

LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

There were several significant developments in the Malaysian legal landscape since we published the previous issue of our Newsletter four months ago. In the first ever sitting of a nine-member panel, the Federal Court held by a 5:4 majority that the civil courts in Malaysia are bound by the rulings issued by the Syariah Advisory Council of Bank Negara Malaysia under sections 56 and 57 of the Central Bank of Malaysia Act 2009.

In July 2019, the Malaysian Parliament passed two significant pieces of legislation. The first is the Trademarks Bill 2019. This Bill is significant as it will introduce many new concepts into our trademarks law when it comes into force. The other is the Companies (Amendment) Bill 2019 which will bring about much welcomed clarifications on several provisions of the Companies Act 2016.

The decision of the Federal Court and the two pieces of legislation mentioned above are discussed in this issue of our Newsletter.

Also featured in this issue are two other noteworthy decisions of the Federal Court; the first determined whether retention sums under a construction contract are trust moneys, and the second, whether a solicitor who unknowingly acts for a fraudster in a land fraud case owes a duty of care to the real owner of the land.

Our third annual review of Malaysian cases on statutory adjudication, a significant Court of Appeal decision on an application for a judicial management order and articles on civil aviation security, renewable energy and legal privilege are also included in this issue.

I hope that you will find the contents of this issue of Legal Insights interesting.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

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ANNOUNCEMENTS

WHO'S WHO LEGAL AWARDS

Our Firm has been named Malaysia Law Firm of the Year 2019 by Who's Who Legal Awards on 16 May 2019.

Ten of our lawyers are featured as Recommended Global Leaders in 11 practice areas in the publication's listings for 2018/2019: Charmayne Ong (Data (Telecoms & Media and Information Technology), Patents and Trademarks); Cheng Kee Check, To' Puan Janet Looi and Quay Chew Soon (M&A and Governance); Khoo Guan Huat (Patents and Life Sciences (Patent Litigation and Product Liability)); Leong Wai Hong (Litigation); Lim Chee Wee (Asset Recovery and Restructuring & Insolvency); Lim Koon Huan (Trade & Customs); Loo Peh Fern (Insurance & Reinsurance); Selvamalar Alagaratnam (Labour, Employment & Benefits)

Selvamalar was also recognised as a Recommended Thought Leader for Labour & Employment.

GLOBAL ARBITRATION REVIEW 100

Skrine is honoured to be recognised as one of only two Malaysian firms listed in the Global Arbitration Review (GAR) 100 rankings. The GAR 100 is a guide of approved law firms globally in the field of international arbitration.

BENCHMARK LITIGATION ASIA-PACIFIC 2019

Our Litigation and Arbitration practice has been ranked in Tier 1 for the categories of Commercial and Transactions, Construction, and Intellectual Property. Our practice was also ranked by Benchmark in the Labour and Employment, Tax, and White-Collar Crime categories.

SENIOR ASSOCIATE

The Firm congratulates Aaron Yong Tze Ken on his promotion to Senior Associate.



Aaron is a member of the Corporate Advisory and Transactions, Mergers & Acquisitions and Capital Markets practices of our Firm. He graduated from Aberystwyth University in 2011.

FILLING THE GAP IN TRADEMARKS

Gooi Yang Shuh and Lam Rui Rong provide a

The Trademarks Bill 2019 ("2019 Bill") was passed by the House of Representatives and the Senate of the Malaysian Parliament on 2 and 23 July 2019 respectively. The 2019 Bill now awaits royal assent from the Yang di-Pertuan Agong. Thereafter, it will come into operation on a date to be appointed by the Minister of Domestic Trade and Consumer Affairs by notification in the Federal Gazette.

The 2019 Bill is a total revamp and overhaul of the current Trade Marks Act 1976 ("1976 Act") and seeks to fill the gaps in the trade marks regime in Malaysia, both figuratively and literally (note that it will soon be 'trademarks' as opposed to 'trade marks'). Below are some of the main takeaways on the 2019 Bill.

DEFINITION OF "TRADEMARK"

To come within the definition of 'trademark' under the 2019 Bill, a sign must be capable of:

- "distinguishing goods or services of one undertaking from those of other undertakings"; and
- "being represented graphically".

“ The Madrid Protocol ... allows the simultaneous registration of trademarks in several jurisdictions with ... one application ”

Most notably, trademark protection will extend to cover non-traditional trademarks, such as colours, sounds, scents, and holograms. The new definition of 'trademark' recognises that such signs are capable of being trademarks and accordingly, may be registered trademarks provided they are capable of graphical representation. In view of the advancements in non-traditional marketing methods, this will be a welcomed development for businesses seeking to rely on non-traditional marks as part of their corporate branding.

The 2019 Bill also provides that a registered trademark shall be a personal or moveable property and may be the subject of a security interest in the same way as other personal or moveable property. The concept of a "registrable transaction" is introduced, and the particulars of a registrable transaction may be entered in the Register of Trademarks upon approval by the Registrar of Trademarks ("Registrar") of an application by a person claiming to be entitled to an interest in or under a registered trademark by virtue of the registrable transaction or any other person claiming to be affected by the transaction. The 2019 Bill itself does not identify what are "registrable transactions"; section 2 provides that "registrable transactions" are transactions determined by the Registrar in guidelines or practice directions issued pursuant to section 160.



LAM RUI RONG (L)

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TRADE MARKS: THE BILL 2019

précis of what's in store for brand owners

MADRID PROTOCOL

Malaysia will be taking its first step in acceding to the Protocol relating to the Madrid Agreement concerning the International Registration of Marks, adopted on 27 June 1989 ("Madrid Protocol"). The Madrid Protocol is an international system that allows the simultaneous registration of trademarks in several jurisdictions with the filing of one application in a single office.

Malaysia's accession to the Madrid Protocol will eliminate the need for an applicant filing an application with the Malaysian office to file separate applications in each member country in which it seeks to protect its trademark. The exact manner in which the Madrid Protocol will be implemented in Malaysia will be set out in subsequent subsidiary legislation.

MULTI-CLASS APPLICATIONS

Multi-class applications (i.e. one trademark application claiming goods and services of several classes under a single trademark application) will be implemented. This may have some impact on costs and may simplify the application, maintenance, and renewal processes, as there would only be one application or registration number and one renewal date.

“ trademark protection will extend to cover non-traditional trademarks ”

COLLECTIVE MARKS

Collective marks (i.e. a trademark owned by an association that is used by its members to identify and distinguish the goods and services of the members of that organisation from others) will be afforded trademark protection. An example of a collective mark is the "CA" mark used by accountants to identify their membership in the Institute of Chartered Accountants.

ACQUIRED DISTINCTIVENESS

The 2019 Bill provides that subsequently acquired distinctiveness may be a defence against revocation for non-use actions. This means that a trademark which, at the time of registration, was devoid of distinctive character or consists exclusively of signs or indications which are descriptive of the goods or services or which are generic, will not be expunged if it is shown to have acquired distinctiveness after registration.

TRADEMARK INFRINGEMENT

Under the 1976 Act, acts amounting to infringement are strictly limited to use of an infringing mark in relation to the goods or services in respect of which the plaintiff's trademark is registered.

Under the 2019 Bill, however, the unauthorised use of a sign even in relation to similar goods or services would amount to trademark infringement.

Further, the approach to determining the likelihood of confusion established in past Malaysian case law, that the Registrar or the courts may take into account all factors relevant in the circumstances, is expressly codified in the 2019 Bill.

The 2019 Bill also provides a number of new defences to trademark infringement, including a provision that the use of a trademark to indicate the intended purpose of the goods bearing the sign, including accessories or spare parts or service, will not constitute infringement of a registered trademark, provided that such use is in accordance with honest practices in industrial or commercial matters.

“ subsequently acquired distinctiveness may be a defence against revocation for non-use ”

Remedies for infringement

The 2019 Bill explicitly provides that in addition to damages, a plaintiff may be awarded an account of profits attributable to the infringement that has not been taken into account in computing damages. Under the 1976 Act, damages and account of profits are mutually exclusive in all circumstances.

Further, additional damages (akin to exemplary and aggravated damages) will only be an available remedy where the infringement involves use of a counterfeit trademark as opposed to being awarded in relation to use of any infringing trademark.

Groundless Threats of Infringement

An aggrieved person who receives groundless threats of trademark infringement may institute proceedings to seek reliefs such as a declaration that the threats are unjustifiable, an injunction against continuance of the threats, and damages for any loss sustained by the threats. This is an entirely new concept in Malaysian trademark jurisprudence that may have an impact on

BANK NEGARA SAC'S FINDINGS BINDING ON CIVIL COURTS

Oommen Koshy and Muhammad Suhaib explain a landmark decision of the Federal Court

On 15 April 2019, in the first ever sitting of a full nine-member bench in Malaysia, the Federal Court in *JRI Resources Sdn Bhd v Kuwait Finance House (M) Bhd (President of Association of Islamic Banking Institutions Malaysia & Anor, interveners)* [2019] 3 MLJ 561 held that rulings on Islamic finance by the Shariah Advisory Council ("SAC") of Bank Negara Malaysia under sections 56 and 57 of the Central Bank of Malaysia Act 2009 ("CBMA") are constitutional and binding on civil courts as they do not amount to judicial decisions.

BACKGROUND FACTS

Sometime in 2008, Kuwait Finance House (Malaysia) Berhad ("KFH") granted JRI Resources Sdn Bhd ("JRI") various Islamic credit facilities ("Facilities"), including four Ijarah Muntahiah Bitamlik Facilities ("Ijarah Facilities"). The Facilities were for the purposes of facilitating the leasing of ships by JRI from KFH and were guaranteed by three individuals ("Guarantors").

HIGH COURT AND COURT OF APPEAL

Arising from JRI's default in making monthly lease payments under the Facilities, KFH commenced legal proceedings against JRI and the Guarantors to recover the amounts owing under the Facilities and obtained summary judgment against them for the sum of RM118,261,126.26 together with compensation fees.

In the appeal to the Court of Appeal by JRI and the Guarantors, JRI contended, among others, that clause 2.8 ("clause 2.8") of the Ijarah Facilities agreements which required it to undertake and bear the costs, charges and expenses of all major maintenance of the leased vessels was not Shariah compliant. JRI further submitted that the High Court had erred in not seeking a ruling on this issue from the SAC pursuant to section 56 of the CBMA.

The Court of Appeal allowed the appeals and set aside the summary judgement. It remitted the case to the High Court for trial and directed the High Court to make a reference to the SAC for a ruling as to whether clause 2.8 is Shariah compliant.

In response to the High Court's request, the SAC issued its ruling through a letter dated 30 June 2016 stating, *inter alia*, that although, in principle, KFH (as owner) should bear the maintenance cost of the lease vessels, it was permissible for the contracting parties to negotiate and agree as to who should bear these costs. In effect, the SAC ruled that clause 2.8 is Shariah compliant.

JRI then applied to have the High Court refer to the Federal Court for the latter's determination as to whether sections 56 and 57 of the CBMA was constitutionality valid. The application was rejected by the High Court but was allowed by the Court of Appeal, resulting in the reference coming before the apex court.

POSITIONS TAKEN AT THE FEDERAL COURT

The proceedings turned on the effect of sections 56 and 57 of the

CBMA. Section 56 states that where any question arises in any proceedings relating to Islamic financial business before a court or arbitrator concerning a Shariah matter, the court or arbitrator shall take into consideration any published rulings of the SAC or refer the question to the SAC for its ruling. Section 57 of the CBMA provides that any ruling made by the SAC pursuant to a reference made to it under Section 56 shall be binding on the court or the arbitrator making the reference.

JRI's position in the Federal Court was that sections 56 and 57 of the CBMA take away judicial power of the High Court from determining any question concerning a Shariah matter and gives it to the SAC, a non-judicial body not provided for under the Federal Constitution ("Constitution").

KFH contended that the impugned provisions do not vest any judicial power in the SAC. It argued that the SAC only has power to ascertain and rule on Shariah issues and present such ruling to the court. The SAC, it submitted, makes no determination of the case at hand; that determination is left to the court to apply the SAC's ruling to the facts of the case.

THE DECISION OF THE FEDERAL COURT

The Federal Court, by a 5:4 majority decision, held that sections 56 and 57 of the CBMA were constitutional and that the ruling by the SAC under section 57 did not conclude or settle the disputes between the parties arising from the Islamic financing facilities. The majority added that the SAC only 'ascertained' Islamic law for the purposes of the Islamic financial business and did not 'determine' the liability of the borrower under the facility. The determination of the borrower's liability under any facility was determined by the presiding judge and not the SAC.

Four judgments were delivered by the learned judges. Mohd Zawawi Salleh FCJ delivered the leading judgment with the concurrence of Ahmad Maarop PCA, Ramly Ali FCJ, Azahar Mohamed FCJ and Alizatul Khair Osman Khairuddin FCJ. In addition, Azahar Mohamed FCJ delivered a supporting judgment.

Richard Malanjum CJ delivered a dissenting judgment, which was concurred by David Wong CJ (Sabah and Sarawak) and Idrus Harun JCA. David Wong CJ (Sabah and Sarawak) also delivered a supporting dissenting judgment.

We shall now examine the leading majority judgment as well as discuss briefly the other three judgments by the learned judges.

THE MAJORITY JUDGMENTS

Judgment by Mohd Zawawi Salleh FCJ

Doctrine of Separation of Powers

The learned judge noted that the doctrine of separation of powers is recognised as an integral element of our Constitution (see *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu*

LANDMARK CASE



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Langat and another case [2017] 5 CLJ 526 (“*Semenyih Jaya*”)) even though it is not expressly provided for in the Constitution.

The doctrine recognises the functional independence of the three branches of government, namely the legislature, the executive and the judiciary, with the legislature being responsible for making the law, the executive for executing and enforcing the law, and the judiciary for interpreting the law.

The Court observed that in reality there is an overlap and blending of functions, resulting in complementary activity by the different branches that makes absolute separation of powers impossible. It acknowledged that the traditional notion of separation of powers has changed over time to reflect the growing interrelationship between the three branches of government to facilitate the efficient operation of government. The Court noted that there are various bodies in Malaysia, such as the Special Commissioners of Income Tax, the Customs Appeal Tribunal and the Competition Appeal Tribunal, with similar trappings as a court but do not exercise “judicial power” and are not “courts” in the strict sense.

“ Parliament is competent to vest ... the ascertainment of Islamic law ... in the SAC ”

Judicial Power

His Lordship acknowledged that “judicial power” is difficult to define and that it is more appropriate to examine its characteristics or attributes. The Court then referred to *Semenyih Jaya* where the Federal Court had highlighted that the exercise of judicial power carries two features namely:

- (1) that judicial power is exercised in accordance with the judicial process of the judicature; and
- (2) that judicial power is vested only in persons appointed to hold judicial office; therefore, a non-judicial personage has no right to exercise judicial power.

Effect of the SAC’s Ruling

The Federal Court then considered the position in law in relation to the binding effect of the SAC’s ruling. The Judge made a comparison to the mandatory sentencing regime under various penal laws where the court is required to impose a specific term of imprisonment. After analysing the position in various jurisdictions, the Court concluded that Parliament is competent to vest the function of the ascertainment of Islamic law in respect of Islamic banking in the SAC and such ascertainment is binding on the court. It likened the position to the legislative power in prescribing the minimum sentence to be imposed by the court on a convicted person.

The Judge added that the function of the SAC is merely to ascertain the Islamic law for Islamic banking and upon such ascertainment, it is for the court to apply the ascertained law to the facts of the case. The ascertainment of Islamic law for banking does not settle the dispute between the parties before the court. The SAC does not determine or pronounce authoritative decision as to the rights and liabilities of the parties before the court and does not convert the High Court into a mere rubber stamp.

Semenyih Jaya

Finally, the Court considered *Semenyih Jaya*, given the heavy reliance placed on that decision by JRI to support its contention that sections 56 and 57 of the CBMA are unconstitutional.

“ The SAC ... does not convert the High Court into a mere rubber stamp ”

The Court was of the view that *Semenyih Jaya* can be distinguished from the present case based on its facts. In *Semenyih Jaya*, the impugned section 40D of the Land Acquisition Act 1960 provided for the final decision on compensation for compulsory acquisition to be determined not by the judge but by the two assessors sitting with him in the High Court. The offending part of section 40D was that it empowers the assessors, and not the judge, to determine conclusively the issue before the High Court, namely the amount of compensation to be awarded to the landowner.

Based on *Semenyih Jaya*, the test is therefore whether there has been a “take-over of the judicial power of the court” by non-judicial personages. Unlike the assessors in land reference proceedings, the SAC in ascertaining the Islamic law for Islamic banking does not conclusively and finally determine the rights between the parties. The judge presiding over the case is still clothed with the ultimate responsibility of coming to a decision based on his assessment of the facts and the application of the SAC’s ruling.

Thus, the majority of the Federal Court concluded that a ruling of the SAC does not amount to a judicial decision. As there is no judicial power vested in the SAC, the SAC does not usurp the judicial power of the court.

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BANK NEGARA SAC'S FINDINGS BINDING ON CIVIL COURTS

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Judgment by Azahar Mohamed FCJ

Azahar Mohamed FCJ made two points in his supporting judgment.

First, that it was incontrovertible that Item 4(k) of the Federal List in the Ninth Schedule of the Constitution vests legislative competence in Parliament to enact laws for the "[a]scertainment of Islamic law ... for the purposes of federal law." This meant that insofar as the Constitution is concerned, the power to ascertain Islamic law for the purposes of Islamic financial business is a legislative power and is not inherent or integral to the judicial function.

Second, that as the Constitution is silent on the methodology to be used to ascertain Islamic law for that purpose, it is entirely within the powers and discretion of Parliament to decide how this should be exercised.

“ the power to ascertain Islamic law ... is a legislative power and is not ... integral to the judicial function ”

His Lordship said that such power and discretion include the power to assign or delegate the powers to any branch of the government or to any administrative body. The decisions of the High Court of Australia in *Federal Commissioner of Taxation v Munro*; *British Imperial Oil Co Ltd v Federal Commissioner of Taxation* [1926] ALR 339 and *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* [1970] ALR 449 were cited in support of this proposition.

Based on the foregoing, Azahar Mohamed FCJ concluded that the ascertainment of Islamic law for the purposes of Islamic financial business embodied in sections 56 and 57 of the CBMA is a function or power delegated by the legislative branch to the judicial branch and the SAC. As such, the impugned provisions did not trespass on the judicial power and did not violate the doctrine of separation of powers. The principle of separation of powers did not apply to invalidate any legislative delegation of powers to the SAC and the courts to ascertain Islamic law for the purposes of resolving disputes on Islamic financial matters. This did not strip the judiciary of its powers; neither did the executive nor legislature usurp or intrude into the sphere of judicial powers.

THE DISSENTING JUDGMENTS

Judgment by Richard Malanjum CJ

Malanjum CJ considered the issue from three aspects, namely separation of powers *vis-a-vis* judicial independence, the rule of

law and judicial power.

Whilst acknowledging that the separation of powers as between the legislature and the executive is not absolute or rigid, the Chief Justice expounded that separation of powers between these two powers on the one hand and judicial power on the other must be total or effectively so. His Lordship, citing *Semenyih Jaya*, added that the principle of separation of powers and the concept of judicial independence have been recognised as sacrosanct and form part of the basic structure of the Constitution.

His Lordship added that the power of Parliament to make laws under the Constitution and the matters set out in the legislative lists (including the Federal List) in the Ninth Schedule must be understood in the context of the constitutional scheme as a whole and the entries in the legislative lists are not a *carte blanche* for Parliament to make law contrary to the principle of separation of powers or the exclusive vesting of judicial power under Article 121 of the Constitution.

“ the principle of separation of powers and the concept of judicial independence ... form part of the basic structure of the Constitution ”

In his Lordship's opinion, it is a fallacy to suggest that the purported 'flexibility' of the separation of powers doctrine allows an 'overlap and blending' of functions between the branches of government so that each can exercise the powers of another. Such a suggestion ignores the fundamental separation of judicial power from legislative and executive power.

According to the Chief Justice, the exclusive vesting of judicial power in the judiciary is inextricably intertwined with the underlying principle of the rule of law. Citing the Federal Court's decision in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak and Ors and other appeals* [2018] 1 MLJ 545 ("*Indira Gandhi*"), he added that the power of the courts is a natural and necessary corollary not just to the separation of powers, but also to the rule of law.

Adopting the *dicta* from *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, Malanjum CJ said that the three common (but non-exhaustive) features of judicial power are: (a) the exercise of an adjudicative function; (b) finality in resolving the whole dispute; and (c) the enforceability of its own decision (by the decision-making body).

The learned judge opined that the function exercised by the SAC undoubtedly exhibits the first feature of judicial power for two reasons. First, by ruling that clause 2.8 was Shariah compliant, the SAC had effectively rendered JRI's appeal – that KFH had failed

in its obligation to maintain the ships – unsustainable, as it had disposed of the central issue in this case. Second, under section 57 of the CBMA, the ruling is binding on the High Court. It is not open to the High Court to determine the question of law or consider expert evidence on the issue.

According to the Chief Justice, a parallel can be drawn between the role of the SAC under sections 56 and 57 of the CBMA and the role of land assessors under section 40D of the Land Acquisition Act 1960. Under section 40D, the High Court Judge is required to adopt the opinion of the two assessors, or if there is a difference in the opinions of the assessors, to adopt the opinion of one of them. Similarly, in the present case, the ruling of the SAC is final as regards the issue of whether the clause is Shariah compliant. Accordingly, his Lordship concluded that the ruling of the SAC also demonstrates the second suggested *indicia* of judicial power.

The learned judge was also of the view that the third feature of judicial power was satisfied. First, the ruling is binding not on the parties but on the High Court. Second, the High Court cannot be said to have retained its judicial power by reason of the SAC merely forwarding its ruling to the High Court. The SAC ruling will necessarily be reflected in the order of the High Court on which it binds. It means the determination of the SAC on the issue referred to it becomes enforceable forthwith. Following *Brandy v Human Rights and Equal Opportunity Commission* (1995) 127 ALR 1, it is impermissible for the decision of a non-judicial body to take effect as an exercise of judicial power.

Where a function is not exclusive to any particular power, but may be ancillary or incidental to legislative, executive or judicial power, the true character of that function would depend on the context or purpose for which it is used. The ascertainment of Islamic law for the purpose of enacting Islamic banking regulations would be an exercise of legislative power. If it is done for the purpose of approving the activities or transactions of a central bank, it could be regarded as an administrative function.

As the ascertainment of Islamic law under sections 56 and 57 of the CBMA occurs in the context of an ongoing judicial proceeding in the High Court, the ascertainment becomes an integral and inextricable part of the process of determining the rights and liabilities of the parties in dispute. Thus, even if the SAC's function is merely one of ascertainment and does not exhibit any core feature of judicial power, it cannot be regarded otherwise than as ancillary or incidental to the exercise of judicial power. In view of its purpose and context, the issuance of a binding ruling by the SAC undoubtedly falls within the ambit of judicial power.

On the basis of the foregoing, the learned Chief Justice concluded that section 57 of the CBMA contravenes Article 121 of the Constitution and must be struck down.

Judgment by David Wong CJ (Sabah and Sarawak)

Referring to *Semenyih Jaya* and *Indira Gandhi*, the learned

judge said that it was clear that the “*basic structure*” doctrine, which includes the principle of separation of powers and the independence of the judiciary, has been accepted by the Malaysian Courts. The exclusive and inherent jurisdiction conferred on the civil courts to review a public authority's actions is a basic part of the Constitution that cannot be altered or removed. Further, judicial power conferred on the civil courts under Article 121(1) of the Constitution also cannot be given to any other body as they do not have the similar protection as the civil courts to safeguard their independence.

Applying the “*basic structure*” doctrine, David Wong CJSS was of the opinion that the impugned provisions contained all three elements of judicial power, namely adjudicative, finality and enforceability. The rights and liabilities of the parties in dispute are adjudicated and finally determined by the SAC in its ruling. As regards enforceability, the learned judge expressed the view that it is “artificial” to contend that the ruling is not itself enforceable by the SAC as the Court has no option but to incorporate and apply the substance of the ruling in making the order and delivering its decision.

“ the “*basic structure*” doctrine ... has been accepted by the Malaysian Courts ”

His Lordship added that even if the functions of the SAC do not exhibit the core characteristics of judicial power, it may arguably be regarded as a “borderline” case. Citing the decision of the Australian High Court in *R v Davison* (1954) ALR 877, the Judge said that borderline functions would form part of judicial power if they are ancillary or incidental to its exercise.

The Judge said that if there were no sections 56 and 57 of the CBMA, the learned trial judge would have, in the normal course of event, in a trial accepted and taken into consideration the respective and conflicting expert opinions in considering whether clause 2.8 is Shariah compliant. With the enactment of those provisions, it is crystal clear that with the SAC's binding ruling, the trial judge's function of analysing the conflicting opinions has been completely usurped - there is a complete prohibition on the part of the trial judge to determine a substantial issue of dispute as to the legality of clause 2.8. The SAC's ruling for all intents and purposes becomes the ruling of the trial judge. Hence the legislative purpose here is to take away from the civil courts the judicial power and place it with the SAC on issues relating to Shariah matters.

The learned judge also disagreed that *Semenyih Jaya* is distinguishable from the case at hand. In *Semenyih Jaya*, the learned judge had no option but to accept the assessment

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THE COMPANIES (AMENDMENT) BILL 2019

Phua Pao Yii and Sheba Gumis provide highlights of the amendments to the Companies Act 2016

The Companies (Amendment) Bill 2019 ("Bill") was passed by the Dewan Rakyat (*House of Representatives*) and the Dewan Negara (*Senate*) of the Malaysian Parliament on 10 and 31 July 2019 respectively. The Bill will now be presented to the Yang di-Pertuan Agong for His Majesty's assent. After His Majesty's assent, the law will be gazetted and come into operation on a date to be appointed by the Minister of Domestic Trade and Consumer Affairs by notification in the *Gazette*.

The Companies Commission of Malaysia ("CCM") has uploaded on its website, a set of Frequently Asked Questions relating to the Bill ("FAQs"). These FAQs are helpful as they explain and clarify the rationale for each of the proposed amendments.

This article highlights the main changes that will be made to the Companies Act 2016 ("Principal Act") under the Bill and explains the rationale behind the amendments.

Section 4 (Definition of "subsidiary" and "holding company")

Section 4(1)(a)(iii) of the Principal Act will be amended by replacing the words "issued share capital" with "total number of issued shares" as one of the circumstances in which a corporation is deemed to be a subsidiary of another. The "total number of issued shares" does not include preference shares. This aligns the provision with the *no par value share regime* that was introduced under the Principal Act.

“ the wider meaning (of) "document" under section 2(1) ... will not apply to section 66 ”

Section 66 (Execution of documents)

The Bill introduces a new sub-section (6) to section 66 of the Principal Act which states that for the purposes of section 66, a "document" means "a document which is required to be executed by any written law, resolution, agreement or constitution in accordance with subsection (1)". Arising from this amendment, the wider meaning assigned to the word "document" under section 2(1) of the Principal Act will **not** apply to section 66. This will limit the scope of section 66 and enable companies to carry on their daily business more effectively by adopting other methods of executing documents that do not come within the definition of a "document" under section 66(6).

Section 72 (Preference shares)

Section 72(5) of the Principal Act will be amended to make it clear that the requirement to transfer an equivalent amount of distributable profits to the share capital account upon the redemption of preference shares only applies when preference shares are redeemed out of profits pursuant to section 72(4)(a) of

the Principal Act. The existing requirement to transfer profits to the share capital account when preference shares are redeemed out of the capital of the company under section 72(4)(c) of the Principal Act will be dispensed with.

Section 84 (Power to alter share capital)

Section 84(1) of the Principal Act will be amended so that the power of a company to alter its share capital in the manner specified in section 84(1) of the Principal Act, namely by –

- (a) consolidating and dividing all or any share capital on the basis that the proportion between the amount paid and the amount, if any, unpaid on each subdivided share remains the same as it was in the case of the share from which the subdivided share is derived;
- (b) converting all or any paid-up shares into stock and vice versa; or

“ The inconsistency between sections 93(1) and 93(2)(b) of the Principal Act is removed ”

- (c) subdividing its shares or any of its shares, whatever is in the subdivision, on the basis that the proportion between the amount paid and the amount, if any, unpaid on each subdivided share remains the same as it was in the case of the share from which the subdivided share is derived,

may be effected by an ordinary resolution instead of a special resolution (unless otherwise provided in the company's constitution). According to the CCM, the rationale for reducing the approval threshold is that the changes in share capital described in paragraphs (a) to (c) above do not result in a change in the percentage of shareholding and the voting rights held by the shareholders of the company.

Section 93 (Application to disallow variation of class rights)

The inconsistency between sections 93(1) and 93(2)(b) of the Principal Act is removed by amending the latter to make it clear that an application to Court to have the variation disallowed may be made on behalf of shareholders representing at least 10% of the voting rights in the class.

Section 247 (Accounting periods of companies within a group)

Section 247(3) of the Principal Act will be amended to require any application to the Registrar for an order to authorise any subsidiary to have, or to adopt, a financial year which does not coincide with that of its holding company to be made not less than 30 days before the circulation of the financial statement of



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the holding company. The CCM has explained in the FAQs that the amendment will give time to the Registrar to process the application and avoid abuse of process whereby applications are submitted too close to the financial statement deadlines.

Section 340 (Annual general meeting)

Section 340(1)(c) of the Principal Act will be amended to provide that one of the matters to be transacted at an annual general meeting of a public company is the appointment and fixing of the remuneration of auditors. This amendment will align the requirements under the Principal Act in relation with the appointment and remuneration of auditors to the provisions of the repealed Companies Act 1965.

Section 386 (Powers of receiver or receiver and manager upon liquidation)

Section 386 of the Principal Act will be amended to make it clear that the exercise by a receiver and manager appointed under a debenture of his powers as receiver in respect of property and assets secured under the debenture will not require consent of the liquidator or the Court after the commencement of winding up.

“ the proposed amendments to sections 66, 72 and 386 ... clarify the requirements under those provisions ”

Section 409 (Dismissal of application for judicial management order)

Presently, the effect of section 409 of the Principal Act is that only a debenture holder who can appoint a receiver or receiver and manager over the whole or substantially the whole of the company's property may veto the appointment of a judicial manager. This provision will be amended to also allow a secured creditor to veto the application for a judicial management order. According to the CCM, the amendment aligns the provision with one of the policy objectives of the Principal Act which is to confer a right on other secured creditors of a company to oppose the appointment of a judicial manager. This proposed amendment may significantly curtail the ability of the Court to grant a judicial management order.

Section 433 (Qualification of liquidator)

Section 433(2) of the Principal Act will be amended to allow two additional categories of persons, namely a person who is (a) a partner, employer or employee of an officer of the company (section 433(1)(d)), or (b) a partner or employee of an employee

of an officer of the company (section 433(1)(e)), to be appointed as interim liquidator or liquidator without leave of Court in a members' voluntary winding up or, subject to approval of the majority of the creditors, in a creditors' voluntary winding up.

In addition, new provisions will be introduced to (i) confer discretion on the Minister of Finance to impose such limitations and conditions as he deems fit on any person who is approved to be a liquidator under section 433(4) of the Principal Act and to revoke such appointment (*new section 433(4A)*); and (ii) limit the duration of the approval (and any renewal of such approval) of a person approved under section 433(4) to two years (*new section 433(4B)*).

New Section 580A (Security for costs)

A new section 580A will be introduced into the Principal Act to confer discretion on the Court to order a plaintiff company to give sufficient security for costs and to direct that the costs of any action or proceedings be borne by the party to the action or proceedings. According to the FAQs, the objective of this provision, which is substantially similar to section 351 of the repealed Companies Act 1965, is to protect the interests of defendants in proceedings under the Principal Act as the safeguards under Order 23 rule 1 of the Rules of Court 2012 may be inadequate for this purpose.

COMMENTS

The Bill is the first time that amendments will be made to the Principal Act since it came into operation. In particular, the proposed amendments to sections 66, 72 and 386 of the Principal Act are welcomed as they clarify the requirements under those provisions. Similarly, the reinstatement of the discretion of the Court to grant security and costs is also welcomed. However, the proposed amendment to section 409 may curtail the effectiveness of the provisions for judicial management under the Principal Act.

RETENTION SUMS – IS IT REALLY YOURS?

Tatvaruban explains a landmark decision on retention sums in construction contracts

Retention sums are usually provided in construction contracts to be withheld by the employer from the sum otherwise certifiable to the contractor. It serves to safeguard the employer against possible defects or non-completion of works on the part of the contractor.

In *SK M&E Bersekutu Sdn Bhd v Pembinaan Legenda Unggul Sdn Bhd & Another Appeal* [2019] 4 CLJ 590, the Federal Court decided on the issue as to whether retention sums under a construction contract are held on trust by the employer for the benefit of the contractor.

This decision concerned two appeals that arose out of common issues of law in respect of actions brought by two different plaintiffs against the same defendant. The cases relating to these appeals were heard together before the High Court and Court of Appeal. Each court rendered one judgment respectively.

FACTS

The facts are similar in both appeals. Pembinaan Legenda Unggul Sdn Bhd ("Respondent") had engaged Geohan Sdn Bhd and SK M&E Bersekutu Sdn Bhd ("Appellants") to carry out sub-contract works in relation to two different projects.

The Appellants completed their works and the respective certificates of practical completion were issued by the architect. Both the sub-contracts contained a clause which provided for the deduction and release of the retention sum. Despite the expiration of the defects liability period and legal demands from the sub-contractors, the Respondent failed to release the retention sum.

On 2 November 2015, the shareholders of the Respondent passed a special resolution for the voluntary winding up of the Respondent. Based on the Respondent's statement of affairs as at 8 October 2015, there were about 250 creditors, out of which 128 were creditors claiming retention sums. The total amount owed to creditors for retention monies was RM8,230,087.61. This included the amounts owed to the Appellants. The Respondent did not open any separate bank account for the retention monies including the amounts owed to the Appellants.

DECISION OF THE HIGH COURT

Relying on the decision of the Court of Appeal in *Qimonda Malaysia Sdn Bhd (In Liquidation) v Sediabena Sdn Bhd* [2012] 3 MLJ 422 ("*Qimonda*"), the High Court held that the retention sums were being held on trust by the Respondent. The basis of such a finding was that while there was no express clause providing for the creation of a trust over the retention monies, a trust could still arise due to the fact that there was a provision for the release of the retention monies upon the completion of any rectification work on any defects and no notice was received from the Respondent requiring any defects to be rectified.

DECISION OF THE COURT OF APPEAL

The Court of Appeal reversed the decision of the High Court and held that there could not be a trust because of the lack of an express clause or clear conduct from the parties, as well as the fact that the retention monies were never segregated.

The Court of Appeal took the view that a trust cannot be implied purely from the nature and purpose of retention monies *per se*, and that the concept of a trust is not inherent in the use of the word "deductions". It went on to hold that most construction contracts do not operate via a trust, unless otherwise expressly stated. The Court also observed that there is no general proposition of law in a building contract that retention monies are, as a rule, held by way of trust between an employer and a contractor. The Court of Appeal's decision is reported in *Pembinaan Legenda Unggul Sdn Bhd (In Creditor's Voluntary Liquidation) v SK M&E Bersekutu Sdn Bhd* [2018] 2 AMR 641 ("*Pembinaan Legenda Unggul (CA)*").

APPEAL TO THE FEDERAL COURT

Leave was granted to the Appellants to appeal to the Federal Court on the following questions of law:

- (i) Where a building contract provides that a certain percentage of the certified sum for work done by a contractor is to be retained by the employer until the conditions for the release of the sum retained are met:
 - (a) is it implied by law that the retention sum is to be held in trust by the employer for the benefit of the contractor; or
 - (b) is it a matter of construction (interpretation of contract) whether or not the retention sum is to be held in trust by the employer for the benefit of the contractor?
- (ii) Where in a building contract there exists an agreement (whether arising by implication of law or upon construction of the contract) that the retention sum is to be held in trust by the employer for the benefit of the contractor, can the trust of the retention sum be constituted without the employer first appropriating and setting aside the money as a separate trust fund?

DECISION OF THE FEDERAL COURT

The Federal Court first considered the status of retention sums under English and Scottish law.

English Law

In the United Kingdom, the position in respect of retention sums is governed by standard-term building contracts which contain provisions whereby the employer undertakes to hold the retention sum on trust for the contractor. The Court used the JCT 1998 standard construction contract as an example where Clause 30.5.1 provides that, "*the employer's interest in the retention*



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is fiduciary as trustee for the contractor and for any nominated sub-contractor". The effect of such a provision is to impose upon the employer a personal obligation to appropriate and set aside as a trust the amount of retention money withheld. If this is successfully carried out, the contractor's claim to the retention money would take priority over the employer's general creditors in the event of the employer's insolvency.

Where a solvent employer neglects to perform its obligation as required by such a clause, the contractor may apply for a mandatory injunction to compel the employer to set aside the retention sum in order to protect the contractor against the employer's possible insolvency (*Rayack Construction Ltd v Lampeter Meat Co Ltd* (1979) 12 BLR 30 and *Wates Construction (London) Limited v Franthom Property Ltd* [1991] 53 BLR 21).

However, if the employer goes into liquidation without having set aside the retention monies as a trust fund, the question of trust does not arise as there is no *res* to which the trust can attach. Therefore, it is essential under English law that where parties have agreed for the retention monies to be impressed with a trust, for that trust to have been established before the employer's insolvency. Otherwise, such monies will form part of the monies to be distributed *pari passu* in the winding up, and the contractor will be unsecured (*Mac-Jordan Construction Ltd v Brookmount Erostin Ltd* [1994] CLC 581 and *Wilmot v Alton* [1897] 1 QB 17).

“ there were no facts to support a finding that a trust was in existence ”

Scottish Law

The position under Scottish law appears to be similar to the English position in that even if the contract provides a mechanism whereby the retention sums deducted are to be held on trust for the contractor, the mere existence of express terms is insufficient to create a trust without any other action (such as setting aside of the monies) by the employer (*Clark Taylor & Co. Ltd v Quality Site Development (Edinburgh) Ltd* 1981 SC 111 and *Balfour Beatty Ltd v Britannia Life* (1997) SLT 10).

Legal Principles on Retention Sums

After considering the positions in England and Scotland, the Federal Court summarised the legal principles on retention sums as follows:

- (1) An agreement must employ sufficiently unambiguous terms to show that a trust is created with the contractor as beneficiary;
- (2) While an explicit clause creating a trust may be of help, it

does not mean that an absence of such a clause negates the existence of a trust;

- (3) There is no presumption that monies held in a separate account must necessarily be held on trust;
- (4) Each case depends on the specific intention of parties as expressed in the relevant construction contract; and
- (5) Even where there is a fiduciary relationship between an employer and a contractor, not every fiduciary is a trustee. The nature and extent of a fiduciary's duties are variable and depend on the circumstances in each case.

Departing from Qimonda

In departing from the Court of Appeal decision in *Qimonda*, the Federal Court observed that the Court of Appeal in that instance found that there was a trust of the retention sum despite the absence of an express trust clause in the contract and that there was no fund set aside before the liquidation of the employer, nor had the contractor requested for it.

“ there were no express provisions requiring the retention sums to be held on trust ”

The Federal Court noted that the Court of Appeal in *Qimonda* had relied on *Re Kayford Ltd* [1975] 1 All ER 604 for the proposition that it was not necessary to set aside money for the purpose of creating a trust. However, the Federal Court distinguished *Re Kayford* on the basis that the context of payment in that case concerned customers paying for their goods in advance whereas there was no such advance payment by the contractor in *Qimonda* but merely an agreement that the employer would release the retention sum to the contractor upon final correction of defects.

The Federal Court's Findings

Based on a perusal of the evidence and after considering the legal positions set out above, the Federal Court took the position that there were no facts to support a finding that a trust was in

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DEVELOPMENTS IN STATUTORY ADJUDICATION IN 2018

Jocelyn Lim examines the significant statutory adjudication cases of 2018

The year 2018 marks another year of considerable development in case law on statutory adjudication in Malaysia. The use of this form of dispute resolution mechanism by stakeholders continues to grow exponentially with no sign of abating. This article encapsulates and examines some of the significant decisions that have been handed down by the Malaysian courts in 2018 and their impact on statutory adjudication under the Construction Industry Payment and Adjudication Act 2012 ("CIPAA").

RETROSPECTIVE OR PROSPECTIVE?

Notable among the case law in 2018 is *Bauer (Malaysia) Sdn Bhd v Jack-In Pile (M) Sdn Bhd & Another Appeal* [2018] 10 CLJ 293 ("*Jack-In Pile*") whereby the Court of Appeal adopted a different view to the rationale expressed in *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case* [2015] 11 MLJ 499 ("*UDA Holdings*") by holding that section 35 of CIPAA, which outlaws conditional payment clauses under the statutory adjudication regime, is prospective in nature.

In *Jack-In Pile*, the construction contract contained a classic 'pay-when-paid' clause which states that the appellant has no obligation to pay the respondent until the appellant has received payment from its principal. Unfortunately, the appellant's principal was subsequently wound-up. Consequently, payment to the respondent was stalled in view of the predicament of the appellant's principal. The respondent then commenced adjudication proceedings against the appellant. During these proceedings, the appellant relied on the 'pay-when-paid' clause in the construction contract. On the other hand, the respondent contended that the 'pay-when-paid' clause was rendered void by section 35. It was undisputed that prior to the adjudication proceedings, the parties had complied with the 'pay-when-paid' clause in relation to payments under the construction contract.

In deciding the question of the applicability of section 35 to the construction contract between the parties which had existed prior to CIPAA coming into force on 15 April 2014, the Court of Appeal found that "CIPAA 2012 is prospective in nature". It then came to the conclusion that section 35 relates to the substantive right of the contractual parties and in the absence of clear words in the statute, such substantive right must be given a prospective effect thereby validating the 'pay-when-paid' clause in the construction contract between the parties.

Notwithstanding the above, the High Court in *Vistasik Sdn Bhd v BME Tenaga Arus Sdn Bhd & another case* [2018] 1 LNS 1278 in addressing the same question as to whether CIPAA has retrospective or prospective effect, found *Jack-In Pile* to be inconsistent with the Federal Court's decision in *View Esteem Sdn Bhd v Bina Puri Holdings Berhad* [2017] 8 AMR 167 ("*View Esteem*") which had impliedly accepted the decision in *UDA Holdings* that CIPAA applies retrospectively. The High Court arrived at the aforesaid finding as it found that as the Federal Court in *View Esteem* did not expressly approve or disapprove *UDA Holdings*, it may arguably be said that the Federal Court in *View Esteem* had accepted the decision in *UDA Holdings*.

Similarly, in *Iskandar Regional Development Authority v SJIC Bina Sdn Bhd* [2018] 1 LNS 1194, the High Court found that the Federal Court in *View Esteem* did not overrule the legal position on the retrospective application of CIPAA that was laid down in *UDA Holdings*. The High Court further found that *Jack-In Pile*, which did not consider the Federal Court's decision in *View Esteem*, had not dealt with the general application of CIPAA but dealt specifically with section 35 in relation to a conditional payment clause. The High Court in *RH Balingian Palm Oil Mill Sdn Bhd v Niko Bioenergy Sdn Bhd* [2018] 1 LNS 1007 shared the same view in finding that *Jack-In Pile* was decided in the context of section 35.

Whether the whole of CIPAA applies retrospectively or prospectively remains to be decided by the Federal Court in *Jack-In Pile* which is now pending appeal in our apex court.

ACCRUAL OF DEFENCE

A defence raised by a respondent based on events that occurred after the issuance of a payment response or notice of adjudication has been held to be not a defence that can be raised in the adjudication proceedings in *Mecomb Malaysia Sdn Bhd v VST M&E Sdn Bhd* [2018] 8 CLJ 380 ("*Mecomb*"), which case was referred to in *Emerald Capital (Ipoh) Sdn Bhd v Pasukhas Sdn Bhd & Another Case* [2018] 1 LNS 459. In the aforesaid cases, the defence of set-off raised by the respective respondents only accrued after the issuance of the payment response or notice of adjudication. In such circumstances, it appears justified for an adjudicator to decline considering the said defence for he may not have the necessary jurisdiction to do so.

BREACH OF NATURAL JUSTICE

The principle established in the Federal Court's decision in *View Esteem* was distilled and followed by the Court of Appeal in *Leap Modulation Sdn Bhd v PCP Construction Sdn Bhd and another appeal* [2019] 1 MLJ 334, namely that a failure by an adjudicator to consider defences, though not set out in the payment response but in the adjudication response, amounts to a breach of natural justice which dictates that the adjudication decision be set aside. It is believed that leave to appeal against the Court of Appeal's decision has been granted by the Federal Court.

It is prudent to actively pursue a breach of natural justice argument under a setting aside application pursuant to section 15 of CIPAA than to passively raise such argument in defending a stay application under section 16 of CIPAA. As held by the High Court in *Mecomb*, "if the complaint is breach of natural justice for wrongful refusal of the adjudicator to assume jurisdiction, then the complainant such as the defendant here must make the active challenge under s.15 of the CIPAA against the error. It is insufficient in my opinion merely to rely on a passive challenge in aid of a stay as done herein in this application."

HARMONIOUS INTERPRETATION WITH OTHER LAWS

In *CT Indah Construction Sdn Bhd v BHL Gemilang Sdn Bhd* [2018]



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1 LNS 380, the High Court in interpreting the right under section 30 of CIPAA of a successful party in an adjudication decision to require the principal of a losing party that has been wound up to make direct payment to the successful party, took into consideration the prohibition against undue preference under the insolvency regime. It was held that any direct payment by a principal to a successful party from monies payable to a losing party which has been wound up would be tantamount to undue preference as the successful party would be given priority over the other unsecured creditors of the losing party and fall foul of the *pari passu* principle under the insolvency rules.

In *Sazean Engineering & Construction Sdn Bhd v Bumi Bersatu Resources Sdn Bhd* [2019] 1 MLJ 495, the appellant appealed against the High Court's decision that dismissed, among others, its application to set aside three adjudication decisions made in favour of the respondent. At the time when the respondent commenced the adjudication proceedings, the number of directors on its board of directors had been reduced below the statutory minimum of two directors required under the *Companies Act 1965* then in force and rendered the respondent to be incapacitated and dysfunctional and lacking the necessary *locus standi* to commence adjudication proceedings. It was against this background that the Court of Appeal set aside the three adjudication decisions.

NATIONAL SECURITY

In *Kerajaan Malaysia v Shimizu Corporation & Ors* [2018] 1 LNS 202, the plaintiff Government applied to set aside an adjudication decision on the grounds that the adjudicator had acted in excess of jurisdiction by reason that the contract, which provided for the construction of a water transfer tunnel from Pahang to Selangor, is exempted from the application of CIPAA pursuant to Order 2(1) and the First Schedule of the *Construction Industry Payment and Adjudication (Exemption) Order 2014* ("Exemption Order"). In deciding whether the contract falls within the Exemption Order, the learned Judge held that the burden of proof is on the Government to show that "a properly authorised person acting pursuant to a legitimate source of executive power has declared the contract to be one relating to national security or that it involves a national security facility."

INJUNCTIONS IN ADJUDICATION

In *Euroland & Development Sdn Bhd v Tack Yap Construction (M) Sdn Bhd* [2018] 1 LNS 896, the High Court in deciding whether it could intervene in adjudication proceedings by granting an injunction to restrain on-going adjudication proceedings considered the intention of Parliament under section 27(3) of CIPAA which allows an adjudicator to proceed with adjudication proceedings as if he has jurisdiction notwithstanding that a jurisdictional objection is raised. The High Court declined to intervene and to grant the injunction. Lee Swee Seng, J found that it was not plain and obvious in the payment claim that the adjudicator has no jurisdiction but rather a question as to whether the adjudicator has exceeded his jurisdiction, which is

a question of fact to be determined by looking into the factual circumstances of the case. His Lordship held, *per obiter*, that in cases where there is no jurisdiction to begin with, the Court is perfectly positioned and has the power to intervene and grant an injunction to stay the adjudication proceedings.

Presumably, injunctions to stay ongoing adjudication proceedings will only be granted in limited circumstances, for example, when the relevant contract is not a construction contract as defined under CIPAA or when the relevant contract falls within the scope of the *Exemption Order* or possibly, when there is an abuse of the adjudication proceedings.

UNDER-CERTIFIED CLAIMS

In *MRCB Builders Sdn Bhd v Southern Builders (J) Sdn Bhd* [2018] 1 LNS 1508, the appellant main contractor applied to set aside the adjudication decision on the grounds that the adjudicator lacked jurisdiction as there is no dispute given that the appellant had paid all monies as certified in the payment certificate. The Court of Appeal unanimously held that the respondent's claims of under-certification fell within the ambit of CIPAA notwithstanding that the appellant had made full payment of the certified sum. It was found that the dispute between the parties relates to the difference in the amount claimed and the amount certified, and that the payment is not for the full sum claimed. Thus, CIPAA extends to claims for payment which arise due to under-certification, and is not confined to non-payment of certified amounts.

DUE DATE OF PAYMENT

In *SKS Pavillion Sdn Bhd v Tasoon Injection Pile Sdn Bhd* [2019] 2 CLJ 704 ("*SKS Pavillion*"), the plaintiff successfully set aside the adjudication decision made in favour of the defendant on the grounds that the adjudicator did not have the jurisdiction as the payment claim, which failed to set out the due date for payment of the amount claimed, was void for failing to comply with a basic and essential requirement of section 5 of CIPAA. Ahmad Kamal Md Shahid JC was of the view that the due date for payment was essential to a cause of action, as it is only if the due date has passed that the defendant has an accrued cause of action. The learned Judicial Commissioner also found that an irregularity in a payment claim cannot be cured under section 26 of CIPAA as the adjudicator does not have the competence or jurisdiction to do that in the absence of a valid payment claim. In other words,

CAN A LANDOWNER SUE A SOLICITOR WHO ACTED FOR A FRAUDSTER TO SELL THE LAND?

Leong Wai Hong and Brenda Chan discuss the liability of solicitors who act for a fraudster in a land fraud case

Does a solicitor who unknowingly acts for a fraudster to sell a piece of land owe a duty of care to the real owner of the land? This, in essence, was the question which the Federal Court had to determine in *Pushpaleela R Selvarajah & Anor v Rajamani Meyappa Chettiar & Other Appeals* [2019] 3 CLJ 441.

BACKGROUND FACTS

The fraudster was an Indian national who possessed an Indian passport bearing the same name as the real owner of the land as stated on the land title. At all material times, the solicitor who acted for the fraudster was not aware that her client, the fraudster, was not the real owner of the land. The fraudster sold the land to a purchaser who in turn sold it to a *bona fide* purchaser. The real landowner, upon discovering the fraud, commenced legal action against the fraudster, the purchasers, the solicitors who acted for the vendor and purchasers, and the land office.

After a full trial, the High Court held that the solicitor for the fraudster vendor did not owe a duty of care to the real landowner based on the earlier Court of Appeal's decision in *Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal* [2014] 1 MLJ 645. However, upon appeal by the real landowner, the Court of Appeal reversed the High Court's decision.

The solicitor for the fraudster vendor obtained leave to appeal to the Federal Court on the following question of law:

*"In deciding whether a solicitor who acted for a fraudster owner of land who sold the said land owes a duty of care to the real owner of the land, whether the Court of Appeal decision in **Yap Ham Seow v Fatimawati bt Ismail & Ors and another appeal** [2014] 1 MLJ 645 or the Court of Appeal decision below is the correct decision."*

The appeal was heard before a panel of five judges comprising of Raus Sharif CJ, Zulkefli Ahmad Makinudin PCA, Ahmad Maarop CJ (Malaya), Richard Malanjum CJ (Sabah and Sarawak) and Azahar Mohamed FCJ.

As Raus Sharif CJ and Zulkefli Ahmad Makinudin PCA had retired after the hearing of the appeal, the remaining three members of the bench delivered a unanimous decision on 29 January 2019 allowing the appeal and holding that the solicitor who acted for the fraudster vendor did not owe a duty of care to the real landowner. We will now look at the Federal Court's grounds of judgment.

ERRORS BY COURT OF APPEAL BELOW

The leave question required the Federal Court to determine whether the Court of Appeal in *Yap Ham Seow* or the Court of Appeal below had correctly decided the question as to whether a solicitor who acted for a fraudster owner of land owed a duty

of care to the real owner of the land.

Yap Ham Seow dealt with a similar set of facts, whereby the solicitor in that case had acted for a fraudster who purported to sell a piece of land on behalf of the owner under a forged power of attorney. In that case, the Court of Appeal held there was no duty of care owed to the owner of the land.

The Court of Appeal in *Pushpaleela* on the other hand, held that *Yap Ham Seow* was not authority for the blanket proposition that solicitors did not owe a duty of care to third parties, but that under certain circumstances such a duty of care could be owed, citing the English cases of *Ross v Caunters* [1980] Ch 297, *Penn v Bristol & West Building Society* [1995] 2FLR 938 and *Al-Sabah v Ali* [1999] All ER (D) 49. The Court of Appeal said:

"[88] We consider these authorities to be good law on liability in negligence by advocates and solicitors to third parties in circumstances peculiar to the facts and circumstances of the present case ... We agree with learned counsel for the plaintiff that the case is not authority for the blanket proposition that a solicitor never owes a duty of care to a third party. Whether a solicitor is to be held liable to a third party must depend on the facts and circumstances of each case.

...

[90] On the facts of the present case it is clear to us that the third and fourth defendants were negligent in failing to take all necessary steps to verify the true identity and status of the imposter, the bogus Rajamani. When the bogus Rajamani produced an Indian passport bearing No F4495077, which did not match with the real Rajamani/plaintiff's passport which bears No X205536, and gave a self-serving declaration in the 'Surat Akuan' at p 2857 of the appeal record to link the two passports, the third defendant was put to notice of the need to make further enquiries."

APPEAL BEFORE THE FEDERAL COURT

In the leading judgment by Azahar Mohamad FCJ, the Federal Court, agreeing with case authorities from Canada and New Zealand, pointed out that the Court of Appeal below had erred by taking an overly simplistic view in failing to appreciate that the solicitor must owe a duty of care to the real landowner before the court considers whether there has been a breach of the duty of care. The Court of Appeal appeared to have erroneously conflated the question of breach, i.e. the solicitor's alleged negligent acts, with the question as to whether a duty of care was owed by the solicitor in the first place.

A careful reading of the English cases relied on by the Court of Appeal below also show that they are not authorities for a broad proposition that a solicitor who acted for a fraudster owner of land owed a duty of care to the real owner of the land. In



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fact, a review of case law in other Commonwealth jurisdictions show that generally, solicitors do not owe a duty of care to third parties except in limited circumstances, namely disappointed beneficiaries in probate cases, and where there is reliance and assumption of responsibility.

The Federal Court went on to consider whether a duty of care should be imposed on a solicitor who acted for a fraudster vendor towards the real owner of the land, by applying the three-fold test of foreseeability, proximity and policy considerations.

Foreseeability and Proximity

Their Lordships found that viewed objectively, it was not factually foreseeable to the solicitor that her act or omission might cause the real landowner to be deprived of her rights to the land. This was because she had been retained as the solicitor for the fraudster, whom she believed to be the owner of the land, and whose interest she is responsible for protecting. The expected scope of her duties covered the carrying out of the fraudster's instructions.

The solicitor could not be expected to take into account the interests of the real landowner, whom she did not even know existed, much less had any knowledge of her interest in the land. It was not reasonable for the solicitor to enquire whether her client was really who she claimed to be or whether her client's action might cause harm to the real landowner. The Court held that it was unrealistic to expect the solicitor to be able to guard the real landowner's interests under those circumstances.

On the question of legal proximity, the Federal Court pointed out that the real land owner only suffered pure economic loss which usually calls for a more restricted approach. The Court considered the question of whether there was voluntary assumption of responsibility by the solicitor and reliance by the real landowner to be important factors in establishing legal proximity between the parties.

From the facts, it was plain that the only nexus between the solicitor and the real landowner was the real landowner's interest in the land, and this alone could not create legal proximity where the real landowner was never the solicitor's client, and the real landowner had never relied on the solicitor. They never met each other prior to the commencement of the present action and did not know of each other's existence. The solicitor never assumed responsibility for the real landowner.

As such, the requirements of foreseeability and proximity in establishing a duty of care were not fulfilled.

Policy Considerations

The Federal Court, agreeing with New Zealand and Singaporean

case authorities, also held that there were policy considerations against imposing a duty of care on solicitors acting for a fraudster owner of land towards the real owner of the land.

Their Lordships were of the view that imposing such a duty would require solicitors to assume that their clients are acting deceitfully and will put them in a position of potential conflict of interest. It would also effectively make solicitors an insurer for all transactions, leading to increased costs that are passed on to the clients.

Such a duty would necessarily also extend to any agents for any person in any transaction, including accountants, bankers, insurers, stockbrokers and any other manifestation of an agent.

Taking into consideration the above factors, the Federal Court declined to impose a duty of care on solicitors acting for a fraudster owner of land towards the real owner of the land and allowed the present appeal.

The apex court of Malaysia then ruled that the answer to the leave question was that the Court of Appeal's decision in *Yap Ham Seow* is correct.

CONCLUSION

The Federal Court's judgment is significant as it conclusively determines that in Malaysia, solicitors acting for a fraudster owner of land do not owe a duty of care to the real owner of the land, and puts to rest the uncertainty that arose from the refusal of the Court of Appeal below to follow the decision in *Yap Ham Seow*.

The decision of the Federal Court is also significant as it will lend some guidance to the scope of duty of care owed by other professionals to third parties in Malaysia, by re-emphasising the applicability of the three-fold test of foreseeability, proximity and policy considerations.

CHECK YOUR PRIVILEGE

Geraldine Goon discusses recent developments in the law on legal advice privilege and litigation privilege

There are broadly three types of legal privilege - legal advice privilege, litigation privilege and "Without Prejudice" privilege.

In Malaysia, legal privilege stems from both the Evidence Act 1950 ("Evidence Act") and common law. Issues arise as to which of these laws provide the basis for legal advice privilege and which for litigation privilege and the application and reach of these two types of privilege.

In brief, legal advice privilege is codified in section 126 of the Evidence Act. Litigation privilege remains substantially within the realm of common law save for when section 129 of the Evidence Act applies to remove the protection of privilege in very limited circumstances. "Without prejudice" privilege cloaks written or oral communications which were genuinely made in an attempt at settlement negotiations.

This article will consider the recent developments in the law of legal privilege, specifically legal advice privilege and litigation privilege in Malaysia. Where relevant, comparisons will be made to the position in Singapore. "Without Prejudice" privilege falls outside the scope of this discussion.

“ Litigation privilege extends ... to communications which is for the purposes of or leading to evidence for use in legal proceedings ”

LEGAL ADVICE PRIVILEGE

Legal advice privilege arises out of the relationship between a client and his lawyer. As is evident from the name, this type of privilege relates to the provision and receipt of legal advice. No legal proceedings need to exist or be in contemplation for legal advice privilege to apply.

Legal advice privilege is codified within section 126 of the Evidence Act. The extent of the protection rendered by section 126 of the Evidence Act has been extensively elucidated by the Malaysian Federal Court in *Dato' Anthony See Teow Guan v See Teow Chuan & Anor* [2009] 3 MLJ 14. Our apex court referred to and relied on the Singapore Court of Appeal judgment of *Skandinaviska Enskilda Banken AB (PUBL), Singapore Branch v Asia Pacific Breweries (Singapore) Pte Ltd and other appeals* [2007] 2 SLR 367 ("*Skandinaviska*"). *Skandinaviska* considered section 128 of the Singaporean Evidence Act which is identical to section 126 of the Evidence Act. In short, legal professional privilege under section 126 of the Evidence Act concerns legal advice or communications between a lawyer and his client with a view to obtaining legal advice. This privilege is absolute and can only be waived by the privilege holder, i.e. the client, save where

protection into such privilege has been eroded by legislation. This will be further discussed below.

LITIGATION PRIVILEGE

Litigation privilege extends further than legal advice privilege, to communications which is for the purposes of or leading to evidence for use in legal proceedings. This applies to such communications with third parties as well.

The Malaysian position is set out in *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2016] 5 MLJ 127 ("*Tenaga Nasional*") and *Wang Han Lin v HSBC Bank Malaysia Bhd* [2017] 10 CLJ 111 ("*Wang*"). Both are judgments of the Court of Appeal.

Tenaga Nasional seemed to imply at the time, that litigation privilege did not exist any longer as a matter of common law due to section 3 of the Civil Law Act 1956. The Court of Appeal was of the view that section 126 of the Evidence Act codifies the law on privilege. Due to this codification, common law privilege no longer existed. As section 126 of the Evidence Act only describes legal advice privilege and not litigation privilege, the court opined that litigation privilege could no longer be relied upon.

The Court of Appeal in *Wang* subsequently straightened out matters. It clarified that litigation privilege continued to exist based on common law principles as the application of common law litigation privilege does not conflict with the sections 126 to 129 of the Evidence Act. *Wang* also sets out the two-fold test for determining how litigation privilege is established. First, whether litigation was pending or apprehended when the information or document was obtained; and secondly whether litigation was the dominant purpose for the preparation of the document.

The Singaporean Court of Appeal in *Skandinaviska* also preserved litigation privilege as a matter of common law. The Court of Appeal determined that common law litigation privilege is consistent with sections 128 and 131 of the Singaporean Evidence Act when read together. Hence, as there was no inconsistency between common law and statute, litigation privilege continued to exist by virtue of common law and was not struck down by section 2(2) of the Evidence Act of Singapore which repeals the rules of evidence that are not contained in written law only if such rules are inconsistent with the provisions of the Evidence Act of Singapore.

In addition, our Court of Appeal in *Wang* confirmed that section 126 of the Evidence Act deals with legal advice privilege, but that section 129 of the Evidence Act is broader and expands into the realm of litigation privilege. Reference was made to *Skandinaviska* which referred to section 131 of the Singaporean Evidence Act which at the material time was identical to section 129 of the Evidence Act. The example scenario given to demonstrate the reach of section 129 of the Evidence Act was where a client offers himself as a witness, in which case he may be compelled to make certain disclosures.



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A point for consideration that arose out of *Wang* is the question of whether legal advice privilege, where not codified within the Evidence Act, continues to exist in common law. In response, there are two points for consideration. First, the Court of Appeal in *Wang* stated that sections 126 to 129 of the Evidence Act deal with the full scope of legal professional privilege and that such privilege covered both legal advice privilege as well as litigation privilege. Hence, if litigation privilege was also dealt with by sections 126 to 129 of the Evidence Act and yet still existed as a matter of common law, the same may be applied to legal advice privilege. Secondly, consideration ought to be given to what alternative principle governs legal advice privilege when it does not come under the ambit of the Evidence Act, for example, in arbitration proceedings or simply where a matter is not the subject of "... judicial proceedings in or before any court".

POSSIBLE EXCEPTIONS TO THE PROTECTION UNDER PRIVILEGE

Section 46 of the Malaysian Anti-Corruption Commission Act 2009 ("MACC Act") and section 47 the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 ("AMLATFA") both contain similar provisions governing disclosure by advocates and solicitors.

Both sections provide that an application may be made to a Judge of the High Court, in relation to an investigation into offences under the respective Acts, to order disclosure by an advocate and solicitor. Such disclosure is limited to information available to that advocate and solicitor in respect of any transaction or dealing relating to property liable to seizure under the respective Acts.

However, both provisions contain a proviso, in subsection 46(2) of the MACC Act and subsection 47(2) of AMLATFA, that limit the extent of disclosure that can be required of the advocate and solicitor. Both provisions do not permit disclosure of "*privileged information or communication which came to his (the advocate and solicitor) knowledge for the purpose of any pending proceedings*".

The protection of subsection 46(2) of the MACC Act has been upheld by the Court of Appeal in *Suruhanjaya Pencegahan Rasuah Malaysia & Ors v Latheefa Beebi Koya & Anor* [2015] 6 CLJ 476 with the court stating that "*sub-s 46(2) categorically excludes any privileged information or solicitor-client communication*". Section 47 of AMLATFA has yet to be tested.

It is critical to note that the wording of both the above-mentioned subsections potentially limit the protection to information that is the subject of litigation privilege. The question as to whether such protection can be extended to documents that are the subject of legal advice privilege has yet to be considered by the courts.

IS A BREACH OF SECTION 126 ACTIONABLE?

The issue of whether a breach of section 126 of the Evidence Act

is actionable arose very recently in the case of *Tan Chong Kean v Yeoh Tai Chuan & Anor* [2018] 2 MLJ 669. The Federal Court was of the opinion that a breach of section 126 was tantamount to breach of a principle of fundamental justice. This would entitle an aggrieved party to commence an action for an order to "*safeguard the confidentiality of the client-solicitor communication*". As a note of caution, in mounting such an action, it is sufficient to merely mention the privileged documents as any disclosure of their contents may be construed as a waiver of privilege.

EXTENDING SECTION 126(1) TO THIRD PARTIES AND IN-HOUSE COUNSEL?

In *Toralf Mueller v Alcim Holding Sdn Bhd* [2015] MLJU 779, Wong Kian Kheong JC (as he then was) confirmed that section 126(1) of the Evidence Act does not apply to communications between in-house counsel and his employer. However, K.K. Wong JC went on to comment on the need for a provision similar to section 128A of the Singaporean Evidence Act which provides that legal advice privilege protects communications between an entity and its in-house legal counsel.

While there is justification in ensuring that all the material facts of a case are not clouded by privilege or such a provision is not abused to prevent material facts from being disclosed, nonetheless an entity ought to be freely able to discuss its concerns with its in-house counsel without fear of disclosure of any internal legal advice given.

In addition to the above, in an increasingly international world, K.K. Wong JC also expressed his hope that the legislature would extend privilege to communications between Malaysian and foreign lawyers.

Section 128A of the Singaporean Evidence Act was introduced in 2012 to provide for the application of legal advice privilege to in-house counsel. In the wider scope of litigation, the Singaporean courts have generally taken a broad approach in interpreting legal advice privilege. Hence, legal advice privilege encompasses both advice by a lawyer to his client on the law, as well as advice of what should be done in a legal context. It remains to be seen whether the Malaysian legislature will consider an update of the Malaysian position to bring us more in line with other jurisdictions.

EROSION BY THE INCOME TAX ACT?

Section 142(5) of the Income Tax Act 1967 ("ITA") purports

NO SECOND BITE AT THE CHERRY

Nathalie Ker explains the Court of Appeal's reasons in disallowing a stay of a "No Order" in an application for judicial management

Since the coming into force of the new corporate rescue mechanisms in the Companies Act 2016 last year ("Act"), the High Court has seen a fair number of judicial management applications made by companies in distress. Section 404 of the Act provides an avenue for the appointment of a judicial manager where the company or its creditor considers that the company is or will be unable to pay its debts and there is a reasonable probability of rehabilitating the company. Once a judicial management application has been made, section 410 of the Act provides for a moratorium over legal proceedings against the company, including winding up proceedings and steps to enforce any security.

In the case of *CIMB Islamic Bank Berhad v Wellcom Communications (NS) Sdn Bhd and Rangkaian Minang (NS) Sdn Bhd* [2019] MLJU 148, the Court of Appeal considered whether a stay of an order dismissing a judicial management application could be granted.

BACKGROUND FACTS

The first respondent was a company in the business of telecommunication services, whereas the second respondent was a state-backed company which ran a one-stop centre for telecommunication services. The respondents had charged their assets under certain debentures to the appellant, CIMB Islamic Bank Berhad ("CIMB"). The respondents subsequently defaulted on the related facility agreements.

“ the ingenuity ... in obtaining the stay gave ... a "second bite at the cherry" to revive the interim protection ”

Prior to the respondents' application for a judicial management order, CIMB had appointed Receivers over certain charged assets of the first respondent and Receivers and Managers ("R&M") over the second respondent. However, just two days after the appointment of the R&M and the Receivers, the respondents filed an application for an injunction to suspend the exercise of powers by the R&M and the Receivers. The injunction was subsequently set aside.

A day after the setting aside of the injunction, the respondents filed an application for the respondents to be placed under judicial management. The application was dismissed by the High Court. The respondents appealed to the Court of Appeal against the dismissal, and applied to the High Court for a stay of the order dismissing the application. The stay was allowed by the High Court, thus reviving the moratorium which had arisen under

section 410 of the Act upon the filing of the judicial management application.

The appellant appealed against the granting of the stay order, arguing that there could be no such stay of a 'no order'.

THE JUDGMENT OF THE COURT OF APPEAL

On CIMB's appeal against the stay, the respondents argued that the Court of Appeal's decision in *Ong Koh Hou @ Won Kok Fong v DA Land Sdn Bhd & Ors* [2018] MLJU 778 ("DA Land") was authority for the proposition that there could be a stay of an order dismissing an originating process. The Court of Appeal was not convinced of this argument and held that *DA Land* relates to stay applications made pursuant to section 44 of the Courts of Judicature Act 1964, which provides for interim orders by the Court of Appeal, and that such a stay of a 'no order' was unprecedented.

CIMB argued that there had been an abuse of process by the respondents in their application for a stay of the 'no order'. It submitted that a balance was necessary given the draconian effects of section 410 of the Act, where despite the company admitting that it is unable to pay its debts, the directors of the company could continue to run the business of the company. Further, it was argued that any stay of the dismissal of the judicial management application fell outside the scope of the judicial management provisions in the Act and would result in an abuse of the judicial management process, as this would render the company immune from its creditors for an extended period. CIMB stated that the High Court, in dismissing the application for judicial management, brought the matter to an end. Thus, the Court was *functus officio* and did not have the power to make any interim order, including an order to stay the dismissal of a 'no order'.

The Court of Appeal in allowing the appeal agreed that there had been an abuse of process in jurisprudential terms, and that the ingenuity of the respondents in obtaining the stay gave the respondents a "second bite at the cherry" to revive the interim protection under section 410 of the Act.

The Mischief of the Company Itself

The learned judge, Hamid Sultan, JCA, observed that the judicial management provisions in the Act do not "safeguard as of right" the mischief of the company itself, in that the company could file the judicial management application with the sole intention of freezing the claims of creditors, at least until the disposal of the judicial management order.

The Court of Appeal held that the High Court, by granting the order for stay, was entertaining the mischief without realising the impact that this would have on the creditors. Further, the Court commented that the effect of making a judicial management



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order in relation to an insolvent company which may have no prospect of recovering money or assets within a reasonable time may be drastic.

The Application Must be Bona Fide

The learned Judge of the Court of Appeal stated that the Court's consideration of an application for judicial management "*must be based on strict proof and evidence, and not merely surmise and conjecture to ensure that creditors are not defrauded by sympathy evoking stories of insolvent companies*". Additionally, the Court must also justly, economically and expeditiously dispose of the application as well as any appeal process, considering the effect of the provisions against creditors.

In relation to the moratorium regime under section 404 of the Act, the Court stated that any application should not be entertained if no element of *bona fide* was reflected in the application. The learned Judge of the Court of Appeal suggested that one way to demonstrate *bona fides* would be to write to all parties concerned to obtain their views before the application is filed, and then to disclose the views of the creditors to the Court.

CONCLUSION

The Court of Appeal's decision in this case has further clarified the judicial management provisions of the Act. In highlighting the mischief inherent in the protection provided by the provisions of the Act to a company making an application for judicial management, the Court has also set down the factors to be considered when such an application is made. Thus, applicants must show proper proof and evidence that there is a reasonable probability of rehabilitating the company. However, due to the fact that the moratorium applies upon the filing of the application for judicial management, it is up to the Courts to ensure that applications which are not *bona fide* are disposed of quickly and efficiently.

CHECK YOUR PRIVILEGE

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to erode the protection generally afforded by all the above-mentioned types of legal privilege. As both types of privilege could relate to the relationship between a client and his legal advisor, it is possible that section 142(5) could apply to either scenario.

The reach of section 142(5) of the ITA has been considered in the case of *Bar Malaysia v Ketua Pengarah Hasil Dalam Negeri* [2018] 9 MLJ 557.

There the High Court determined that on the following three reasons, section 142(5)(b) of the ITA does not defeat section 126 of the Evidence Act. First, the wording in section 142(5)(b), at the most, is intended to remove protection from "*practitioners*" or "*firm of practitioners*", such as tax accountants and tax agents. The High Court was of the view that the term "*practitioners*" does not extend to "*advocates and solicitors*". Section 126 of the Evidence Act, on the other hand, specifically refers to an advocate. Section 126 of the Evidence Act being more specific would override section 142(5)(b) of the ITA, hence maintaining the protection afforded by section 126 of the Evidence Act. Secondly, the qualification in section 142(5)(b), namely "*Notwithstanding the provisions of any other written law ...*" does not operate to exclude common law. Therefore, common law principles of privilege would not be overridden by section 142(5)(b) of the ITA. Thirdly, as the Evidence Act is more precise, Parliament did not intend to apply the ITA to advocates and solicitors and thus, the provision should not stray beyond Parliament's intentions. The High Court then highlighted sections 126(1)(a) and 126(1)(b) of the Evidence Act to emphasise circumstances which would permit disclosure.

This case is now on appeal to the Court of Appeal.

CONCLUSION

The Malaysian courts have, insofar as the law permits, upheld the sanctity of legal advice privilege and litigation privilege. We now look to the legislature to ensure that Malaysia is on equal footing with other commonwealth jurisdictions when it comes to the protection of privileged information.

RENEWABLE ENERGY: THE RISING SUN

Anita Natalia discusses the framework for renewable energy in Malaysia, with a specific focus on solar energy

Malaysia introduced renewable energy as the fifth fuel, in addition to oil, gas, coal and hydro, in the energy supply mix under the "Five-Fuel Diversification Policy" as part of the 8th Malaysia Plan. It was the first time that renewable energy has been earmarked to be a major contributor to electricity generation in our country.

One of the aims of the "Five-Fuel Diversification Policy" was to generate 5% of the country's electricity from renewable resources by 2005. However, only 3% of the target was achieved at the end of that period. While the Government continued with the "Five-Fuel Diversification Policy" under the 9th Malaysia Plan, the ideal electricity generation mix remained unmet. Thus the National Renewable Energy Policy and Action Plan ("NREP") was launched in 2010 as part of the 10th Malaysia Plan to overcome the main barriers to renewable energy deployment in Malaysia and to provide a secure and sustainable national electricity supply.

The objectives of the NREP are to:

- increase renewable energy contribution in the national power generation mix;
- facilitate the growth of the renewable energy industry;
- ensure reasonable renewable energy generation costs;
- conserve the environment for future generations; and
- enhance awareness on the role and importance of renewable energy.

It is envisioned under the NREP that renewable resources will contribute 20% of electricity generated in Malaysia by 2025.

RENEWABLE ENERGY ACT 2011

The most significant feature of the NREP was that it laid the foundation for the introduction of the Renewable Energy Act 2011 ("REA").

The REA is Malaysia's main regulatory instrument in prioritising renewable energy over fossil fuels. It came into operation in Peninsular Malaysia and Sabah on 1 December 2011 (except for sections 17 and 18 which came into operation on 31 December 2012). Key features of the REA are the establishment of the feed-in tariff ("FiT") system and the renewable energy fund ("RE Fund").

In tandem with the REA, the Sustainable Energy Development Authority Act 2011 ("SEDA Act") came into operation in Peninsular Malaysia and Sabah on 1 September 2011. The SEDTA Act, *inter alia*, establishes the Sustainable Energy Development Authority ("SEDA") whose responsibilities include advising the Government on sustainable energy and promoting and implementing the national policy objectives for renewable energy. In addition, the REA charges SEDTA with the responsibility to implement and administer the FiT system and administer and control the RE Fund.

The REA and the SEDTA Act have yet to be enforced in Sarawak.

Renewable Energy

Presently, five types of "renewable resources" qualify to participate in the FiT system under the REA, namely biogas, biomass, small hydropower, solar photovoltaic and geothermal. A notable omission is wind energy notwithstanding that two wind turbine units are operating in Pulau Perhentian, Terengganu and Pulau Layang, Sabah.

The FiT System

To encourage the generation of electricity from renewable resources, the Government makes it mandatory for distribution licensees (namely Tenaga Nasional Berhad, NUR Distribution Sdn Bhd and Sabah Electricity Sdn Bhd) to purchase electricity generated from these resources for a duration that ranges from 10 to 21 years and at the FiT rates set out in the Schedule to the REA. The FiT rates generally exceed the cost of generating an equivalent amount of electricity from non-renewable resources.

It should be noted that a cap is imposed on the total amount of electricity that is to be generated under the FiT system. The additional capacity allocated to each type of renewable resource is determined by SEDTA for every six month period on a three year rolling basis.

By guaranteeing access to the grid and setting favourable FiT rates, the FiT system encourages renewable energy to become a viable long-term investment for companies, industries and also for individuals.

A person must obtain approval from SEDTA in order to participate in the FiT system. The REA requires the electricity to be generated from one of the renewable resources mentioned earlier. In addition, the installed capacity of the renewable energy installation must not exceed 30MW (or such higher installed capacity as may be approved by the Minister). The applicant is also required to meet other criteria prescribed by SEDTA.

Subject to the limited exceptions set out in section 12(2) of the REA, a distribution licensee is required to enter into a renewable energy power purchase agreement with a person who has received approval to participate in the FiT system ("FiAH") upon receipt of a written notice from SEDTA.

Unless exempted by SEDTA, a distribution licensee is required under the REA to purchase and distribute the entire available quantity of renewable energy generated by an FiAH in priority to electricity generated from non-renewable resources.

Renewable Energy Fund

The RE Fund is established pursuant to section 23 of the REA. The RE Fund is raised primarily through sums allocated for such purpose by Parliament and such portion, as determined by the Minister, of the tariffs collected by a distribution licensee from



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its customers pursuant to section 26(1) of the Electricity Supply Act 1990.

An initial funding of RM300 million was provided by the Government at the inception of the RE Fund.

A distribution licensee is required under the Renewable Energy (Allocation from Electricity Tariffs) Order 2013 to pay into the RE Fund a sum equivalent to 1.6% of the tariffs (after deducting applicable discounts) collected by such licensee from its consumers other than domestic customers with electricity consumption of 300kWh and below per month. Thus, the more electricity one uses, the more he will contribute towards the RE Fund.

The annual contributions to the RE Fund increased from RM219,241,907 in 2012 to RM753,972,002 in 2016 and the balance in the RE Fund in 2016 stood at RM2,236,153,690.

Application of the RE Fund

As the FiT rates paid by a distribution licensee to its FiAHs exceed the cost that it would incur to generate an equivalent amount of electricity, the distribution licensee is entitled to recover from the RE Fund, a sum equivalent to the difference between (a) the FiT paid by the distribution licensee to its FiAHs; and (b) the cost which it would have otherwise incurred to generate the same amount of electricity generated by its FiAHs. A distribution licensee is also entitled to recover administrative fees which it incurs in administering FiT payments to its FiAHs.

When SEDA determines that a particular renewable energy installation ("Relevant Installation") has achieved **grid parity**, that is the time at which the FiT rate applicable to the Relevant Installation is equal to or less than the displaced cost (i.e. the average cost of generating and supplying 1kWh of electricity from non-renewable resources): (a) the FiAH concerned will cease to be entitled to be paid the FiT but will be paid based on the prevailing displaced cost for the remaining duration of the effective period; and (b) the distribution licensee will not be entitled to recover from the RE Fund the amount paid by it to the FiAH for the purchase of electricity generated by the Relevant Installation or be paid administrative fees pertaining thereto.

CURRENT RENEWABLE ENERGY INITIATIVES

As Malaysia is located where sunshine is in abundance throughout the year, it is not surprising that photovoltaic or solar energy accounts for about 63% of the total installed capacity of the electricity generated from renewable resources as of 2018.

To create a more balanced output of renewable energy under the FiT system, the Government ceased to allocate additional capacity for solar energy after 2017. At the same time, other measures were introduced to encourage the development of solar energy.

Large-Scale Solar Programme

The Large-Scale Solar Programme ("LSSP") was introduced in 2016 to accelerate the development of solar energy. The Energy Commission is mandated under the LSSP to conduct tenders to invite private sector companies to build, own and operate large-scale solar photovoltaic plants to generate and sell energy to distribution licensees under long term power purchase agreements.

The first tender under the LSSP was held in 2016 with capacity packages ranging from 1MW up to a maximum of 50MW, while the second LSSP tender was held in 2017 with capacity packages ranging from 1MW up to a reduced maximum of 30MW. The third tender under the LSSP opened in February 2019 with capacity packages from 1MW up to an increased maximum of 100MW.

Net Energy Metering

Net Energy Metering ("NEM") is a mechanism that allows electricity consumers in Peninsular Malaysia and Sabah to sell excess electricity generated from their solar photovoltaic systems back to the grid. This scheme is available to all consumers (other than delinquent consumers) whom are customers of Tenaga Nasional Berhad or Sabah Electricity Sdn Bhd.

The original NEM scheme saw a low take-up rate partly due to the fact that the selling price (based on a displaced cost basis) for electricity supplied to the grid was lower than the price to be paid (at regulated tariff rates) by the consumer for electricity consumed by it. The NEM scheme was revised from 1 January 2019 to a "true net energy metering" basis. The consumer will be given credit for every 1kWh of energy exported to the grid. The credit, which can be rolled over for 24 months, will be offset against the electricity consumed by the consumer on a "one-on-one" offset basis. The revised NEM scheme is presently available only to consumers in Peninsular Malaysia.

According to the Minister of Energy, Science, Technology, Environment and Climate Change, the response to the revised NEM scheme has been encouraging. As at 10 May 2019, 16.6MW of electricity generation has been approved for 2019 as compared to the total approved capacity of 18.24MW in 2018.

Solar Photovoltaic Investors

To encourage generation of energy from renewable resources, the *Guidelines for Solar Photovoltaic Installation on Net Metering Scheme* (approved by the Energy Commission on 20

BEEFING UP AVIATION SECURITY

Tan Hui Wen highlights some of the key provisions in the Civil Aviation (Security) Regulations 2019

Air transport has revolutionised the way we travel and trade over the past century. With increasing movement of people and cargo across borders, global aviation security has become a focus of the International Civil Aviation Organisation (ICAO) and the 193 Contracting States to the Convention on International Civil Aviation ("Chicago Convention"). Malaysia, as one of the Contracting States, introduced the Civil Aviation (Security) Regulations 2019 ("Security Regulations") which came into operation on 30 March 2019.

Amongst other matters, the Security Regulations provide for the matters discussed below.

NEW AVIATION SECURITY AUTHORITIES

National Civil Aviation Security Authority

The Security Regulations establish a National Civil Aviation Security Authority ("the Security Authority") which is responsible for safeguarding civil aviation against any acts of unlawful interference and for regulating the security of civil aviation in compliance with the provisions of Annex 17 to the Chicago Convention.

Acts of unlawful interference mean any act which jeopardises the safety of civil aviation, including (i) unlawful seizure of aircraft; (ii) the destruction of aircraft in service; (iii) hostage-taking on an aircraft or in aerodromes; (iv) forcible intrusion on board an aircraft; (v) the introduction on board an aircraft or at an airport of a weapon or hazardous device or material intended for criminal purposes; and (vi) the use of an aircraft in service for the purpose of causing death, serious bodily injury or serious damage to property.

The functions of the Security Authority include: (i) establishing and reviewing civil aviation security policies; (ii) monitoring the implementation of the Security Regulations; (iii) reviewing the National Security Programmes; (iv) approving a security programme and reviewing the same; (v) defining and allocating tasks and co-ordinating civil aviation security activities between various entities; (vi) reviewing the level of threat to civil aviation; (vii) re-evaluating security control and procedures on civil aviation security; and (viii) responding to meet any increased threat to civil aviation security.

National Civil Aviation Security Committee

The Security Regulations also establish a National Civil Aviation Security Committee ("the Committee") whose functions include: (i) advising the Security Authority on matters relating to the implementation of the Security Regulations; (ii) facilitating the co-ordination of civil aviation security activities between various entities responsible for implementing the National Civil Aviation Security Programme ("NCASP"); and (iii) considering the recommendations made by the airport security committees in relation to the civil aviation security and, where appropriate,

recommending to the Security Authority any change to the civil aviation security policies.

THE NATIONAL SECURITY PROGRAMMES

The Chief Executive Officer of the Civil Aviation Authority of Malaysia ("CEO") is charged with the responsibility for establishing and implementing the National Security Programmes, which shall include (i) the NCASP to safeguard civil aviation operations against any act of unlawful interference; (ii) the National Civil Aviation Security Training Programme ("NCASP") to ensure that security awareness and function specific trainings are provided to persons involved in the implementation of the NCASP; and (iii) the National Civil Aviation Security Quality Control Programme ("NQCP") to determine the compliance with and validate the effectiveness of the NCASP.

The Security Regulations impose an obligation on all operators, aerodrome operators, groundhandlers and other persons as may be determined by the CEO to comply with the National Security Programmes and require all Government entities responsible for implementing the National Security Programmes to cooperate with and assist one another to ensure the proper implementation of the said programmes.

The Security Regulations also require an operator, aerodrome operator, a groundhandler or any other persons as determined by the CEO to establish a civil aviation security programme, a civil aviation security training programme and a civil aviation security quality control programme in accordance with the requirements of the NCASP, NCASP and NQCP respectively, which are to be approved by the Security Authority. Such approval is to be renewed within such period as may be determined by the CEO.

In addition, an aerodrome operator is required to establish a contingency plan (i.e. a proactive plan which includes measures to be implemented in the event of an actual act of unlawful interference) in accordance with the requirements of the NCASP which is to be approved by the Security Authority.

An operator, aerodrome operator, a groundhandler or any other persons as determined by the CEO is required to comply with the approved security programmes. In addition, an aerodrome operator is also required to comply with its approved contingency plans.

The CEO may, if he thinks necessary, vary any of the National Security Programmes and direct any person to vary any approved security programmes established by such person to be in accordance with the variations made to the National Security Programmes.

The Security Authority may, if it thinks necessary, conduct a review of any approved security programme and direct the person who established the programme to vary the same. The



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Security Authority may also require a person who establishes any approved security programme to conduct a review of its programme.

SECURITY AND SCREENING CONTROLS

Amongst others, the Security Regulations require an operator, aerodrome operator, groundhandler or any other person to: (i) use security equipment that is approved by the Security Authority; (ii) permit only a person who holds a security screener certificate issued by the Security Authority to act as a security screener; and (iii) ensure that a security screener complies with the method and manner of screening determined by the CEO. In addition, an aerodrome operator must, with the approval of the CEO, designate an area on the airside of an aerodrome as a security restricted area (“security restricted area”) that is a priority risk area where in addition to access control, other security controls are applied.

The expression “security equipment” refers to a device of a specialised nature for use, individually or as part of a system, in the prevention or detection of any act of unlawful interference with civil aviation and its facilities, including closed-circuit television, hand-held metal detector, walk-through metal detector and body scanner.

Screening of person

Subject to the exceptions set out below, the Security Regulations prohibit any person from entering a security restricted area or an aircraft in a security restricted area unless that person undergoes a screening process by a security screener. An operator, aerodrome operator, groundhandler or any other person responsible for providing a screening process is required to ensure that the foregoing is complied with.

The screening requirements do not apply to: (i) a transit passenger who remains on board an aircraft; (ii) a transit passenger or transfer passenger who does not mix with an unscreened person from the transiting or transferring airport; and (iii) a transit passenger or transfer passenger who arrives from a Contracting State to the Chicago Convention where the security standards are recognised as being equivalent to the requirements as determined by the CEO.

Screening of baggage

A person is prohibited under the Security Regulations from taking, or causing to be taken, on board an aircraft, or delivering or causing to be delivered, for loading or carriage on an aircraft any baggage unless it undergoes a screening process by a security screener. An aerodrome operator is required to ensure that the foregoing is complied with. The foregoing requirements do not apply to cabin baggage carried by a transit passenger or transfer passenger.

Screening of cargo, mail and stores

A person is prohibited from taking or causing to be taken on board an aircraft, or delivering or causing to be delivered for loading or carriage on an aircraft, any cargo or mail, and from carrying or causing to be carried in a security restricted area or on board an aircraft within a security restricted area, any stores, unless the cargo, mail or stores have been duly screened by a security screener.

The expression “stores” refers to any goods, other than cargo or mail, and includes any goods for consumption by a passenger or crew on board an aircraft, any goods used for the operation and maintenance of an aircraft, including fuel and lubricants, and any goods for sale to a passenger or crew on board an aircraft or in a security restricted area.

Screening of vehicles

The Security Regulations prohibit a person from using or operating, or causing to be used or operated, a vehicle in a security restricted area unless the vehicle undergoes a screening process by a security screener, and require an aerodrome operator to ensure that the foregoing is complied with.

AIRCRAFT SECURITY

An operator is permitted to fly its aircraft for the purpose of commercial air transport only if the operator has conducted a security search and checks on the aircraft in accordance with the NCASP.

The Security Regulations prohibit a person from entering or being in a flight deck of any aircraft flying for the purposes of commercial air transport unless that person is: (i) a crew on duty and authorised by the operator; (ii) performing any regulatory functions under the Civil Aviation Act 1969 or for the purpose of the Civil Aviation Authority of Malaysia Act 2017; or (iii) authorised by the CEO.

An operator is required to ensure that: (i) its aircraft is protected from any unauthorised interference from the time the security search and checks are carried out until the departure of the aircraft; (ii) its aircraft is kept under its supervision to prevent any unauthorised access of person or vehicle to or from the aircraft; (iii) no unauthorised person enters or is in a flight deck of any of its aircraft; and (iv) any item left behind in its aircraft by a passenger disembarking from any flight, including a transit flight,

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FILLING THE GAP IN TRADE MARKS: THE TRADEMARKS BILL 2019

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the method of enforcement of the trademark rights by registered proprietors.

WELL-KNOWN MARKS

The scope of protection under the 2019 Bill for well-known marks which are not registered in Malaysia will be expanded to cover the use of an infringing mark in relation to similar goods or services, and use which would indicate a connection with, and is likely to damage the interests of, the proprietor of the well-known mark.

LICENSEE

The 'registered user' concept under the 1976 Act will be removed and is now subsumed under the licensing provisions set out in Part X of the 2019 Bill. This amendment reflects the commercial reality and recognition that trademark licensing arrangements are increasingly common and complex. The 2019 Bill provides a welcomed framework for the rights and remedies of licensees.

“ The scope of protection ...
for well-known marks which
are not registered in
Malaysia will be expanded ”

The 2019 Bill differentiates between an "exclusive licensee" and a "licensee". An exclusive licensee refers to a licensee who is authorised to use the registered trademark to the exclusion of all other persons including the person granting the licence. The definition of a "licensee" has been expanded to include sub-licensees. The rights and remedies of a licensee under the 2019 Bill will differ depending on whether the licensee is an exclusive or a non-exclusive licensee.

Licence agreements may provide exclusive licensees extensive rights and remedies as if the licence has been an assignment, e.g. the exclusive licensee shall be entitled to bring infringement proceedings in his own name against any person other than the registered proprietor.

NEW CRIMINAL OFFENCES

The criminalisation of the use of a false trade description in relation to trade mark is presently provided for in the Trade Descriptions Act 2011 ("TDA"). However, once the 2019 Bill comes into force, various new criminal offences will be introduced under the 2019 Bill and the Sessions Court will have jurisdiction to try such offences.

The Trade Descriptions (Amendment) Bill 2019, which has also been passed by both Houses of the Malaysian Parliament, will

amend the TDA to remove all references to 'trade mark'. All trademark-related offences, such as counterfeiting a trademark, falsely applying a registered trademark to goods or services, importing or selling goods with falsely applied trademarks, falsely representing trademark as protected international registration designating Malaysia, and false entries to the Trademarks Office or in the Register of Trademarks, will be consolidated under the 2019 Bill.

TRANSITIONING FROM THE 1976 ACT TO THE 2019 BILL

The 2019 Bill has a whole host of transitional provisions, providing for the potential effects on pending matters such as applications, registered trade marks, rectification applications, rights and remedies of licensees, infringement actions, and revocation actions. To highlight a few:

- Trade marks registered under the 1976 Act before the commencement of the 2019 Bill ("existing registered marks") shall continue to be registered trademarks under the 2019 Bill;
- Pending applications for registration of a trade mark under the 1976 Act shall be reviewed according to the provisions of the 1976 Act, and if registered, shall be treated as an existing registered mark;
- Applicants with pending applications which have not been examined under the 1976 Act, may apply to have those applications determined according to the provisions of the 2019 Bill;
- The provisions of the 1976 Act continue to apply to any infringing act committed before the commencement of the 2019 Bill; and
- Pending applications under section 46 of the 1976 Act for non-use of trade mark will continue to be dealt with according to the provisions of the 1976 Act.

CONCLUSION

The 2019 Bill paves the way for a new era of trademark protection in Malaysia to streamline Malaysia's trademark regime with current commercial realities and the international trademark protection landscape. That said, as with all development efforts, there will always be concerns that in attempting to plug the current gaps under the 1976 Act, new lacunae may inadvertently arise. To date, no proposed subsidiary legislation or guidelines have been sighted to provide clarification as to how the 2019 Bill will be implemented.

In subsequent issues of Legal Insights, we will be taking a deeper dive into some of the topics highlighted above, including interpretation, potential implications, and some possible lacunae.

DEVELOPMENTS IN STATUTORY ADJUDICATION IN 2018

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non-compliance with the statutory requirements with respect to a payment claim is a fatal defect.

REFUND OF COSTS AND EXPENSES AFTER TRIAL

In *Gaya Analisa Sdn Bhd v Oceanergy Gases Sdn Bhd* [2018] 1 LNS 1016, the plaintiff successfully proved its claim against the defendant after full trial. This resulted in the adjudication decision, which had an interim binding effect, in favour of the defendant to be superseded by the judgment of the High Court. Consequently, money that was paid by the plaintiff to the defendant pursuant to the adjudication decision had to be returned. However, in determining whether such refund includes the costs, fees and administrative charges relating to the statutory adjudication proceedings which amounts were ordered to be paid by the adjudicator, the High Court held that such costs and expenses “shall not be taken into account” for in this case, there was nothing wrong with the adjudication decision as it was not set aside under section 15, but was being enforced under section 28 of CIPAA.

LOSS AND EXPENSE CLAIM FROM DELAYS

There appears to be a difference in the treatment between a claimant’s claim and a respondent’s claim for loss and expense arising from delays in completion of work.

On one hand, *SKS Pavillion* echoed the High Court’s finding in *Syarikat Bina Darul Aman Berhad & Anor (collectively referred to as BDB-Kery (joint venture)) v Government of Malaysia* [2017] 4 AMR 477 that the claimant’s loss and expenses claim arising from delays in completion of work falls within the scope of CIPAA.

On the other hand, liquidated and ascertained damages (“LAD”) arising from late completion of works which are usually raised by a respondent in its payment response as a counterclaim was found in *Transmission Technology Sdn Bhd v PESB Engineering Sdn Bhd & Another Case* [2018] 7 CLJ 516 (“PESB”) to be “too contentious for an adjudicator to be able to deal with during adjudication proceedings” and “any refusal by an adjudicator to deal with the issue of LAD especially by way of set-off against a payment claim, by itself, does not amount to a denial of natural justice.”

However, in *PESB*, it does not appear that the Federal Court’s decision in *View Esteem* was referred to, even though the High Court’s decision in *View Esteem* was cited. The present legal position, as established by the Federal Court in *View Esteem*, is that an adjudicator may be found to be in breach of natural justice if he fails to deal with the defences raised in a payment response. It is also interesting to note that the law relating to LAD has since been changed by the Federal Court in *Cubic Electronics Sdn Bhd (in Liquidation) v Mars Telecommunications Sdn Bhd* [2019] 2 CLJ 723 thus allowing, in appropriate circumstances, for reasonable compensation to be awarded for LAD without the requirement for a party to prove the actual loss it suffers. Yet, it remains to be

seen how the change in law will affect a LAD claim made under CIPAA.

PREREQUISITE FOR ENFORCEMENT

The High Court in *Tan Eng Han Construction Sdn Bhd v Sistem Duta Sdn Bhd* [2018] 1 LNS 428 appears to hold that enforcement of an adjudication decision, even if it remains unchallenged by the losing party, would not be allowed if it was found that the adjudicator lacks the jurisdiction to decide the dispute or that there is patent non-compliance with section 12 of CIPAA, for instance, where the adjudication decision: (a) is void for being made outside the period stipulated in section 12(2), or (b) is not in writing or does not contain reasons as per section 12(4), or (c) has not determined the adjudicated amount or the time and manner the adjudicated amount is payable as per section 12(5).

SPECIAL CIRCUMSTANCES FOR STAY

Following *View Esteem*, courts have been given some degree of flexibility to evaluate each case on its merits without the fetter of a predetermined test when granting a stay under section 16. It appears that the ‘special circumstances’ test, which is the test applied in granting a stay of execution of court judgments, may be considered when determining whether to grant a stay of the adjudication decision under section 16 of CIPAA. In *Ireka Engineering and Construction Sdn Bhd v PWC Corporation Sdn Bhd & Another Appeal* [2019] 1 LNS 51, the Court of Appeal in considering the said test appears to have adopted a liberal interpretation of section 16 established in *View Esteem* and the criterion for a stay under section 16 is no longer limited to the financial status of the party.

CONCLUSION

Whilst the case law on statutory adjudication in Malaysia continues to develop and the scale and complexity of disputes referred under the regime of CIPAA increases, it has become all the more necessary that the interpretation of the provisions of CIPAA established under the growing body of case law be consistent so that the statutory adjudication system continues to enjoy the confidence it now has earned.

SAC'S FINDINGS BINDING ON CIVIL COURTS

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value of the assessors. In this case, similarly the judge's judicial power to determine whether clause 2.8 is Shariah compliant is also taken away by the binding effect of the SAC's ruling. In both instances, the judges have been prohibited from exercising their constitutional duty of judging.

His Lordship added that although the SAC is not part of the court structure, two important features cannot be ignored. Firstly, that the court is obliged to refer a dispute on Shariah compliance to the SAC, and secondly, that the ruling is binding on the court, including the appellate courts. These two features in substance make the SAC very much part of the judicial framework. The SAC by providing a ruling that is binding on the courts has in no uncertain terms stepped into the sphere of judicial function which is solely reserved to the civil courts under the Constitution.

David Wong CJSS also agreed that there is merit in JRI's contention that the binding ruling of the SAC under sections 56 and 57 deprives a litigant of his right to a fair trial and to due process as it denies him of the right to lead evidence and to argue that clause 2.8 is forbidden by law.

For the reasons set out above, the learned judge was constrained to find that sections 56 and 57 had violated the doctrine of separation of power as the provisions clothed the SAC, a non-judicial body under the Constitution, with judicial power.

COMMENTS

The introduction of sections 56 and 57 of the CBMA is well intended as the provisions seek to achieve certainty in Islamic banking principles by vesting the interpretation of such principles in the SAC which comprises individuals of vast experience and knowledge in various fields, especially in finance and Islamic law.

Noble intentions aside, the crucial issue is whether the power conferred on the SAC to make rulings which are binding on the court amounts to the exercise of judicial power. The majority judges were of the view that the SAC does not encroach into the realm of judicial power as the trial judge remains responsible for deciding the dispute based on its facts and by applying the SAC's ruling. The minority judges on the other hand, took the opposite view and maintained that in substance, the SAC exercises judicial power as the trial judge is bound to follow the SAC's ruling on the question of Islamic law referred to it.

Regardless whether we agree with the views of the majority or minority judges, this decision is a milestone in Malaysian judicial history as it is the first ever sitting of a full nine-member bench of our Federal Court.

RETENTION SUMS – IS IT REALLY YOURS?

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existence. The Court noted that there were no express provisions requiring the retention sums to be held on trust with the employer as the fiduciary and there was also no clause mandating that the retention monies be kept separate from the assets of the Respondent. Accordingly, the Federal Court found itself unable to discern any clear intention or evidence that indicated that the retention monies should be accorded the status of trust monies.

For the reasons stated above, the Federal Court answered Leave Question (i)(b) in the affirmative and Leave Questions (i)(a) and (ii) in the negative and dismissed the appeals.

The Way Forward

The Federal Court acknowledged that its decision to depart from *Qimonda* exposes contractors and sub-contractors to high risks in the event of the employers going into liquidation. It was therefore suggested that legislative reforms be undertaken to address these risks. The Federal Court provided examples from various jurisdictions of measures taken to alleviate the risks for contractors and suggested that legislation be enacted to either mandate that retention sums be placed in authorised deposit-taking institutions such as banks or to declare retention sums as trust monies.

“ The Federal Court decision ... puts an end to the uncertainty that arose from the conflicting decisions of the Court of Appeal ”

CONCLUSION

The Federal Court decision is welcomed as it puts an end to the uncertainty that arose from the conflicting decisions of the Court of Appeal on this issue in *Pembinaan Legenda Unggul (CA)* and *Qimonda*.

Arising from this decision, and until such time that legislative reforms are introduced to declare that retention monies withheld by an employer under a construction contract are trust monies, a contractor who seeks to establish a trust over retention monies must not only include provisions in the construction contract that expressly create a trust over the retention monies in its favour but also take proactive steps to ensure that the employer appropriates and deposits such monies into a separate trust account while the latter is still solvent.

RENEWABLE ENERGY: THE RISING SUN

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December 2018) were revised to allow third party financing of solar photovoltaic installations through solar lease, solar power purchase agreement or hybrid of solar lease/power purchase agreement. This initiative has been well received by investors seeking to finance such installations. The SEDA website discloses that 30 companies have been registered as Registered Photovoltaic Investors ("RPVI") as at 4 June 2019.

Supply Agreement for Renewable Energy Programme

Another improvement made to the NEM scheme is the introduction of the Supply Agreement for Renewable Energy ("SARE") programme. The SARE programme is a tripartite arrangement that involves a consumer, an RPVI (who must be licensed under section 9 of the Electricity Supply Act 1990 and registered with SEDA) and Tenaga Nasional Berhad as a distribution licensee. The consumer leases a solar photovoltaic installation from an RPVI who installs and owns the said photovoltaic installation for an agreed duration. The consumer pays the distribution licensee for electricity consumed and sells the excess electricity generated from the solar photovoltaic installation to the distribution licensee. The leasing fee may be paid to the RPVI through electricity bills.

Renewable Energy Transition Roadmap

On 18 March 2019, the Minister of Energy, Science, Technology, Environment and Climate Change announced that a new roadmap, the Renewable Energy Transition Roadmap 2035 ("RETR 2035"), is currently being developed to explore the possible strategies and action plans to attain the Government's aspirational renewable energy target of 20% in the national power mix by 2025. Some of the potential strategies that will be explored under RETR 2035 are as follows:

- (a) Peer-to-peer energy trading whereby solar prosumers can sell their excess electricity to consumers who have rooftop constraints to enable the latter to enjoy the NEM scheme;
- (b) Providing an option for a consumer to purchase 100% renewable energy electricity from a distribution licensee; and
- (c) Mobilising the renewable energy certificate ("REC") market by establishing a mandatory REC market in place of the existing voluntary market.

THE FUTURE OUTLOOK

In light of the initiatives taken by the Government to leverage on solar energy as one of the main driving forces to achieve the renewable energy generation target of 20% by 2025, the coming years may be the time for solar photovoltaics to shine!

BEEFING UP AVIATION SECURITY

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is removed from the aircraft.

The Security Regulations also require an operator to ensure that its civil aviation security programme contains measures and procedures for carrying of passengers in lawful custody of any law enforcement agency in accordance with the requirements in the NCASP.

MOVING FORWARD

In line with the introduction of the Security Regulations, Part XXIV (regulation 168) of the Civil Aviation Regulations 2016, which charges the CEO with the responsibility for safeguarding civil aviation against acts of unlawful interference, is deleted by the Civil Aviation (Amendment) Regulations 2019 ("Amendment Regulations") with effect from 30 March 2019.

The Amendment Regulations provide that the National Civil Aviation Security Programme or any other security programme established under Part XXIV before 30 March 2019 is deemed to have been established under the Security Regulations and continues to have effect until reviewed, varied or substituted under the Security Regulations. It also provides that any notice issued under Part XXIV before 30 March 2019 continues to have effect until amended or revoked.

In light of the saving provisions described above, all security programmes established and any directions issued under Part XXIV will remain in force until they are varied, amended or revoked, as the case may be.

Moving forward, companies would have to comply with the procedures for applying for any approval, certificate or authorisation required under the Security Regulations as contained in regulations 29 to 32 of the Security Regulations, and with payment of fees prescribed by the Civil Aviation (Fees and Charges) (Amendment) Regulations 2019 (which came into effect on 30 March 2019). Companies and other persons with an approval, certificate or authorisation issued under the Security Regulations cannot transfer or assign them, or risk a fine not exceeding RM200,000 if convicted.

It would be prudent for passengers, operators, aerodrome operators, groundhandlers and other persons to comply with the Security Regulations as conviction of an offence entails a fine up to RM200,000 or to imprisonment for a term not exceeding five years or to both for an individual; or a fine up to RM400,000 for companies, limited liability partnerships, firms, societies or other bodies of persons.

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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Printed By

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