa Malaysia Securities Berhad ("Bursa Securities") or a securities exchange outside Malaysia.

Shares listed in Malaysia

If the shares are listed on the Main Board of Bursa Securities, the underlying company must have an average daily market capitalisation (excluding treasury shares) of at least:

(a) RM1 billion in the past three months ending on the last market day of the calendar month immediately preceding the date of issue; or

(b) in the case of a newly listed company that does not meet the three-month market capitalisation track record, RM3 billion.

The underlying company must also meet the public shareholding spread requirement.

Shares listed outside Malaysia

If the shares are listed on a securities exchange outside Malaysia, the underlying company must be listed on an exchange in a jurisdiction where the capital market regulator is a signatory of the International Organization of Securities Commissions multilateral memorandum of understanding concerning consultation and co-operation and the exchange of information among securities regulators.

The underlying company must also have an average daily market capitalisation of at least:

(a) RM3 billion in the past three months ending on the last market day of the calendar month immediately preceding the date of issue; or

(b) In the case of a newly listed company that does not meet the 3-month market capitalisation track record, RM5 billion.

> **"Where the underlying instrument … is an index, the constituents of the index must be listed on a securities exchange"**

However, the Guidelines do not specify whether treasury shares are to be taken into account when computing the average daily market capitalisation of the underlying company whose shares are listed outside Malaysia.

Index

Where the underlying instrument of a CFD is an index, the constituents of the index must be listed on a securities exchange in or outside Malaysia. The index must (a) be broadly based; (b) have a transparent composition; and (c) be a recognised benchmark. Further, information on composition and performance of the index must be conveniently accessible by investors.

Margin requirements

As CFDs are leveraged trading instruments, they are traded on margin. Instead of paying the full value for the underlying instrument, an investor pays an initial margin to open the position and is required to maintain the minimum margin requirement for open positions at all times.

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For a CFD based on shares, a minimum of 10% and 20% margin is required for index shares and non-index shares respectively. If the CFD is based on an index, a 5% margin is required. A CFD provider may require a higher margin than the prescribed minimum requirements.

A CFD provider must make additional calls for margin when necessary and if an investor fails to comply with the demand for margin within reasonable time, the CFD may be terminated.

Settlement of CFD

A CFD must only be settled in cash and not by delivery of the underlying instruments. This is to prevent an investor from circumventing disclosure requirements and stealthily building a stake in the issuer of the underlying instrument.

The Guidelines further provide that a CFD in respect of shares must not carry any voting rights or any options for conversion into the underlying shares.

> **"the Guidelines require a CFD provider to make available stop loss measures to its clients"**

Stop loss measures

To mitigate some of the risks involved in trading CFDs, the Guidelines require a CFD provider to make available stop loss measures to its clients. A stop loss measure allows an investor to set a stop-loss price at which an open trade will automatically be closed out.

When underlying shares are suspended, halted or delisted

A CFD provider is prohibited from creating new positions when the trading in the underlying instrument has been halted or suspended.

Although the Guidelines do not specify how an open position on a CFD is to be dealt with in the event that the underlying instrument is suspended, halted or delisted, a CFD provider is required to provide its clients with clear information on its procedure to address these situations.

Sophisticated investors

In Malaysia, CFDs can only be offered to sophisticated investors, i.e. any person who falls within any of the categories of investors set out in Part 1 of Schedules 6 and 7 of the Capital Markets and Services Act 2007.

PROVIDER REQUIREMENTS

Among the requirements that a CFD provider has to satisfy are the following -

Licensing requirements

Only a holder of a capital market services licence for (a) dealing in derivatives; or (b) dealing in derivatives restricted to CFD, may carry out the offering of CFDs. The financial requirements that an applicant or a licensee is required to comply with are set out in the Handbook.

Suitability assessments

Notwithstanding that CFDs may only be offered to sophisticated investors, a CFD provider is required to conduct a suitability assessment on an investor who wishes to invest in CFD. If a CFD trading account may be opened online, an online questionnaire may be used for this purpose.

> **"A CFD must only be settled in cash and not by delivery of the underlying instruments"**

Disclosure requirements

Before a CFD is offered, the CFD provider must register a product highlight sheet and a disclosure document with the SC. Similarly, the product highlight sheet and disclosure document must be provided to an investor before opening a CFD account for the investor.

Information required to be disclosed in the product highlight sheet and disclosure documents include (a) background information of the CFD provider; (b) product description of the CFD; (c) key features of the CFD; and (d) key risks in CFD trading.

Risk management and managing conflicts

A CFD provider is required to have adequate risk management practices in place. These include (a) adequate infrastructure and processes; (b) comprehensive internal control and audit procedures; and (c) documented policies and procedures for

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DRILLING DOWN THE DETAILS

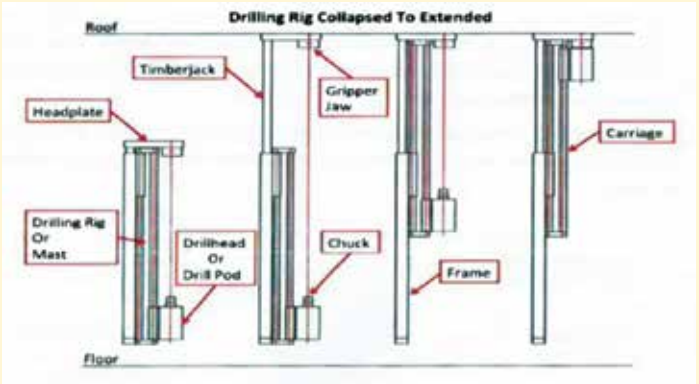
Joshua Teoh explains how a decision of the Federal Court of Australia may be relevant to Malaysian patentees

In *Sandvik Intellectual Property AB v Quarry Mining & Construction Equipment Pty Ltd* [2017] FCAFC 138, the Full Court of the Federal Court of Australia affirmed the decision of Justice Jessup sitting as a single judge in the Federal Court of Australia, holding that the claims in Australian Patent No. 744870 entitled "Extension Drilling System" ("'870 Patent") belonging to the Appellant ("Sandvik") were invalid for, among others, failure to comply with the requirement to describe the best known method of performing or carrying out an invention.

The aforesaid requirement is set out in section 40(2)(aa) of Australia's Patents Act 1990 (Cth) ("section 40(2)(aa)") which stipulates that "*a complete specification must disclose the best method known to the applicant of performing the invention*".

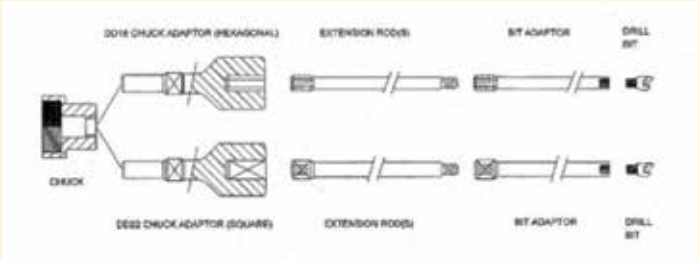
> **"the purpose of … section 40(2)(aa) … is to allow the public the full benefit of the invention"**

The technology in this case concerned an extension drilling system for drilling holes in subterranean mining operations such as coal mining, where the structure of the roof of a tunnel is to be rendered more secure by the insertion of rock bolts into the holes drilled into the roof structure. An illustration of a drilling system (drilling rig without drill rods connected at the chuck) is represented in the diagram below.



THE '870 PATENT

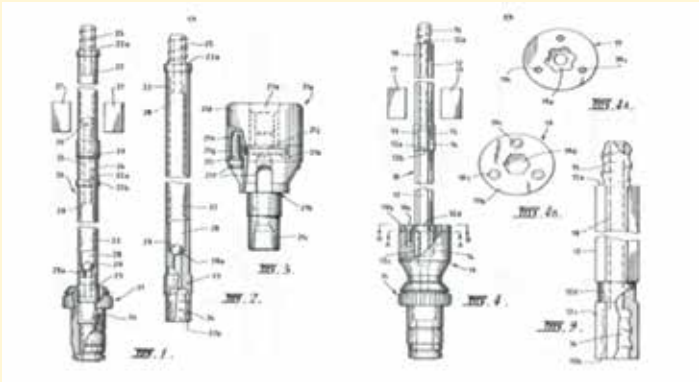
The '870 Patent claimed an invention over an extension drilling system. In the invention, each extension rod has a male right-hand rope-threaded connection at one end and a female right-hand rope-threaded connection at the other end. The extension rods are connected together by coupling the male end to the female end, and where a drive chuck (or an adaptor) drives the outside surface of the female end of the rod at the bottom end of the drill rod string such that during the process of uncoupling the drill rod string, there is only one threaded connection between the gripper jaws and the drive chuck (or adaptor). The following diagram illustrates the extension drilling system contemplated in the invention of the '870 Patent:



There were two preferred embodiments described in the specification of the '870 Patent (see diagrams below), where:

(a) The first preferred embodiment as depicted in Figures 1 and 2 show that the drill rods are directly connected to the drive chuck;

(b) The second preferred embodiment depicted in Figures 3, 4, and 5 involve the use of an adaptor. Figure 3 identified an alternative adaptor (referred to as a "direct drive chuck") to the drill rods in Figures 4 and 5.



The '870 Patent described an axial passage within the connected drill rods, through which flushing fluid is pumped to the drill bit to clear debris from the drilling process and prevent the drilled hole from being clogged.

To inhibit the outflow of the flushing fluid when the lowest connecting rod is removed (and also to facilitate the insertion of the next rod), some or all of the drill rods are internally equipped with a non-return ball-valve arrangement. Further, at the end of the drill string, there is also a sealing member or water seal at the point where the adaptor sits in the chuck.

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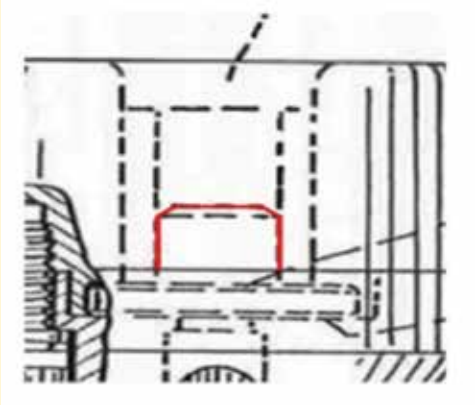
AT FIRST INSTANCE

The Respondent, Quarry Mining & Construction Equipment Pty Ltd, contended that the specification of the '870 Patent did not disclose the best method of performing the invention when it omitted to refer to the particular type of sealing member known to Sandvik at the date of filing. On this, the issue before the Federal Court was whether the specification disclosed by Sandvik included an upwardly-extending cylindrical part (marked red in the diagram below).

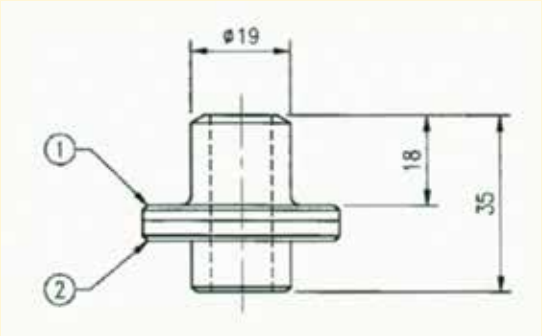


Justice Jessup held that:

(a) The specification of the '870 Patent did not disclose a sealing member with upper and lower sections – it only disclosed a horizontal sealing member;

(b) At the time of filing the complete specification, Sandvik had developed a sealing member with upper and lower sections, which was an improvement on a purely horizontal sealing member;

(c) Even though it was not part of the invention claimed, Sandvik ought to have disclosed in the specification the improved sealing member with the extended parts, as depicted below:



THE APPEAL

The Full Federal Court observed that the purpose of the requirement in section 40(2)(aa) to disclose the best method known to the applicant of performing the invention is to allow the public the full benefit of the invention before the patentee's monopoly expired. Although a patentee might not be explicitly required to act in good faith, the principles of good faith underlie the best method requirement, to protect the public against a patentee who deliberately keeps to himself something which he knows gives the best results. The nature and extent of the disclosure required to satisfy the best method requirement will depend on the nature of the invention itself.

Section 40(2)(aa) is directed to the method of performance of the invention. Even though the monopoly is circumscribed by the claims, the nature of the invention is as described in the whole of the specification. The requirement to describe the best method of performing the invention is ordinarily satisfied by including in the specification a detailed description of one or more preferred embodiments of the invention.

> **"the principles of good faith underlie the best method requirement"**

The Full Federal Court set out the approach to determine whether the patentee has fulfilled the best method requirement:

(a) First, identify the invention described in the specification as a whole, as distinct from the invention as claimed in the claims.

(b) Second, determine whether the omitted part is necessary and important to perform the invention or otherwise carry out the invention. Even though the water seal was not part of the invention described in the specification, the use of an effective water seal was nevertheless necessary and important to perform the invention. There was evidence that designing an effective water seal was "*a real and important issue which needed to be overcome*".

(c) Third, in circumstances where the specification purported to address the best method requirement, such as by providing

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WAR AND PEACE

Ashley and Wen Shan discuss the preservation and division of assets in divorce proceedings

The contract of marriage which binds two people together is a joyous occasion warranting the celebration of the community. Unfortunately, the tides of time change circumstances and in some cases, people decide that it is best to go their separate ways. The process of legal separation or divorce will almost always involve the disentanglement of matrimonial assets, which are assets acquired during the marriage by the spouses.

On occasions, the legal process of disentangling matrimonial assets becomes a war between the couple, particularly where a substantial amount of assets is at stake. In this article, we explore the process of laying claim to the assets, looking first at the arsenal of legal rights available to protect the assets, and secondly, at the legal limits in claiming the matrimonial assets between the couple.

Matrimonial assets play a central role in two periods of the separation proceedings. The first is in the opening act, and the second, in the closing stages of the proceedings. In this article, the party initiating the divorce will be referred to as the applicant, and the other, as the respondent.

> **“ the Law Reform (Marriage and Divorce) Act 1976 … allows for the issue of freezing injunctions in matrimonial proceedings ”**

THE FREEZING INJUNCTION – THE NUCLEAR WEAPON

The BBC reported that nearly a quarter of divorcees in the UK have tried to hide financial assets “to keep them secure” (*Divorcing Couples Often Hide Assets, Survey Suggests; bbc.com, 22 February 2013*). This typically involves diverting salaries from a joint account, to utilising special purpose companies with offshore bank accounts.

To prevent the dissipation of assets, the law provides for freezing injunctions over matrimonial assets to prevent a party from disposing of the marital assets during the separation proceedings. In Malaysia, section 102 of the Law Reform (Marriage and Divorce) Act 1976 (“LRA”) allows for the issue of freezing injunctions in matrimonial proceedings. It applies the same principles as a commercial freezing (also known as a Mareva) injunction (*Sheng Lien @ Sheng Len Yee v Tan Teng Heng & Anor* [2010] 1 LNS 1480).

In a classic ambush tactic, and to prevent the respondent from hiding or disposing the assets, the applicant would usually apply for the injunction on an *ex parte* basis (meaning that the applicant will seek the relief without the respondent’s knowledge or attendance at the hearing) and serve the injunction order alongside the cause papers for a divorce. Consequently, the first occasion the respondent will find out about the freezing order is when the divorce papers are served, which is after the assets have been frozen.

The freezing injunction is seen as a first strike nuclear weapon, signalling an aggressive, unapologetic, vengeful and bitter start to a divorce. It begins a war because the respondent normally sees it as a fight for money and property with the implied undertone that the applicant has not an ounce of trust in the respondent’s honour and integrity.

The freezing injunction has very far reaching consequences; it can freeze all the respondent’s assets, including bank accounts of a company in respect of which the respondent is a director or has control over. The Court may even extend it to a group of companies under the control of the respondent.

LIMITING THE NUCLEAR FALLOUT

While a freezing injunction initially feels overwhelming, not all is lost - the respondent can clawback lost territory by relying on the safeguards developed under the common law to protect against abusive tactics by either or both parties and overreaching reliefs granted by the Court.

> **“ The freezing injunction is … an aggressive, unapologetic, vengeful and bitter start to a divorce ”**

1. The 50% Limit

Firstly, the injunction should only be limited to the maximum value of the marital assets that the applicant would be entitled to receive at the conclusion of the divorce or separation.

In *Ghoth v Ghoth* [1992] 2 All ER 920, the Court of Appeal of England held that it would not in any foreseeable circumstance grant a freezing injunction over all the assets of the other party. In matrimonial proceedings, a freezing injunction should be limited to the amount which realistically, considering everything in the applicant’s favour, would be the maximum amount which could possibly be achieved at the conclusion of the divorce. In Malaysia, the High Court in *Susila S Sankaran v Subramaniam P Govindasamy* [2013] 4 CLJ 579, held that the maximum the applicant could claim is 50% of the matrimonial assets.

2. Movement of Assets Must Defeat the Applicant’s Claim

In determining whether the movement or potential movement of assets is designed to defeat an applicant’s claim, the Malaysian Court has taken into account the adequacy of matrimonial assets


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remaining to satisfy the likely proportion a Court will order in favour of the applicant.

In *Susila S Sankaran*, it was held that the respondent's disposal of assets had not reached the point where the applicant's claim to the marital assets would be defeated. In that case, the applicant could claim at most, 50% of the matrimonial assets and the respondent had not disposed of the property to the extent that his ability to meet his obligation for spousal maintenance was compromised, or that he had deprived the applicant from effectively obtaining 50% of the matrimonial assets.

In another example where the assets are internationally located, in *Lee Chi Lena v Chien Chuen Chi Jeffrey (Qian Jie, co-defendant)* [2011] SGHC 91, the Singapore High Court upheld the dismissal of the wife's application for an injunction to restrain the husband from dealing with a piece of immovable property in Shanghai. The Singapore High Court held that apart from the Shanghai property, there were adequate matrimonial assets available to satisfy a likely division proportion in favour of the wife.

> **"the injunction should only be limited to the maximum value of the marital assets that the applicant would be entitled to receive"**

3. Evidence of Risk of Dissipation Required

Establishing the risk of dissipation requires proof of an *intention* to dissipate. The intention in this context means a deliberate or reckless dealing with the asset (*UL v BK (Freezing Orders: Principles and Safeguards)* [2013] EWHC 1735). There needs to be solid evidence of an unjustified dealing with the assets by the respondent to avoid the possibility of a judgment, or that the respondent is disposing the assets in a manner clearly distinct from his/her usual or ordinary course of business. In *UL v BK*, the English High Court observed that mere expressions of anxiety and suspicions do not meet the threshold.

For internationally invested couples, moving assets in offshore structures will not of itself amount to unjustified conduct. The English High Court in *Wade v Wade* [2003] EWHC 773 held that the fact that the respondent had placed his shares in offshore trusts did not give rise to a suspicion as there was no evidence in this case to suggest that he had ever failed to pay a debt due.

4. No Detriment to Business Dealings or Standard of Living

The Malaysian Court of Appeal in *Malaysia Discounts Bhd & Ors v Pesaka Astana (M) Sdn Bhd & Ors* [2008] 5 MLJ 1 (applying the English Court of Appeal decision in *Polly Peck International Plc v Asil Nadir & Ors* [1992] Lloyd's Rep 238) held that one of the relevant established judicial principles relating to the nature of a freezing injunction is that the defendant "*cannot be required to reduce his ordinary standard of living nor be prevented from carrying on his business in the ordinary way, meeting his debts or other obligation as they become due*".

The concept of payment or other asset-dealing falling within the "ordinary and proper course of business" was discussed by the English Court of Appeal in *Michael Wilson Partners Ltd v John Foster Emmott* [2015] EWCA Civ 1028. Whether a payment is made in the "proper course of business" is likely to depend on the purpose of the payment. If the payment is made in order to discharge a pre-existing liability of the business made in good faith, it would be difficult to see how that would not be in the "proper course of business".

As regards the second requirement, i.e. whether a payment is made "in the ordinary course of business", the Court in *Michael Wilson Partners* observed that it is not the payment, but the course of business that must be "ordinary". It is possible that similar tests will be applied in relation to a freezing injunction under section 102 of the LRA.

Lifting the Injunction

As mentioned earlier, it is not unusual for the Court to grant an *ex parte* order to freeze all assets under the control of the respondent in order to prevent a dissipation of assets.

At the *inter-partes* injunction hearing, both parties are present to submit their positions on the merits of the injunction. The respondent may be able to set aside the injunction by establishing the absence of risk of dissipation. However, where the applicant successfully establishes a risk of dissipation, the respondent could nevertheless seek to vary the injunction in accordance with the 50% rule.

THE ASSET DIVISION – THE FINAL BATTLE

In this section, we consider the next point at which assets are battled over once and for all – the division of assets. Skipping forward to the conclusion of the separation, the next point in which the marital assets are in contention is in deciding how to divide the marital assets.

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WAR AND PEACE

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Under the existing law, it is essential for a Malaysian Court to determine whether the marital asset was acquired by the joint effort of both spouses, and if so, to lean towards equality of division, or whether the said asset was acquired through the sole effort of one spouse, in which case a greater proportion will be awarded to the party who put in a greater amount of effort to acquire the asset.

In cases where the asset was acquired by the sole effort of one spouse, the Malaysian Courts have awarded 25% to 35% to the non-acquirer for his/her non-financial contributions, i.e. contributions to the welfare of the family by looking after the home or caring for the family *(Lim Bee Cheng v Christopher Lee Joo Peng* [1997] 4 MLJ 35; *Joint Petition of Heng Peng Hoo & Goh Ah Moy* [1989] 1 CLJ (Rep) 639; *Ching Seng Woah @ Cheng Song Huat v Lim Shook Lin (F)* [1997] 1 CLJ 375; *Retnam Suppan v Kamala Ponnampalam* [2009] 1 LNS 1442; *Lee Yu Lan v Lim Thain Chye* [1984] 1 MLJ 56; *Baheerathy Arumugam v Gunaselan V. Visvanathan* [2013] 1 CLJ 954 and *Ng Bee Lee v Liew Kam Cheong* [2010] 1 LNS 736).

The Law Reform (Marriage and Divorce) (Amendment) Act 2017, which has yet to come into operation, will change this by removing the distinction between jointly acquired assets and solely acquired assets. It provides that all assets that have been acquired by both spouses during the marriage will be subject to division and the Court in considering the division, subject to statutory considerations, will incline towards equality of division.

This change in the law towards equality of division recognises that the two halves of the relationship may have played very different roles in the household, presuming that the contribution of both halves were equal yet different.

The House of Lords in *White v White* [2000] UKHL 54 summarised the reason behind the legal recognition of non-financial contributions in respect of claims to matrimonial assets. The discretionary powers conferred by the UK's Parliament some three decades ago, enable the courts to recognise and respond to developments of this nature. These wide powers enable the English Courts to make financial provision orders in tune with the current perceptions of fairness. Today, there is greater weight attached to the value of non-financial contributions to the welfare of the family. According to Lord Nicholls of Birkenhead:

"*There is greater awareness of the extent to which one spouse's business success, achieved by much sustained hard work over many years, may have been made possible or enhanced by the family contribution of the other spouse, a contribution which also required much sustained hard work over many years.*"

There is increased recognition that, by being at home, and having and looking after young children, a wife may lose forever the opportunity to acquire and develop her ability and capacity to earn an independent income.

Recently, in *AAZ v BBZ, C Ltd and P Ltd* [2016] EWHC 3234 (Fam), one of the UK's largest divorce settlement, the English Family Court awarded the former wife of an oil and gas trader almost half of GBP1 billion of matrimonial assets. The wife was a housewife and mother throughout the marriage whilst the husband worked as an oil and gas trader. In his judgment, Haddon-Cave J said that the couple's GBP 1 billion worth of marital assets had been built up over the course of the marriage through equal contributions, and should be subject to the sharing principle. According to a family law practitioner in an English law firm, "*This big-money divorce settlement represents yet another example of the English Court's unparalleled generosity towards the financially weaker spouse. This generosity is rooted in the fundamental principle that breadwinners' and homemakers' contributions to a marriage are of equal importance*" (*Estranged Wife Gets £453m In One Of Biggest UK Divorce Settlements; theguardian.com, 11 May 2017*).

THE AFTERMATH

In the battle for matrimonial assets, the freezing injunction marks the beginning of an aggressive and bitter war due to its emotional and financial impact on the respondent. Its objective is to protect the applicant's claim to the matrimonial assets. Though the freezing injunction may seem overwhelming at first glance, the common law has developed a series of safeguards to protect against abusive tactics and overreaching reliefs as aforesaid.

The battle then proceeds further during the division of matrimonial assets, where proving a spouse's contributions during the marriage becomes crucial in establishing his or her claim to the matrimonial assets.

Although the above analysis of the law sets out the rules of (dis)engagement in a clear and orderly sequence, one should never downplay the realness and reality of a marital breakdown. The lengthy and bitter ending of relationships takes its toll on both parties, draining them psychologically, emotionally and financially. In the aftermath, the winner, if there is one, will emerge emotionally scarred.

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FLORICULTURISTS, BARBERS, AIRLINES AND INSURERS

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market that the MyCC would enforce the Act strictly and that ignorance should no longer be pleaded as a mitigation point or in defence of a contravention.

The PIAM proposed decision, if finalised and issued as presently proposed, would result in the largest financial penalty ever imposed by the MyCC in the history of the Act's enforcement, at roughly RM213.5 million. The penalties generally appear to be on an upward trend, and where MyCC accepted undertakings in the past, the more recent decisions see these replaced with orders or instructions attached to the fines.

INTO THE FUTURE

Since the Act came into force, one of the more notable changes is the disapplication of the same to certain industries – new laws have been drawn up and old ones amended so as to bring competition issues in certain industries out of the scope of the Act and within the powers of the regulatory authority under the relevant legislation (for example, the Petroleum Development Act 1974 and the Malaysian Aviation Commission Act 2015).

The MyCC had also conducted market studies on particular industries to examine how potentially anti-competitive behaviour should be analysed given the particular market characteristics – these include, among others, the two recent studies on the pharmaceutical and building construction industries.

The MyCC's political will is clear and unambiguous – despite having been active for less than a decade, the investigative and enforcement arm of the MyCC has been hard at work, as can be seen from the increasing complexity of the cases being tried and the thought being given to the decisions issued.

During a public consultation relating to its latest proposed Guidelines on Intellectual Property Rights and Competition Law ("IPR Guidelines"), the MyCC reiterated that it would take a strong stance against anti-competitive behaviour, particularly where there was an object to prevent, restrict or distort competition.

Considering the latest draft IPR Guidelines, and with at least one case up for judicial review and two proposed decisions in the pipeline, it is definitely an exciting time for competition in Malaysia. If the MyCC's track record is indicative of any sort of trend or movement, that movement is forwards and upwards, and the enforcement of competition legislation is definitely growing in Malaysia. Against this backdrop, companies operating, or considering to carry out business, in Malaysia, should ensure that they are familiar and comply with the competition legislation to avoid the risk of falling foul of the legislation and consequently bearing the brunt of enforcement action by the MyCC.

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THE EYE APPEAL

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(c) The patient had initially requested for another anaesthetist but was informed that the latter was unavailable;
(d) The patient had no control over how the hospital chose to provide anaesthetic services, whether by delegation to employees or otherwise;
(e) The hospital had delegated to the anaesthetist the responsibility to administer doses to the patient properly; and
(f) The anaesthetist was negligent in the performance of the duty delegated to him by the hospital.

The decision in the Eye Appeal is the first positive finding in Malaysia of a non-delegable duty of care by a private hospital for the medical negligence of independent contractors.

In arriving at this decision, the Federal Court was mindful of the proviso in *Woodland* to impose liability only to the extent where it is fair, just and reasonable, and stated that it would not make broad findings of liability by **all** private hospitals on the basis of policy alone.

It appears that the question as to whether a private hospital will be found to owe a non-delegable duty of care to its patients will continue to be answered on a case-by-case basis, and could turn on nuanced differences in the facts of the case as shown by the findings in the Eye Appeal and in *Dr Kok Choong Seng*. The Federal Court's judgment in the Eye Appeal will be useful guidance on this issue.

CONCLUSION

The Federal Court's judgment in the Eye Appeal is significant in several respects.

It reiterates the position of law in Malaysia with respect to the standard of care for medical professionals. For diagnosis and treatment, the courts must accept the views of a responsible body of men skilled in the particular discipline, and cannot resolve differences of expert opinion on its own. However, it must still examine the expert evidence to see if it is capable of withstanding logical analysis.

As for the duty to advise of risks, it is the courts and not the body of medical professionals that will decide the yardstick for the standard of care to be expected.

The Eye Appeal also represents the first time that a non-delegable duty has been imposed in Malaysia on a private hospital.

Based on reported cases, the award of RM1,000,000 for aggravated damages is the highest ever imposed in Malaysia. This will have a significant impact on claims against professionals such as lawyers, doctors and accountants as it shows that in certain cases, an award of aggravated damages can far exceed the general damages awarded.

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DUTIES OF COUNCIL MEMBERS

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(4) Once the interest is disclosed, a council member is at liberty to exercise his right to vote in any way he deems fit at any council meeting or general meeting of the management corporation, including advancing a personal interest that he may have in his capacity as a proprietor, and to suborn the interest of the collective to his personal interests.

In light of the Judge's view that council members owe a fiduciary duty to the management corporation and to the proprietors as a whole but not to individual proprietors, His Lordship held that the plaintiff's claim against the second to ninth defendants for breach of fiduciary duty failed on a point of law. The Court was also satisfied that there was insufficient evidence to show that the council members had acted otherwise than in good faith and in what they considered to be in the best interests of the proprietors as a whole.

CONCLUSION

This decision is noteworthy as it sheds light on the basis for determining whether certain areas or facilities in a stratified development are to be categorised as common property.

It is also significant as it is the first reported decision in Malaysia which considers and sets out the nature and extent of the duties of the council members of a management corporation of a stratified development.

As the plaintiff's action was commenced prior to the coming into force of the Strata Management Act 2013 ("SMA"), the provisions of the SMA did not apply to this case and were not considered by the Court (except in relation to the issue of costs). It is submitted that the duties of council members of a management corporation expounded by the learned Judge in this case would be applicable under the regime of the SMA.

Although the definition of "common property" under the SMA differs from that in the STA, it is submitted that the principles laid down in *3 Two Square* on the categorisation of common property would apply under the SMA provided that the area or facility in question is used, or capable of being used or enjoyed, by the occupiers of two or more parcels.

WHERE DIFFERENCES MATTER

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managing risks.

Further, a CFD provider must also have in place supervisory and internal control procedures and systems to address potential conflicts of interest and establish effective Chinese walls between the various divisions of its business.

Segregation of assets

If a CFD provider also offers other derivative contracts, it must segregate the client's assets for CFD trades from the client's other assets. Rehypothecation of clients' assets is prohibited.

Maintenance of records

A CFD provider must maintain certain records, including (a) instructions by a client; (b) the date and time of receipt, sending and carrying out of those instructions; and (c) the person by whom those instructions are received, the person by whom they are sent and the person by whom they are carried out.

Reporting requirements

A CFD provider must submit to the SC a monthly report of (a) transactional information to the SC in the format prescribed in the Guidelines; and (b) specified financial information, such as its financial condition and adjusted net capital.

COMMENTS

The Guidelines do not contain requirements to deal with changes in the capital structure (e.g. a bonus issue or a capital reduction) of an underlying company that is announced and completed during the tenure of a CFD for shares. It would appear desirable that provision, similar to those applicable to company warrants, be made to deal with these contingencies.

The introduction of CFD would be eagerly anticipated by Malaysian investors and would most certainly bring the Malaysian derivative markets closer to the likes of Singapore and Australia where CFD offerings are already available. It remains to be seen whether Malaysian investors are equipped for CFD trading.

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DRILLING DOWN THE DETAILS

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> a detailed description of two preferred embodiments and where one embodiment refers to a particular type of sealing member, it was incumbent on Sandvik to describe the best embodiment known to it.

In the above premises, the Full Federal Court affirmed the earlier finding that Sandvik did not disclose an important sealing member known to them and hence failed to provide the best method of performing the invention in the '870 Patent.

CONCLUSION

Although the Malaysian Patents Act 1983 has no provision identical to section 40(2)(aa), regulation 12(1)(e) of the Patents Regulations 1986 provides that the patent description shall "*describe the best mode contemplated by the applicant for carrying out the invention, using examples where appropriate and referring to the drawings, if any*". Section 23 of the Malaysian Patents Act requires every application to comply with the prescribed regulations, and failure to comply renders a patent invalid pursuant to section 56(2).

> **"the Sandvik case is a cautionary tale that applicants should ensure that their patent specifications are complete and updated"**

While it remains to be seen if the Malaysian courts will impose similar obligations on applicants to disclose the best method or embodiment known to the applicant to carry out the invention, the *Sandvik* case is a cautionary tale that applicants should ensure that their patent specifications are complete and updated prior to filing. The specification should include the full details of the best method known to the applicant at the time of filing even though such details are not claimed as part of the invention but are nevertheless necessary and important to carry out the invention.

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ANNOUNCEMENTS

AN EVENING WITH PERTIWI

As one of the initiatives by our Social Responsibility Unit, twenty members of our Firm volunteered their time to help out with the Pertiwi Soup Kitchen on 13 July 2018.

The evening began at Lorong Medan Tuanku 2 before moving to Jalan Tun Perak. Food and drinks were provided to more than 500 fellow Malaysians looking for a bite to eat to tide them over to the weekend.

The tasks undertaken by our volunteers ranged from pouring cups of coffee to handing out packets of nasi lemak to the beneficiaries. Some of our volunteers even helped to look after the little children looking for food, ensuring that they received yummy cakes and syrup while keeping them away from the coffee.

It was an eye-opening affair for our volunteers who were happy to be given an opportunity to give back a little to society.

LEGAL INSIGHTS

A SKRINE NEWSLETTER

This newsletter is produced by the LEGAL INSIGHTS' Editorial Committee. We welcome comments and feedback on LEGAL INSIGHTS. You may contact us at skrine@skrine.com for further information about this newsletter and its contents.

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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.

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