

THE BRIEF *Case*

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ZUL RAFIQUE & partners celebrates 20th Anniversary



A BRIEF NOTE...

by Dato' Zulkifly Rafique

To many more years to come...

ZUL RAFIQUE & partners have just celebrated our 20th Anniversary in December. We have grown by leaps and bounds since its inception in 1999. What started as a small law firm has now grown to be one of the largest in Malaysia, with almost 100 lawyers. We are thankful to all our clients for the trust you have given us all these years. Above all, we are proud to have dedicated, passionate and hardworking employees who share the same vision as the firm, to improve our standards year to year.

We are also delighted to announce that we are now a member of *Meritas*, a premier global alliance of independent law firms which was founded almost 30 years ago in 1990. We look forward to becoming a valuable member.

On another note, we are proud to be ranked in the *Chambers Asia Pacific 2020* in seven practice areas and in the *Legal 500 Asia Pacific 2020* in eight practice areas.

We are also ranked as a Top Tier Firm 2020 by *IFLR1000* in the practice areas of Banking & Finance and Capital Markets and as an Outstanding Firm by *Asialaw Profiles 2020* in Banking & Finance, Capital Markets, Construction and Labour & Employment.

Congratulations to all the teams involved!

On that note, I would like to thank all our clients and friends for their never ending support, I wish you all the very best for the new year ahead!

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- Revision of Laws (Amendment) Act 2019
- Guidelines/Rules/Circulars/Directives and Practice Notes issued between July and December 2019 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia

- **ANTI-FAKE NEWS ACT REPEALED** Malaysia has repealed the Anti-Fake News Act 2018, a law criminalising 'fake news', on the second attempt following the Senate's approval. The repeal was in accordance with the government's commitment to abolish draconian laws and to ensure the media has the freedom to 'check and balance' the administration.
- **CCM GUIDELINE TO REPORT BENEFICIAL OWNERSHIP** The Companies Commission of Malaysia (CCM) has issued a consultation paper on the 'Guidelines for the Reporting Framework for Beneficial Ownership of Legal Persons'. The guidelines aim to provide guidance to companies, limited liability partnership and businesses on the requirements regarding beneficial owners.
- **CONSUMER PROTECTION (AMENDMENT) ACT 2019** The Consumer Protection (Amendment) Act 2019 (the "Act"), has come into force on 1 October 2019. The Act has set a new cap for the Consumer Claims Tribunal's (the "Tribunal") jurisdiction to hear cases with claims up to MYR50,000. The penalty for failure to comply with an award by the Tribunal has also increased to MYR10,000 and a fine of not less than MYR100 and not exceeding MYR5,000 in cases of a continuing offence.
- **COURT RULES JAWI SCRIPT CAN BE TAUGHT IN VERNACULAR SCHOOLS** In dismissing *Gerakan's* suit that *Jawi* script should not be taught in vernacular schools nationwide, the High Court ruled that *Jawi* script can be taught to pupils in Chinese and Tamil schools as *Jawi* is part of *Bahasa Malaysia*, the national language of Malaysia. The Court further held that it was not against the provisions of the Federal Constitution.
- **CURRENCY BILL 2019** Under the proposed Currency Bill 2019, any person issuing, printing or minting any note, coin, token, document or instrument which is likely to pass as legal tender commits an offence and shall, on conviction, be liable to a fine not exceeding MYR50 million or imprisonment not exceeding ten years or both.
- **DEWAN RAKYAT PASSED EPF (AMENDMENT) BILL** The *Dewan Rakyat* has passed the Employees Provident Fund (Amendment) Bill 2019 (the "Bill") which among others, would allow the voluntary transfer of a husband's EPF contributions, at a rate of two percent, into the account of his wife or wives. The Bill also seeks to impose travel bans on those with outstanding EPF and overdue contributions.
- **DIGITAL LEGAL AID CENTRE IN SABAH** Sabah has set up Malaysia's first Digital and Artificial Intelligence Legal Aid Centre (the "Centre") to provide free legal advice to the public. The Centre is situated at the *Grand Merdeka Shopping Mall* in *Telipok*, about 21 kilometers from the state capital.
- **DIGITAL TAX** The new Service Tax in Digital Services has taken effect on 1 January 2020. Service tax shall be charged and levied on any digital service provided by a foreign-registered person to any consumer in Malaysia. Digital service has the meaning assigned to it under section 2 of the Service Tax Act 2018. The rate is six per cent.
- **FATWA IS SYARIAH COURT'S JURISDICTION** The High Court of Malaya dismissed an application by *Sisters In Islam (SIS) Forum (Malaysia)*, challenging the Selangor Fatwa Committee's decision to declare the organisation as deviant and that *fatwa* (edict) is the exclusive jurisdiction of the *Syariah* Court. The High Court further ruled that the civil court has no jurisdiction to hear the judicial review application brought by SIS pursuant to Article 121(1A) (Judicial power of the Federation) of the Federal Constitution.
- **FEDERAL COURT DISMISSED APPEAL FOR REVIEW OF NATIVE LAND RIGHTS** The Federal Court has dismissed an application by a group of Sarawakians to review a 2016 decision over native customary land rights. The Federal Court ruled in favour of the Sarawak government and provisional leaseholder on the ground that the review application was more of an appeal rather than a judicial review.

- **FEDERAL COURT: HOUSING CONTROLLER HAS NO POWER TO GRANT EXTENSION OF TIME TO DEVELOPERS**

The Federal Court has ruled that housing controller has no power to grant an extension of time to developers to complete their property development projects on the ground that Regulation 11(3) of the Housing Development (Control and Licensing) Regulations 1989 which confers power on the controller to waive and modify the terms and conditions of the contract of sale between purchasers and the developer was *ultra vires* the Housing Development (Control and Licensing) Act 1966.

- **FEDERAL COURT: LEAVE TO APPEAL TO BE DECLARED AS A NON-MUSLIM ALLOWED**

The Federal Court allowed a woman born to a *Muslim* father but raised as a *Buddhist* by her *Buddhist* mother, to appeal against the High Court's and Court of Appeal's dismissals of her originating originating summons to be declared as a *Buddhist* and as a *non-Muslim*.

- **FEDERAL COURT: PM CAN BE SUED FOR ALLEGED PUBLIC OFFICE MISFEASANCE**

The Federal Court has ruled that the Prime Minister or any other Minister are public officers within section 5 of the Government Proceedings Act 1956. As such, it was held that former Prime Minister *Datuk Seri Najib Abdul Razak* was a public officer and could be sued for alleged misfeasance in public office.

- **HIGH COURT REJECTS BID TO CHALLENGE SMOKING BAN AT FOOD OUTLETS**

The High Court of Kuala Lumpur has dismissed a bid by seven individuals to challenge the Ministry of Health's smoking ban at food outlets, enforced since 1 January 2019. The application was dismissed on the grounds that the Ministry of Health had acted within its jurisdiction and that the enforcement of the smoking ban did not breach Articles 5 (Right to life and liberty) and 8 (Equality) of the Federal Constitution.

- **NATIONAL ANTI-FINANCIAL CRIME CENTRE BILL 2019**

The *Dewan Rakyat* has passed the National Anti-Financial Crime Centre (NAFCC) Bill 2019 on 10 October 2019. The

NAFCC would establish, administer, maintain and manage a centralised data system which contains relevant information received or gathered. Such information may then be used to plan and coordinate an integrated operation and prevention of financial crimes.

- **PLANTING KETUM ALLOWED FOR RESEARCH PURPOSE IN MALAYSIA**

The Poisons (Amendment) Bill 2019 (the "Bill"), which was tabled for the first reading in the *Dewan Rakyat*, allows for the planting of psychoactive plants like *ketum* for research purpose only and supported with a letter of authorisation issued by the Health Minister.

- **SINGAPOREAN HOUSE BUYER WON APPEAL IN MALAYSIA**

The Court of Appeal ruled in favour of a Singaporean house buyer and dismissed the appeal of a mega project developer, the *Country Garden Danga Bay*, in a long-running judicial review case which went from the Tribunal to the High Court and then to the Court of Appeal, on the ground that there was no merit in the Appellant's appeal. The developer is now appealing to the Federal Court against the decision in favour of the house buyer over the MYR1.6 million purchase.

- **SYARIE LEGAL PROFESSION (FEDERAL TERRITORIES) BILL 2019**

The *Dewan Rakyat* has passed the Syarie Legal Profession (Federal Territories) Bill 2019, which will establish the Syarie Legal Profession Qualifying Board, Syariah Lawyers' Body and the Federal Territories Syarie Lawyers Council to ensure professional practices, behaviour and code of conduct.

- **WORD 'MANDATORY' TO BE REMOVED FROM DRUG TRAFFICKING LEGISLATION**

The word 'mandatory' with regard to sentencing in drug trafficking cases will be removed from the legislation to allow presiding judges the choice to either impose the death sentence or imprisonment of not less than ten years. Under current laws (section 39B of the Dangerous Drugs Act 1952), an accused found guilty of trafficking a certain amount of drugs will be punished with the mandatory death sentence.

AROUND THE WORLD... IN-BRIEF

- **AUSTRALIA: COURTS NO POWER TO MAKE CFOS** The High Court of Australia, in a landmark ruling has held that the courts do not have the power to make common fund orders (CFOs), a court order which are issued at the outset of proceedings and guarantee litigation funders a share of successful class action pay-outs. The decision is likely to impact the litigation funding industry and result in a decline in class actions. 🌀
- **EU: GOOGLE WINS LANDMARK RIGHT TO BE FORGOTTEN CASE** The European Union's top court has ruled in favor of *Google* in a dispute between *Google* and a French privacy regulator where it held that *Google* does not have to apply the right to be forgotten globally, and that the firm is only required to remove links from its search results in Europe upon receiving the relevant request. 🌀
- **EU COURT RULES AIRBNB IS NOT AN ESTATE AGENT** Europe's top court has ruled that the accommodation-booking service *Airbnb* does not need an estate agent's licence to operate in France after the French tourism association had complained that *Airbnb* did not comply with French property laws. 🌀
- **FACEBOOK TO FACEBOOK** *Facebook* has introduced a new branding for its products and services in an attempt to distinguish the company from its familiar app and website. The main *Facebook* app and website will retain its familiar blue branding. 🌀
- **INDIA: SUPREME COURT TO REVIEW LANDMARK RULING ON WOMEN'S ENTRY** India's Supreme Court will review its landmark judgement which allow women of menstruating age to enter a controversial *Hindu* shrine on the ground of discrimination, due to massive protests that include assaulting women who attempted to enter the shrine. 🌀
- **SINGAPORE: E-SCOOTERS BANNED** In the latest and toughest measure to address the public safety concerns surrounding the usage of electric scooters, Singapore has banned its use on footpaths. Riders can use them only on park connectors and cycling paths or face fines up to SGD2,000 and/or imprisonment of up to three months. 🌀
- **SINGAPORE: NEW APPELLATE DIVISION OF THE HIGH COURT** The High Court of Singapore will be restructured into the General Division and the Appellate Division of the High Court. The new Appellate Division, staffed by the newly designated Judges of the Appellate Division, will have no criminal jurisdiction and will hear civil appeals not allocated to the Court of Appeal under the proposed restructuring of the Supreme Court. 🌀
- **SINGAPORE: STRICTER NRIC DATA COLLECTION RULES** Singapore has imposed stricter rules governing the use, collection and disclosure of the National Registration Identity Card (NRIC) and other national identification numbers. Singapore's Personal Data Protection Commission (PDPC) stated that unless required by law, it will be illegal for organisations to physically hold on to an individual's NRIC and collect its full number. This also applies to birth certificate numbers, foreign identification numbers and work permit numbers. 🌀
- **UK: EMAIL SIGNATURE BY LAWYER LEGALLY BINDING** A UK High Court judge has ruled that an email sent by a lawyer is legally binding as it included his automated signature. In this case, in an email exchange between the lawyers with regard to a dispute over a land, the lawyer for the owners had set out the terms with a sale price GBP25,000 lower than the original asking price, which was accepted by the other lawyer. It was disputed that the terms had not been finalised, lacking signature by the parties. However the High Court judge held the email as legally binding as the automated signature at the bottom of the email served as a signature. 🌀

- UK: THE 'EXTRAORDINARY' ESSEX INHERITANCE CASE** A High Court Judge in England has ended an 'extraordinary' court battle between two stepsisters, Ms Winter and Ms Cutler, in a dispute over their late parents' GBP300,000 assets by ruling out that Ms Cutler should receive the whole estate under the doctrine of 'presumption' envisaged in the England Law of Property Act 1925.
- US: JOHNSON & JOHNSON HIT BY OPIOID CRISIS** Drugmaker Johnson & Johnson was held accountable for thousands of deaths and addictions, after a judge in a seven-week non-jury trial in Oklahoma ruled that it must pay USD572 million (later reduced to USD465 million) for its years-long marketing campaign that minimised Opioid's (addictive painkillers) risks and promoted their benefits which led to Oklahoma's Opioid addiction crisis.
- US: JUUL FACES MOUNTING STATE LAWSUITS** Juul Labs, the biggest vaping firm in the US, has been hit with a lawsuit by the state of New York accusing the firm of misrepresenting the safety of its products and targeting teens in advertisements.
- US RAISED TOBACCO-BUYING AGE TO 21** US has raised the minimum age to purchase cigarettes, e-cigarettes and other tobacco products to 21 years old nationwide under the spending bill passed by the Senate in a provision aimed at curbing a surge in underage vaping.
- WESTERN AUSTRALIA LEGALISES VOLUNTARY ASSISTED DYING** Western Australia has legalised voluntary assisted dying, the second state in the country after Victoria. The new law provides for more than 100 safeguards in place, including the requirement for eligible persons to be terminally ill and in severe pain with a likelihood to result in death within six months or a year for a neurodegenerative condition, and for verbal and written requests signed off by doctors independent of one another.

EMPLOYMENT AND INDUSTRIAL RELATIONS

Article written by Amylia Soraya Aminuddin and Azfar Asadullah Abdul Sathar from Knowledge Management, Research and Training department

PROPOSED AMENDMENTS TO THE INDUSTRIAL RELATIONS ACT 1967...

The Industrial Relations (Amendment) Bill (the "Bill") was tabled in the Malaysian Parliament for first reading on 7 October 2019 and was passed by the Dewan Rakyat¹ on 9 October 2019.

In this article, we will highlight the key amendments proposed under the Bill.

REMOVAL OF MINISTER'S DISCRETION The proposed amendments to the Industrial Relations Act 1967 (IRA) confers many powers previously vested in the Minister of Human Resources (the "Minister") to the Director General of Industrial Relations (DGIR).

This is reflected under section 20(3) of the Bill whereby the discretion of the Minister to refer representations on dismissals is removed and carried out by the DGIR instead.

Similarly under section 9(1D) of the Bill, the DGIR will have the power to determine whether a workman is employed in a managerial, executive, confidential or security capacity, a power previously accorded to the Minister.

UNFAIR DISMISSAL CLAIMS

Referral of unfair dismissal claims to Industrial Court

Currently, under section 20 of the IRA, when parties are unable to reach a settlement in cases of unfair dismissals, the Minister has the discretion to refer representations to the Industrial Court as he deems fit. However under the Bill, such discretion is removed and instead, when parties are unable to settle during conciliation meetings, the DGIR will automatically refer such cases to the Industrial Court for an award.

This essentially means that the decision to refer an unfair dismissal complaint to the Industrial Court will no longer be subject to judicial review by the civil

¹ Malaysian House of Representatives

courts. As such, there are concerns that the removal of such discretion will increase the likelihood of frivolous and vexatious claims.

Representation during conciliation meetings

Amendments to Section 20 6(a) and 6(b) provides an additional option for representation during conciliation meetings whereby parties may be represented by any person except an advocate and solicitor, provided there is authorisation in writing and permission of the DGIR.

The Bill also includes a new Section 20(6A) which allows the next-of-kin of a workman under a mental disability to apply to the High Court to appoint a guardian *ad litem* (to act in a lawsuit on behalf).

SOLE BARGAINING RIGHTS New provisions have been included in relation to sole bargaining rights. Section 12A provides that when more than one trade union have received recognition by the employer to represent a class of employees, the employees are given the flexibility to decide amongst themselves which trade union shall have the sole bargaining rights.

In the instance there is no agreement, an application in writing may be made to the DGIR who will, by way of secret ballot, ascertain the preference of which trade union should have sole bargaining rights by the highest number of votes received.

Further, Section 12B provides that when a trade union has obtained the sole bargaining rights, no other trade unions shall have the same rights until a period of three years has elapsed or if the trade union ceases to exist.

COLLECTIVE BARGAINING Under the current Section 13(3) on collective bargaining, trade unions are limited to only raising in the course of discussion the general character with regard to procedures of promotion of workmen.

With the new amendment, Section 13(3) now allows a trade union to raise in the course of discussion all the question of general character with regard to matters on:

(a) promotion of any employee from a lower to a higher grade or category

(b) transfer of an employee within the organisation, provided such transfer does not entail a change to the detriment of the employee's terms of employment

(c) employment of an employee in the event of vacancies in the establishment

(d) termination of an employee by reason of redundancy or re-organisation of the establishment

(e) dismissal and reinstatement of an employee

(f) assignment or allocation to an employee that are consistent or compatible with the terms of employment

Further, amendments to Section 26(2) provides that where a trade dispute relates to a refusal to commence collective bargaining or a deadlock in collective bargaining, reference to the Industrial Court cannot be made without the consent in writing of the parties, unless (a) the trade dispute refers to the first collective agreement; (b) refers to any essential services specified in the First Schedule; (c) results in acute crisis if not resolved expeditiously; or (d) if parties are not acting in good faith to resolve the trade dispute.

APPEAL PROCESS Under section 33B(1) of the IRA, an award, decision or order of the Industrial Court shall be final and conclusive, and shall not be challenged, appealed against, reviewed, quashed or called in question in any court. The only redress available is to file an application for judicial review at the High Court.

Under the new Section 33C, it provides for a person who is dissatisfied with the Industrial Court award to appeal to the High Court within 14 days from the date of receipt of the award. Procedure for the appeal shall follow the Rules of Court 2012 and treated as an appeal from the Sessions Court with the relevant required modifications.

RESTRAIN STRIKES OR LOCK-OUTS New section 44A under the Bill confers the Minister additional powers to restrain strikes or lock-outs if it lasts beyond a certain time or beyond a certain scope, thus endangering the life, personal safety or health of the whole or part of the population.

PENALTIES The amendments under the Bill has increased a number of penalties in cases of contravention of the Act:

(a) Section 40 – Picketing

The punishment of imprisonment has been removed and the fine has been increased to MYR5,000 instead of MYR1,000.

(b) Section 46 – Penalty for illegal strikes and lock-outs

The punishment of imprisonment has been removed and the fine is increased to MYR5,000 instead of MYR1,000.

(c) Section 47 – Penalty for instigation of illegal strikes and lock-outs

The punishment of imprisonment has been increased to five years from one year and the fine has been increased to MYR5,000 instead of MYR1,000.

(d) Section 48 – Penalty for giving financial aid to illegal strikes and lock-outs

Fine has been increased to MYR5,000 from MYR500.

(e) Section 56 – Non-compliance with award or collective agreement

Fine has been increased to MYR50,000 from MYR2,000.

(f) Section 60 – General penalties

Fine has been increased to MYR50,000 from MYR5,000.

COMMENTS Whether the amendments to the IRA will strengthen industrial harmony can only be seen once the amendments are implemented.

One example would be the amendment to the Industrial Courts where cases will now automatically be referred to the Industrial Court by the DGIR if reconciliation fails. This would likely result in an increase of industrial cases and open the floodgate of litigation as the 'filtering process' has been removed.

In view of the above amendments to the IRA, it seems that the rights of both the employers and employees will be affected. However, what matters most is that no party will be prejudiced in any way.

CIVIL PROCEDURE

Article written by Noor Sumaeya Sofea Shamsudin from Construction Dispute Resolution practice group

AMENDMENT TO LIMITATION ACT 1953 – LIMITATION PERIOD FOR LATENT DAMAGE...

On 4 April 2018, the Malaysian Parliament passed the Limitation (Amendment) Bill 2018 (the "Bill"), which was subsequently granted the Royal Assent by the *Yang di-Pertuan Agong* on 27 April 2018. On 4 May 2018, the Bill was then gazetted into law as the Limitation (Amendment) Act 2018, and came into force on 1 September 2019.

The amendment to the Limitation Act 1953 would extend the time period for commencing a legal action in cases of negligence not involving personal injuries under two circumstances: (1) where the damage suffered is latent (Section 6A²); and (2) where a person is under a disability when the cause of action accrued (Section 24A³).

This article will only discuss the former, i.e. the new Section 6A.

OBJECTIVE The objective of the amendment is to resolve issues pertaining to the limitation of time to institute a legal action in construction cases where the damage could not be detected at the time the damage materialised. The amendment will further address the legal complications of limitation laws, especially in the case of *Pirelli General Cable Works v Oscar Faber & Partners* [1983] 2 AC 1 where the House of Lords held that a cause of action in tort for negligence in the design or workmanship of a building accrues at the date when physical damage occurred to the building, and not when the damage was discovered.

² Limitation of actions to claim damages for negligence not involving personal injuries.

³ A person who is disabled at the time when the cause of action accrued in which the limitation period in Section 6A applies, is entitled to bring an action within three years the person ceased to be disabled or has died.

THE AMENDMENT Section 6A applies to negligence cases involving latent damage in construction cases where the damage is not discoverable through general inspection, and the person having the cause of action did not know, or could not have reasonably expected the damage.

Prior to the amendment, the time limit of six (6) years as provided in Section 6(1) of the Limitation Act 1953 applies regardless of when the person having the cause of action discovers the damage. Section 6(1) of the Limitation Act 1953 states that an action in tort:

“...shall not be brought after the expiration of 6 years from the date on which the cause of action accrued...”

With the new Section 6A, the person having a cause of action in negligence not involving personal injuries would have an extension of the limitation period of three (3) years from the date the damage was discovered, to initiate a legal action. However, Section 6A(3)⁴ prevents any person from instituting court proceedings more than fifteen (15) years after the cause of action accrued even if it results in the extended time limit being less than 3 years, or if the damage is only discovered after 15 years.

EXAMPLES The following examples illustrate how Section 6A operates:

1. Alya bought a house from Builders Sdn Bhd (BSB) in 2000. In 2009, she discovered a crack which damaged her walls badly. A building report shows that the crack appeared in 2004.

Prior to the amendment, Alya would only have until 2010 to commence a legal action against BSB (6 years after the cause of action accrued in 2004). However, with the new Section 6A, Alya would have an extension of 3 years from the date of discovery (2009), to initiate an action against BSB. Therefore, pursuant to the new amendment, the limitation period for Alya's case would only expire in 2012, instead of 2010.

2. Alya bought a house from BSB in 2000. In 2019, she discovered a crack which damaged her walls badly. A building report shows that the crack appeared in 2002.

Here, Alya cannot initiate an action against BSB as the 15 years limitation period under Section 6A(3) expired in 2017 (15 years after cause of action accrued in 2002).

APPLICABILITY Section 6A only applies when these criteria are met:

1. the claim is for negligence not involving personal injuries;
2. the person having the cause of action have the knowledge required for bringing an action for damages in respect of the relevant damage, and a right to bring such action;
3. the action is brought within 3 years from the date the damage was discovered; and
4. the 15 years limitation period under Section 6A(3) have not passed.

COMMENTS It is prevalent in the construction industry that latent defects are not discoverable at the time the damage was caused, and are almost always only discoverable after the limitation period of 6 years under Section 6(1) has lapsed. The new amendment removes the harshness of the law pre-amendment, and provides a better opportunity for property owners to safeguard their interests. The amendment does not only protect property owners, but also protects those involved in the construction industry such as engineers, and architects by preventing any person from instituting court proceedings more than 15 years after the cause of action accrued. ✂


⁴ Notwithstanding subsection (2), no action shall be brought after the expiration of fifteen years from the date on which the cause of action accrued.

INTELLECTUAL PROPERTY – Patent infringement
– Patentability requirements – Patents Act 1983

**MERCK SHARP & DOHME GROUP &
ANOR V HOVID BERHAD**
[2019] MLJU 918, Federal Court

FACTS The first appellant is a manufacturer for the pharmaceutical product known as *Fosamax* (the “product”) which was a drug used in the treatment of osteoporosis and *Paget’s* disease, and had licensed the second appellant to exclusively distribute, sell and offer the product for sale in Malaysia. The product’s dosing regime was granted a Malaysian patent (the “194 patent”) under the Patents Act 1983 (the “Act”). The appellants sued the respondent for infringing its 194 patent. By way of a counterclaim, the respondent sought a declaration that the 194 Patent was invalid on four grounds, one of which was that the patent lacked inventive step and therefore it was not deserving of protection under the Act. The High Court dismissed the ground of invalidation raised by the respondent and ruled that based on the ground that the patent lacked invented step, the 194 Patent and all other claims dependent upon it were invalid. Consequently, the appellants’ claim for patent infringement was dismissed. The appellants appealed against the decision while the respondent cross-appealed against the dismissal of its three other ‘grounds of invalidation’ at the Court of Appeal but was dismissed. Hence, this appeal.

ISSUE Whether it is correct to hold that the independent claim having fallen, all the other dependent claims also fall automatically as held in *SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor* [2015] 6 MLJ 293 (“SKB Shutters”).


HELD In allowing the appeal, the Federal Court overturned the decision in *SKB Shutters* as it failed to take into account the myriad of other claims and bases of the challenge that routinely arise in patent adjudication and remitted back the case to the High Court to determine whether each of the dependent claims possesses independent validity. 

HARTA INTELEK – Pelanggaran paten – Syarat-syarat paten – Akta Paten 1983

**MERCK SHARP & DOHME GROUP &
YANG LAIN V HOVID BERHAD**
[2019] MLJU 918, Mahkamah Persekutuan

FAKTA-FAKTA Perayu pertama merupakan pengeluar produk farmaseutikal yang dikenali sebagai *Fosamax* (“produk tersebut”), yang digunakan untuk merawat osteoporosis dan penyakit *Paget*, dan telah melesenkan perayu kedua untuk mengedar, menjual dan menawarkan produk tersebut untuk jualan secara eksklusif di Malaysia. Rejim dos produk tersebut telah diberikan paten Malaysia (“Paten 194”) di bawah Akta Paten 1983 (“Akta tersebut”). A1 telah melesenkan perayu kedua untuk secara eksklusif mengedar, menjual dan menawarkan produk tersebut untuk jualan di Malaysia. Perayu-perayu telah menyaman responden kerana melanggar patennya, iaitu Paten 194. Melalui tuntutan balas, responden memohon deklarasi bahawa Paten 194 tidak sah atas empat alasan, salah satunya bahawa paten itu tidak mempunyai langkah merekacipta dan oleh itu ia tidak layak mendapat perlindungan di bawah Akta tersebut. Mahkamah Tinggi telah menolak tiga daripada empat alasan ketidaksahan yang dibangkitkan oleh responden dan memutuskan bahawa berdasarkan alasan yang paten tersebut tidak mempunyai langkah merekacipta, Paten 194 dan semua tuntutan lain yang bergantung kepadanya adalah tidak sah. Akibat itu, tuntutan para perayu untuk pelanggaran paten telah ditolak. Perayu-perayu telah membuat rayuan terhadap keputusan itu manakala responden telah membuat rayuan balas terhadap penolakan tiga alasan ketidaksahan yang lain di Mahkamah Rayuan tetapi ditolak. Oleh itu, rayuan ini.

ISU Sama ada ia adalah benar untuk memutuskan bahawa jika satu tuntutan bebas telah gagal, maka semua tuntutan berkenaan yang lain juga akan gagal secara automatik seperti yang diputuskan di *SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor* [2015] 6 MLJ 293 (“SKB Shutters”).


KEPUTUSAN Dalam membenarkan rayuan itu, Mahkamah Persekutuan mengetepikan keputusan *SKB Shutters*, kerana ia gagal untuk mengambil kira tuntutan-tuntutan yang lain dan asas tuntutan yang sering timbul dalam penghakiman paten dan meremiti semula kes itu kepada Mahkamah Tinggi untuk menentukan sama ada setiap tuntutan berkenaan yang lain mempunyai kesahan bebas. 

CONSTITUTIONAL LAW – Judicial review – Delayed vacant possession – Scope of powers and duties of *Tribunal Tuntutan Pembeli Rumah*

GJH AVENUE SDN BHD V TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN AND ORS
[2019] MLJU 861, Court of Appeal

FACTS The appellant is a housing developer of the bungalow (the “said unit”) purchased by the second and third respondent (the “Purchasers”). The sale and purchase agreement (SPA) for the said unit was signed between the parties and the SPA requires vacant possession to be delivered within 24 months from the date of the agreement (“Clause 22”). The appellant took a stand that they were only two days late in delivering the vacant possession of the said unit and had made payment for damages for late delivery of vacant possession and this was accepted by the second and third respondents without any dispute or protest. The Purchasers then filed their claim at the first respondent’s office for Liquidated Ascertained Damages (LAD) against the appellant for a higher sum, and succeeded on the basis that the 24 months was to run from the date of the booking fee and not from the date of the agreement. Dissatisfied with the award, the appellant filed the judicial review application at the High Court at Melaka to quash the decision of the first respondent (the “Tribunal”) but was dismissed. Hence, this appeal.

ISSUE Whether the Tribunal had acted beyond the scope of its lawful powers and had committed a statutory breach which amounted to an error of law.


HELD In allowing the appeal, the Court of Appeal held that since Clause 22 of the SPA is clear and unambiguous that vacant possession shall be delivered within 24 months, there was no need for the Tribunal to look at various other case law to decide on the meaning of ‘from the date of this Agreement’. The Tribunal is an administrative tribunal and not court of law. Thus, the Tribunal had acted beyond the scope of its lawful powers in making the award. 

UNDANG-UNDANG PERLEMBAGAAN – Semakan kehakiman – Milikan kosong terlewat – Skop kuasa dan tanggungjawab Tribunal Tuntutan Pembeli Rumah

GJH AVENUE SDN BHD V TRIBUNAL TUNTUTAN PEMBELI RUMAH, KEMENTERIAN KESEJAHTERAAN BANDAR, PERUMAHAN DAN KERAJAAN TEMPATAN DAN LAIN-LAIN
[2019] MLJU 861, Mahkamah Rayuan

FAKTA-FAKTA Perayu adalah pemaju perumahan banglo (“unit tersebut”) yang dibeli oleh responden kedua dan ketiga (“Pembeli”). Perjanjian Jual Beli (SPA) untuk unit tersebut ditandatangani di antara pihak-pihak berkenaan dan SPA memerlukan pemilikan kosong yang akan diserahkan dalam tempoh 24 bulan dari tarikh perjanjian (“Fasal 22”). Perayu menegaskan bahawa mereka hanya dua hari lewat dalam menyerahkan pemilikan kosong unit tersebut dan telah membayar ganti rugi atas kelewatan itu dan ia diterima oleh responden kedua dan ketiga tanpa sebarang pertikaian atau protes. Para Pembeli kemudian memfailkan tuntutan mereka di pejabat responden pertama untuk Kerugian Ditentukan Likuidasi (LAD) terhadap perayu untuk jumlah yang lebih tinggi, dan berjaya atas dasar bahawa 24 bulan itu bermula dari tarikh bayaran tempahan dan bukan dari tarikh perjanjian. Tidak berpuas hati dengan keputusan penghakiman itu, perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi di Melaka untuk membatalkan keputusan penghakiman responden pertama (“Tribunal tersebut”) tetapi ditolak. Oleh itu, rayuan ini.

ISU Sama ada Tribunal tersebut telah bertindak melampaui skop kuasa sahnyanya dan telah melakukan pelanggaran berkanun yang merupakan kesilapan undang-undang.


KEPUTUSAN Dalam membenarkan rayuan itu, Mahkamah Rayuan memutuskan bahawa Klausula 22 SPA tersebut jelas dan tidak samar-samar menyatakan bahawa pemilikan kosong harus diserahkan dalam masa 24 bulan. Tribunal tersebut tidak perlu merujuk kepada kes-kes lain untuk memutuskan maksud ‘dari tarikh Perjanjian ini’ kerana ia merupakan sebuah tribunal pentadbiran dan bukannya mahkamah undang-undang. Oleh itu, Tribunal tersebut telah melampaui skop kuasa sahnyanya dalam membuat keputusan penghakiman. 

BUILDING AND CONSTRUCTION LAW –
Construction Industry Payment and Adjudication
Act 2012 (CIPAA 2012)

**JACK-IN PILE (M) SDN BHD V BAUER
(MALAYSIA) SDN BHD**
[2019] MLJU 1212, Federal Court

FACTS The appellant was awarded a subcontract by the respondent for the supply and installation of spun piles. The employer of the project was ITD Vertex Consortium ("ITD Vertex") but it was wound up. In 2013, the respondent lodged its proof of debt with the liquidator of ITD Vertex and certified and uncertified amounts claimed by the appellant. Payment claims by the appellant had stalled in view of the predicament of ITD Vertex and this consequentially gave rise to payment disputes between the parties. The appellant commenced adjudication proceeding under CIPAA 2012 against the respondent. The learned judge dismissed the appellant's application to set aside the adjudication decision and allowed the enforcement of the aforesaid adjudication decision by the respondent on the issue of applicability of section 35⁵ of CIPAA 2012 in relation to the construction contract. The High Court dismissed the respondent's application to set aside the adjudication decision. The respondent then appealed in the Court of Appeal and the appeals were allowed. Hence, this appeal.

ISSUE Whether CIPAA 2012 has a retrospective or prospective operation.

HELD In dismissing the appeal, the Federal Court held that the adjudication proceedings and its decision are void and CIPAA 2012 can only be applied prospectively as neither CIPAA 2012 nor the *Hansard* records expressly provide that the Act is to be applied retrospectively. It is the intention of Parliament to provide a speedy resolution to payment disputes in the construction industry. But that intention, without more, does not lead to the conclusion that Parliament intended for CIPAA 2012 to be applied retrospectively. 


⁵ Prohibition of conditional payment

UNDANG-UNDANG BANGUNAN DAN
PEMBINAAN – Akta Pembayaran dan Adjudikasi
Industri Pembinaan 2012 (CIPAA 2012)

**JACK-IN PILE (M) SDN BHD V BAUER
(MALAYSIA) SDN BHD**
[2019] MLJU 1212, Mahkamah Persekutuan

FAKTA-FAKTA Perayu telah diawardkan satu subkontrak oleh responden untuk pembekalan dan pemasangan cerucuk konkrit spun. Majikan untuk projek tersebut ialah ITD Vertex Consortium ("ITD Vertex") akan tetapi ITD Vertex telah digulungkan. Pada tahun 2013, responden telah menyerahkan bukti hutang kepada pelikuidasi ITD Vertex termasuk hutang yang disahkan dan yang tidak disahkan, yang dituntut oleh perayu. Tuntutan bayaran oleh perayu tergantung disebabkan kesukaran dari pihak ITD Vertex dan ini mengakibatkan terjadinya pertikaian atas pembayaran antara kedua-dua pihak. Disebabkan pertikaian tersebut, perayu memulakan prosiding adjudikasi terhadap responden di bawah CIPAA 2012. Permohonan pihak perayu untuk mengetepikan keputusan adjudikasi ditolak dan penguatkuasaan keputusan adjudikasi responden atas isu pemakaian seksyen 35⁶ CIPAA 2012 berkenaan dengan kontrak pembinaan itu dibenarkan. Mahkamah Tinggi telah menolak permohonan responden untuk mengeneppikan keputusan adjudikasi. Responden kemudian merayu di Mahkamah Rayuan dan rayuan itu dibenarkan. Oleh itu, rayuan ini.

ISU Sama ada CIPAA 2012 beroperasi secara retrospektif atau prospektif.

KEPUTUSAN Dalam menolak rayuan itu, Mahkamah Persekutuan memutuskan bahawa prosiding adjudikasi dan keputusannya tidak sah dan CIPAA hanya boleh digunakan secara prospektif kerana CIPAA mahupun rekod *Hansard* secara nyata memperuntukkan bahawa CIPAA 2012 akan digunakan secara retrospektif. Ia adalah niat Parlimen untuk memberikan penyelesaian yang cepat kepada pertikaian pembayaran dalam industri pembinaan. Niat itu juga tidak bermaksud bahawa Parlimen bertujuan untuk CIPAA 2012 digunakan secara retrospektif. 

⁶ Larangan pembayaran bersyarat

ACT


TRADEMARKS ACT 2019

National Language
Akta Cap Dagangan 2019

No
815

Date of coming into operation
27 December 2019

Notes

This is an Act to provide for the registration of trademarks in relation to goods and services and to implement the relevant treaties and for other matters connected therewith. The highlight of the new Act is the recognition of non-conventional trademarks namely shape, colour, sound and scent marks and the introduction of international trademark registration procedure. 

AMENDMENT ACTS


STREET, DRAINAGE AND BUILDING (AMENDMENT) ACT 2019

National Language
Akta Jalan, Parit dan Bangunan (Pindaan) 2019

No
A1588

Date of coming into operation
27 December 2019

Notes

The highlight of the amending Act is the amendment to section 39 which raises the fine from the current MYR1,000 to MYR100,000 for damaging public roads, pedestrian pathways, five-foot ways or other properties belonging to the local authorities, and the minimum fine increased to MYR50,000 from the previous MYR500 for taking up space on the pavement without written permission from local or other lawful authorities. Section 70 is also amended which makes it a requirement for any individual to submit a geotechnical report validated by a qualified inspector for any construction involving slopes of 25-degree gradient and higher than 10 metres. 


TRADE DESCRIPTIONS (AMENDMENT) ACT 2019

National Language
Akta Perihal Dagangan (Pindaan) 2019

No
A1607

Date of coming into operation
27 December 2019

Notes

The highlight of the amending Act is the deletion of certain sections in the Trade Descriptions Act 2011, which are consequential amendments arising from the enactment of the new Trademarks Act 2019. The amendments include removal of all references to 'trade mark' and consolidation of all trademark-related offences. 


CONSUMER PROTECTION (AMENDMENT) ACT 2019

National Language
Akta Perlindungan Pengguna (Pindaan) 2019

No
A1598

Date of coming into operation
1 October 2019

Notes

The highlight of the amending Act is the amendment to sections 98, 100, and 101, by substituting for the words "twenty-five thousand ringgit" the words "fifty thousand ringgit". This amendment increases the total consumer claims amount the Tribunal for Consumer Claims has jurisdiction over. Amendment to section 117 also increases the criminal penalty for failure to comply with an award to MYR10,000 and a fine of not less than MYR100 and not exceeding MYR5,000 in the case of a continuing offence. 

CONSTITUTION (AMENDMENT) ACT 2019

National Language

Akta Perlembagaan (Pindaan) 2019

No

A1603

Date of coming into operation

11 September 2019 (except for Section 3)

Notes

The highlight of the amending Act is the amendments to Article 47, 119 and section 5 of the Eighth Schedule, by substituting for the words "twenty-one years" the words "eighteen years". The amendments essentially lowers the voting age and qualification requirement for membership of the House of Representative in Malaysia to 18 years old.

LIMITATION (AMENDMENT) ACT 2018

National Language

Akta Had Masa (Pindaan) 2018

No

A1566

Date of coming into operation

1 September 2019

Notes

The highlight of the amending Act is the introduction of new section 6A which extends the time period for commencing a legal action in cases of negligence not involving personal injuries.

CIVIL LAW (AMENDMENT) ACT 2019

National Language

Akta Undang-Undang Sivil (Pindaan) 2019

No

A1591

Date of coming into operation

1 September 2019

Notes

The highlight of the amending Act is the amendment to section 2, which introduces a

definition of the term "persons with disabilities", which has the same meaning as that assigned to it in the Persons with Disabilities Act 2008. Section 7 is also amended to extend persons with disabilities under the care of a deceased person to claim damages for loss of dependency. The age limit for the purpose of assessing the loss of earnings in dependency claims is also extended to 60 years old and that it is no longer a requirement to prove good health prior to the deceased's death to claim for loss of earnings. Amount of damages for bereavement is increased to MYR30,000 and that the child of the deceased person is now entitled to claim for damages for bereavement.

REVISION OF LAWS (AMENDMENT) ACT 2019

National Language

Akta Penyemakan Undang-Undang (Pindaan) 2019

No

A1599

Date of coming into operation

1 August 2019

Notes

The highlight of the amending Act is the amendment to section 6, by inserting the following paragraph under the Powers of the Commissioner, "(xviii) to make such alterations in any written law to reflect any change of the style and title, or the transfer of any functions or responsibility, of any Minister, or the change of name of any Ministry;"

SUBSIDIARY LEGISLATION

- PU(A) 282/2019: Strata Titles (Federal Territory of Kuala Lumpur) Rules 2019 – *Effective date: 1 January 2020*
- PU(A) 271/2019: Service Tax (Rate of Digital Services Tax) Order 2019 – *Effective date: 1 January 2020*
- PU(A) 269/2019: Service Tax (Digital Service) Regulations 2019 – *Effective date: Part II and V, and regulations 17 and 18 on 1 October 2019, Part III, IV and VI except regulations 17 and 18 on 1 January 2020*
- PU(A) 270/2019: Consumer Protection (The Tribunal for Consumer Claims) (Amendment) Regulations 2019 – *Effective date: 1 October 2019*

- PU(A) 233/2019: Service Tax (Compounding of Offences) (Amendment) Regulations 2019 – *Effective date: 1 September 2019*
- PU(A) 232/2019: Service Tax (Amendment) Regulations 2019 – *Effective date: 1 September 2019*
- PU(A) 231/2019: Service Tax (Imposition of Tax for Taxable Service in Respect of Designated Areas and Special Areas) (Amendment) Order 2019 – *Effective date: 1 September 2019*
- PU(A) 197/2019: Capital Markets and Services (Capital Market Compensation Fund) (Contribution)(Amendment) Order 2019 – *Effective date: 18 July 2019*
- BNM Policy Document on Application Procedures for New Licences under Financial Services Act 2013 and Islamic Financial Services Act 2013 – *Effective date: 1 January 2020*
- BNM Policy Document on Corporate Governance – *Effective date: 13 December 2019*
- BNM Policy Instrument on Statutory Reserve Requirement – *Effective date: 16 November 2019*
- BNM Policy Document on Repurchase Agreement Transactions – *Effective date: 12 November 2019*
- BNM Framework for Electronic Trading Platforms – *Effective date: 11 November 2019*
- BNM Policy Document on Outsourcing – *Effective date: 23 October 2019 save for the transitional arrangements as set out in Part D*
- BNM Policy Document on Credit Risk – *Effective date: 1 October 2019 except for certain types of financial institutions*
- BNM Exposure Draft on Operating Cost Controls for Life Insurance and Family Takaful Business – *Effective date: 30 September 2019*
- BNM Document on Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Money Services Business (Sector 3) (Supplementary Document No. 2) – *Effective date: 19 September 2019*

**GUIDELINES/RULES/CIRCULARS/
DIRECTIVES AND PRACTICE NOTES ISSUED
BETWEEN
JULY AND DECEMBER 2019
BY BANK NEGARA MALAYSIA,
BURSA MALAYSIA AND
SECURITIES COMMISSION MALAYSIA**

BANK NEGARA MALAYSIA (BNM)

- BNM Policy Document on Shariah Governance – *Effective date: 1 April 2020 except paragraph 12.5 on 1 April 2023*
- BNM Policy Document on Net Stable Funding Ratio – *Effective date: 1 July 2020*
- BNM Policy Document on Credit Card – *Effective date: 2 July 2019 except for paragraphs 10.1 to 10.3 on 2 October 2019 and 11.1 to 11.4 on 2 January 2020*
- BNM Policy Document on Credit Card-i – *Effective date: 2 July 2019 except for paragraphs 11.1 to 11.3 on 2 October 2019 and 12.1 to 12.4 on 2 January 2020*
- BNM Policy Document on Risk Management in Technology (RMiT) – *Effective date: 1 January 2020*

BURSA MALAYSIA

- Consolidated Rules of Bursa Malaysia Securities Bhd – *As at: 15 August 2019*
- Consolidated Rules of Bursa Malaysia Derivatives Clearing Bhd – *As at: 15 August 2019*
- Consolidated Rules of Bursa Malaysia Derivatives Bhd – *As at: 15 August 2019*
- Consequential amendments following the Revamp of the Rules and Directives of Bursa Malaysia Derivatives Berhad – *Effective date: 15 August 2019*

SECURITIES COMMISSION

- SC Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors – *Effective date: 26 November 2019*
- SC Guidelines on Unlisted Capital Market Products under the Lodge and Launch Framework – *Effective date: 26 November 2019*
- SC Prospectus Guidelines – *Effective date: 26 November 2019*
- SC Guidelines on Sales Practices of Unlisted Capital Market Products – *Effective date: 26 November 2019*
- SC Licensing Handbook – *Effective date: 8 November 2019*
- SC Quick Guide on Guidelines on Implementation of Targeted Financial Sanctions Relating to Proliferation Financing for Capital Market Intermediaries – *Issued on: 29 October 2019*
- SC Guidelines on Seasoned Corporate Bonds and Sukuk – *Effective on: 19 July 2019*
- SC Guidelines on Issuance of Corporate Bonds and Sukuk to Retail Investors – *Effective on: 19 July 2019*

WORD OF THE BRIEFCASE

salus populi est suprema lex

It is a Latin phrase which means 'the safety of the people is the supreme law'.

The issue of whether the Latin maxim *salus populi est suprema lex* can be invoked without regard to the terms of the Federal Constitution was raised in the case of *Titular Roman Catholic Archbishop of Kuala Lumpur v Menteri Dalam Negeri & Ors* [2014] 4 SHLR 1.

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