

the ZRp brief

Brief: 5/07

Folder 2/April-June

KDN No: PP12857/8/2007

A BRIEF NOTE...

by Dato Zulkifly Rafique



On thinking "out of the box"...

It must have been about 20 years ago when I first became familiar with the concept of 'lateral thinking' pioneered by Edward de Bono. Little did I realise how useful that would be to legal practice.

In facing challenges, I wonder how many of us 'think out of the box'. It is easier to despair and throw in the towel when we find ourselves in a quandary. Life however is like a labyrinth. The journey is full of twists and turns and in the real world, there is neither a guided tour nor a map but I would like to think that at the end of every tunnel, there is some light, however dim it may seem.

Ronald Dworkin once said that to every legal problem there is always a right answer and I subscribe to such view in relation to all challenges. It may take some time to discover the solution but with effort and innovation on our part, there is always an answer to every question.

It reminds me of what de Bono, the doyen on lateral thinking, once said:

Sometimes the situation is only a problem because it is looked at in a certain way. Looked at in another way, the right course of action may be so obvious that the problem no longer exists.

On that note, I do hope that you find this issue of the ZRp Brief thought-provoking and enlightening.

in this issue...



BRIEF-FLASH...

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The highlights in this Folder include:

- Biggest Buy-Out!
- Capital Markets & Services Bill
- Welcome to South Johor



BRIEFING...

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Amongst the articles in our features:

- CCC replaces CFO
- Abolition of the RPGT
- Minority Protection for Creditors



BRIEF-CASE...

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Our Brief-Case contains the following:

- See *Teow Chuan v YAM Tunku Nadzaruddin Ibni Tuanku Jaafar & Ors* [2007] 2 CLJ 82, Court of Appeal
- *Tan Kok Tong v Hoe Hong Trading Co Sdn Bhd* [2007] 2 CLJ 305, Court of Appeal
- *Ismail Muda v Danaharta Urus Sdn Bhd* [2007] 1 CLJ 517, Court of Appeal
- *Abu Bakar Ismail & Anor v Ismail Husin & Ors* [2007] 3 CLJ 97, Court of Appeal
- *Securities Commission v Omega Holdings Bhd* [2007] 2 CLJ 747, High Court



BRIEF-UP...

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Legislation Update:

- Anti-Money Laundering (Amendment) Act 2006
- Building & Common Property (Maintenance & Management) Act 2007
- Strata Title (Amendment) Act 2007
- Guidelines/ Rules/ Practice Notes issued by Bank Negara Malaysia, Securities Commission and Bursa Malaysia Securities Bhd between April and June 2007

BRIEF-FLASH...

- **APPROVAL IN ONE DAY** The Securities Commission will now approve in just one day applications for exemption from having to undertake mandatory offers. Similar approvals previously took 21 working days. 🏠
- **ARBITRATION RULES FOR ISLAMIC BANKING** Arbitration Rules for the Islamic Banking and Financial Services have been introduced by the Kuala Lumpur Regional Centre for Arbitration (KLRC). 🏠
- **BIGGEST BUY-OUT!** The move to privatise Maxis Communications Bhd, the country's largest mobile operator, is the biggest ever in Malaysia. The privatisation deal, which is worth RM39.9 billion, is said to also be the largest buy-out in Asia Pacific. The exercise was launched by T Ananda Krishnan, through his company Usaha Tegas and its affiliates. 🏠
- **BUILD-THEN-SELL TO BE MONITORED** The government will give the build-then-sell system a two-year trial and this will serve as a grace period to assess the reaction of the housing industry. Incentives are being offered to developers who adopt this system, the most attractive being the RM200,000 licence exemption. 🏠
- **BY-LAWS TO HARVEST RAINWATER** In anticipation of future water shortages, the government will introduce by-laws requiring certain buildings to be equipped with devices to collect, store and use rainwater. 🏠
- **CAPITAL MARKETS & SERVICES BILL** The Capital Markets & Services Bill 2007, which was tabled in Parliament in May 2007, is aimed at modernising the regulatory framework relating to financial markets and will introduce a single licensing regime for capital market intermediaries. Under the Bill a consolidation of several statutes is expected, namely the Securities Industry Act 1983, Futures Industry Act 1983 and specific provisions in the Securities Commission Act 1993. 🏠
- **COMMODITY MURABAHAH HOUSE ESTABLISHED** A mechanism to facilitate Islamic financing by using the concept of Murabahah or Tawarruq has been established by Bank Negara Malaysia, Securities Commission, Bursa Malaysia Securities Berhad (Bursa Malaysia) and other industry players. According to Bank Negara Malaysia Governor, Tan Sri Dr Zeti Akhtar Aziz, the Commodity Murabahah which is a common feature in other Islamic centres, is anticipated to provide linkages between Malaysia and such other countries. 🏠
- **CONSUMER PROTECTION ACT TO BE AMENDED?** The Consumer Protection Act 1999 is expected to be amended to provide redress to persons who engage in electronic transactions. 🏠
- **ELECTRONIC GOVERNMENT ACTIVITIES ACT** The Electronic Government Activities Act is expected to be tabled in Parliament soon. The Act is meant to apply to electronic transactions of government departments. 🏠
- **EMPLOYMENT ACT AMENDED TO STRENGTHEN SEXUAL HARASSMENT LAWS** A proposal to amend the Employment Act 1955 includes a provision to penalise employers who fail to act or investigate sexual harassment complaints at the workplace. The amendment is meant to encourage employers to implement the Code of Practice against Sexual Harassment at the Workplace, which was introduced in 1999. 🏠
- **FIC RULES RELAXED** The Foreign Investment Committee (FIC) rules have been relaxed to allow 100% foreign equity

in Islamic financial institutions dealing in foreign currencies. The relaxation is to encourage foreign participation in the system. ❧

- **FOREIGN COMPANIES TO LIST ON BURSA MALAYSIA** Foreign companies will be allowed to list on Bursa Malaysia once the infrastructure and regulatory framework have been completed. ❧
- **JOINT INFORMATION NOTE BY BNM, SC** A joint information note outlining the procedures for the issuance of foreign currency-denominated bonds and sukuk in Malaysia has been issued by Bank Negara Malaysia and the Securities Commission. ❧
- **LANDMARK AGREEMENT SIGNED** A mutual recognition agreement has been signed between the Securities Commission and the Dubai Financial Services Authority (DFSA) which will enable cross-border marketing and distribution of Islamic funds. The mutual recognition agreement is expected to reduce the regulatory costs and expand investor base. ❧
- **LIBERALISATION OF FOREX ADMINISTRATIVE POLICIES** In an effort to woo foreign funds, Bank Negara Malaysia has introduced measures to liberalise the foreign exchange administration rules. The liberalisation takes effect from 1 April 2007. ❧
- **LISTING RULES AMENDED** Bursa Malaysia made changes to its Listing Rules of both the Main and Second Boards as well as the MESDAQ Market. This move is expected to encourage cross-border listings for both Malaysian and foreign companies. ❧
- **NATIONAL LAND CODE TO BE AMENDED?** The controversial 2001 decision of *Adorna Properties Sdn Bhd v Boonsom Boonyanit* by the Federal Court has

resulted in suggestions to amend the National Land Code 1965, in particular section 340. ❧

- **RETIREMENT AGE** The retirement age has once again been the focus of the Malaysian Trade Union Congress (MTUC). The proposal is for the age to be raised to 60, in line with most other countries. ❧
- **THE END OF RPGT** Malaysians will see a new beginning on 1 April 2007 when the Real Property Gains Tax (RPGT) is abolished. This was announced on 22 March 2007 by Prime Minister, Datuk Seri Abdullah Badawi at the Invest Malaysia 2007. This is viewed by many quarters as a positive move to improve the national property sector. ❧
- **TWELVE WEEKS' MATERNITY LEAVE?** The government has been urged to extend maternity leave from 60 to 84 days. This is said to be consistent with the Maternity Protection Convention 2000. ❧
- **WELCOME TO SOUTH JOHOR** A goodie basket of incentives is being prepared to attract foreign investors to the Iskandar Development Region (IDR) in South Johor. One of the initiatives by the Government is to exempt the IDR from policies that favour the bumiputeras. ❧

FOREIGN FLASH

- **SPARE THE ROD, SPOIL THE CHILD?** A controversial law in New Zealand that would prohibit parents from hitting their children to discipline them has been passed amidst protests. The new law amends the New Zealand's Crime Act, which previously allowed parents to use 'reasonable force' to discipline their

children. The aim of this piece of legislation is to disallow the use of 'reasonable force' as a legal defence, though the authorities have been given power not to prosecute 'inconsequential' complaints. ✚

- **TOO FAT TO FLY?** Indian Airlines initially had to concede defeat when thirteen of its air hostesses won a claim for wages that were lost as a result of being grounded on the basis that they were overweight. The dispute began at the beginning of 2006 when Indian Airlines introduced a system of measuring air hostesses based on their height and weight. However, their victory was short-lived when the Delhi High Court, pursuant to a petition filed by Indian Airlines, ruled in favour of the airline citing that the safety of passengers at high altitudes depended on the crew's ability to perform. The female judge also dismissed claims by the air hostesses that the policy was an 'insult to their womanhood'. ✚
- **LANDMARK RULING FOR AIRLINE PASSENGER** In an unprecedented ruling, a passenger who was not allowed to board an overbooked flight for which he had bought a ticket, brought a claim and won a suit against China Southern Airlines. ✚
- **BIGGEST BANK TAKEOVER?** In what has been termed the biggest bank takeover, Barclays Plc has agreed to buy Dutch rival ABN Amro for USD90 billion. ✚

Brief Take...



Au Wei Lien (Partner – Corporate)

✚ BRIEFING...

PROPERTY

CCC REPLACES CFO As of 12 April 2007, the Certificate of Completion and Compliance (CCC) replaces the previous system of issuance of the Certificate of Fitness for Occupation (CFO).

WHY THE CHANGE The reason underlying the change is that under the previous system, the issuance of the CFO by the local authority resulted in many problems such as delay in the certification by technical agencies, additional conditions imposed by the local authority and lack of technical officers to process the issuance of the CFO.

In order to obtain a CFO under the old system, the submitting person would have to fill in Form E, comply with all the conditions given by the local authority and obtain certification by technical agencies after the local authority had visited the site.

Under the new system, which is an expansion of the former CFO system, the CCC is now to be issued by the Principal Submitting Person (PSP) who is either a professional architect or a professional engineer or a registered Building Draughtsman. Therefore, it is the duty of the PSP to supervise the erection of the building and ensure that the construction of the building has been completed in conformity with the provisions of the laws and terms of the approved plans, and that the building is safe and fit for occupation. The rationale for the implementation of the new system is to reduce the red tape of the local council and also to shift the responsibility of certifying the safety of a building to the PSP who is and should be qualified to do so.

In the event that the local authority finds any non-compliance with the approved plans and

provisions of the Act by the PSP, it may issue a notice in writing to such PSP, requiring that the non-compliance be rectified and a directive in writing to withhold the issuance of the CCC in the meantime. If the non-compliance has not been rectified thereafter, the local authority may execute or take any measures to rectify the non-compliance with costs to be borne by the owner of the building.

It should also be noted that under the recent amendments to the Street, Drainage and Building (Amendment) Act 2007, penalties have been enhanced. A person found guilty of an offence shall be liable to a fine not exceeding RM10,000 with a further fine not exceeding RM500 for every day that the offence is continued after conviction.

One of the benefits of the new system is that it ensures vacant possession together with the CCC. This appears to resolve the problem faced by house owners under the previous system where they would have to wait for the CFO to be first issued before obtaining vacant possession.

Further, with the amendments to the Uniform Building By-Laws 1984, the Engineering Registration Act 1967 and the Architect Act 1967, which have introduced the responsibility of the matrix form to verify the completion and compliance of the construction components, the party issuing the CCC could be charged and reported to the controlling professional bodies if the CCC is issued without complying with the relevant provisions of the Act. Furthermore, stricter disciplinary measures are imposed on professionals either by increasing fines, increasing the duration of the suspension of membership or cancelling membership registration.

Therefore in conclusion, the new system has in fact moved towards self-regulation which reduces governmental red tape which in turn benefits the house buyers. ☺

PROPERTY

ABOLITION OF THE RPGT The Real Property Gains Tax (Exemption) (No 2) Order 2007 was gazetted as PU (A) 146/2007 and came into force with effect from 1 April 2007. In exercise of the powers conferred by section 9(3) of the Real Property Gains Tax Act 1976 (the RPGT Act), the Minister exempts any person, which includes a company, partnership, body of persons, executor and a corporation, from all provisions of the RPGT Act in respect of any disposal of chargeable assets after 31 March 2007.

THEN... The basis of taxation where the chargeable gains arising from the disposal of any land situated in Malaysia and any interest, option or other right in or over such land or the disposal of shares in a 'real property company' is subject to Real Property Gains Tax (RPGT).

Prior to the exemption, a disposer had to submit a completed Form CKHT (Cukai Keuntungan Harta Tanah) 1, copies of the stamped Sale and Purchase Agreement, copy of grant/title deed and copies of bills and receipts for expenses claimed. An individual had to pay an amount of RM5,000 or 10% of the chargeable gain, whichever was greater, in respect of a chargeable gain accruing on the disposal of a chargeable asset which was part of a larger chargeable asset at the time of the disposal. Referring to the prescribed tax rates in Schedule 5 under the RPGT Act, if an individual was a non-Malaysian citizen or permanent resident, he or she would be charged at the rate of 30% of gains made from the disposal of the asset. Resident individuals were taxed at the rates of between 0% and 30% depending on the holding period, but companies had to pay a minimum of 5% even if real properties were sold after the 5th year.

Now... Pursuant to the exemption, more foreign investors are expected to buy high-end

residential units in strategic areas such as the Klang Valley, Penang and Johor. In the opinion of the REHDA (Real Estate and Housing Developers' Association), the removal of the RPGT serves as a catalyst to spur the local property and construction markets. REHDA added that this exemption is timely as such measure is supported by positive economic fundamentals, cash liquidity and good consumer and business confidence. This incentive is beneficial to foreign and local investors who purchase property for capital appreciation. Foreigners would now be more confident to purchase property without having to lose out on capital gains if they choose to sell off their properties before they leave Malaysia. Furthermore, prospective house buyers are encouraged to make the purchasing decision because they can realise the property gains within 3 to 5 years of purchase, knowing the fact that they would not be subject to RPGT in the future. This has lightened the financial burden on house purchasers.

The ACCCIM (Associated Chinese Chambers of Commerce and Industry of Malaysia) has also welcomed the abolition of RPGT as it feels that it 'would help the property and construction industries by attracting more local and foreign ownership under the Malaysia - My Second Home Programme'. ACCCIM added that the exemption would encourage qualified local as well as foreign investors to participate in the Iskandar Development Region (IDR).

However, there are arguments against the complete exemption of RPGT. RPGT was the only capital gains tax in Malaysia, charged on gains arising from the disposal of real property or shares in a real property company. It is a source of revenue for the government in the national interest. According to the statistics of the Federal Government Revenue published by the Ministry of Finance Malaysia (see <http://www.treasury.gov.my>), the revenue generated from RPGT in 2006 was approximately RM250 million, amounting to 0.4% out of the total direct taxes. RPGT is paid mainly by those involved in the business of

buying and selling properties. The majority of Malaysians do not pay RPGT. For instance, individuals do not have to pay RPGT in disposing their properties which have been acquired for more than 5 years. Section 9 of the RPGT Act provides exemptions in Schedule 4 of the Act, whereby most ordinary and low-income Malaysians do not have to pay or pay very little RPGT. Hence, this total exemption would only slash taxes for the rich and propertied classes whereas many low-income Malaysians are still unable to own property. A total exemption of RPGT reduces the government's own revenue, which might lead to the deterioration or privatisation of essential public services, consequently worsening the gap between the rich and poor.

It should be noted that this is only an exemption order, without repealing the RPGT Act. In the event of speculative activities in property which might cause excessive rise in the real property prices, the policy makers are at liberty to re-introduce and re-impose the RPGT. 🧩

Brief-take...



Emira Faridah binti Mohd Said (Partner - Corporate)

COMPANY

MINORITY PROTECTION FOR CREDITORS

The landmark decision of *Gamlestaden Fastigheter AB v Baltic Partners Limited and others* by the Privy Council delivered on 25 April 2007 followed a 12-year legal battle which ended up in the Jersey Court of Appeal in 2005 before making its way to the Privy Council. The decision would certainly change the landscape of the corporate world where investors may now rely on minority protection laws even when they themselves are creditors. This is an especially important ruling for equity and debt investors involved in structuring complex and multiparty ventures, as seen in this case.

FACTS This case was sparked off by a series of acts by the directors of Baltic Partners Limited (Baltic), which Gamlestaden Fastigheter AB (Gamlestaden) considered as breaches of duties. Gamlestaden, the appellant, is a member of the Gamlestaden group incorporated in Sweden, which formed a partnership with an individual, Mr Karlsten to invest in commercial property in Germany, whereby Gamlestaden will provide the funds. Baltic, the respondent, was the corporate vehicle through which the business was to be run. Shortly thereafter, Baltic together with Mr Karlsten and a Mr Hansen established, under German laws, a limited partnership called SPK. Throughout all arrangements, it was the understanding of all parties that Gamlestaden will provide the funding for all investments via Baltic.

ALLEGED BREACHES Sometime in May 1993, Karlsten and Hansen both withdrew a large sum of money without Gamlestaden's knowledge. This sum was authorised by the written resolutions signed by each of the three SPK partners, with the two directors signing on behalf of Baltic. Half a year later, the three partners again acted without informing Gamlestaden – this time by converting SPK from a limited liability partnership

to a limited liability company, SPG, with Baltic the majority shareholder holding 98.36% of shares, Karlsten with a shareholding of 1.54% and Hansen with 0.1%.

With Baltic subsequently declared insolvent, its only asset would be in its cause of action in damages against the directors for breach of duty. Gamlestaden instituted proceedings in 1997 against the directors, with Baltic joined as a defendant. The claim, which was amended to proceed as a derivative action, failed on the ground that it did not fall within the exception of the rule in *Foss v Harbottle*.

ARTICLES 141 AND 143(2) In September 1998, Gamlestaden then made an Article 141 (of the Companies (Jersey) Law 1991) application which, if allowed would entitle Gamlestaden to relief provided by Article 143(2). In the application, Gamlestaden sought for an order for payment by the directors to Baltic for breach of duty and, in the alternative, an order authorising Gamlestaden to continue the adjourned appeal hearing against the striking out of the derivative action. In order to rely on Article 141, which is substantively similar to section 459 of the Companies Act 1985, Gamlestaden must be a member of Baltic and must satisfy the court that the company's affairs 'have been conducted in a manner unfairly prejudicial to the interest of its members generally or of some part of its members', bearing in mind that a "member" is simply a shareholder.

Article 141:

A member of a company may apply to the court for an order under Article 143 on the ground that the company's affairs are being or have been conducted in a manner which is unfairly prejudicial to the interests of its members generally or of some part of its members (including at least himself) or that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial.

ISSUE The pertinent issue revolved around Baltic's insolvency, which resulted in

Gamlestaden and other creditors being deprived of a share of the Baltic fund and also in recovering some part of its investment. It was argued that the Article 141 application would not benefit Gamlestaden as a member because Baltic would remain insolvent even if damages were paid. As such, the Jersey court struck out Gamlestaden's application, bearing in mind that this order had been widely used for protection of minority shareholders. If anything, the order would only increase the funds available to the creditors and Gamlestaden could only benefit in that capacity.

PRIVY COUNCIL At the Privy Council, it was argued that an Article 141 application can only succeed if it can be shown that the relief awarded would be of some benefit to the applicant shareholder in his capacity as a shareholder. However, the Law Lords drew a distinction between a creditor's winding-up petition and an Article 141 application. The former is an order sought to put the company into an insolvent liquidation that will affect the interests of all creditors and members. As it is a public process in which the public has an interest, a member without any financial interest cannot be allowed to initiate the process. The unfair prejudice application, on the other hand, does not involve public interest, and the reason that the grant of relief would not benefit the applicant as a member should not be allowed to stand.

The justification for seeking relief should be a real, as opposed to a merely nominal, financial benefit to the applicant to facilitate its recovery of part of its investment. Such a relief should not only be confined to benefiting a member of the company. Thus, where an investor in a joint venture company has, pursuant to the joint venture agreement, invested in the company as a shareholder and loan creditor, the investor should not be barred from the grant of relief through a literal reading of Article 141(1). ☞

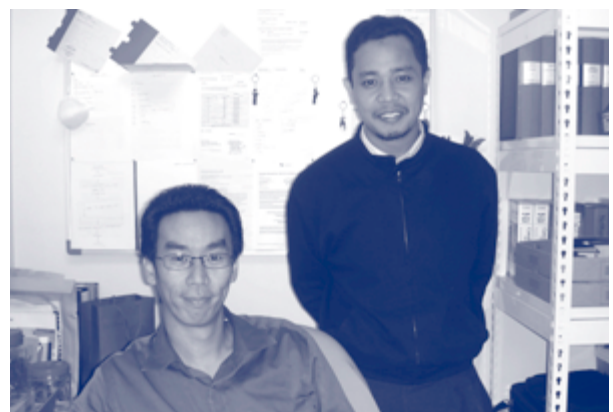
Brief-take...



(from left) - T Kuhendran (Partner - Dispute Resolution) and P Jayasingam (Partner - Industrial Relations)



(from left) - Sheamala Srepathy, Vivien Wong and Jennifer Tan (Property & Conveyancing)



(from left) - Jacky Ang and Mohd Nor Fairuz bin Mazlan (Information Technology)


BRIEF-CASE...

CONTRACT – Service Contract – Imposition of retirement age – Whether company could pass resolution imposing retirement age when contract was silent

SEE TEOW CHUAN V YAM TUNKU NADZARUDDIN IBNI TUANKU JAAFAR & ORS [2007] 2 CLJ 82, Court of Appeal

FACTS The fifth defendant was a public-listed company and the other defendants were members of the fifth defendant's board of directors. The plaintiffs who were brothers, were directors and substantial shareholders of the fifth defendant. Their service contracts with the fifth defendant were NOT in writing and therefore there was no express term imposing a retirement age for the plaintiffs. It must also be noted that there was no article in the memorandum and articles of association of the fifth defendant specifying a retirement age. On 31 March 1999, the Board of the fifth defendant resolved that all executive directors must retire upon attaining the age of 55.

ISSUE The issue before the Court of Appeal was whether the fifth defendant by its board resolution of 31 March 1999 could require that the first plaintiff retire as he had already attained 55 years, bearing in mind that he turned 55 three years ago.

HELD The issue was resolved in favour of the plaintiff for the following reasons, namely that (a) it was a term of the plaintiff's contract that he should serve as managing director for as long as he was willing and able to perform his duties, which was why he was permitted without any protest to continue to serve as managing director even after he had attained 55 years; and (b) there was sufficient evidence to show that the resolution of 31 March 1999 was a product of a design by the second defendant. 


COMPANY LAW – Injunction to restrain a winding-up petition – Factors to consider – Whether the claim was bona fide disputed on substantial grounds

TAN KOK TONG V HOE HONG TRADING CO SDN BHD [2007] 2 CLJ 305, Court of Appeal

FACTS The plaintiff was a private limited company whilst the defendant was the managing director of the plaintiff. The defendant who was subsequently removed, took out a petition under section 181 of the Companies Act 1965. The defendant, who had also advanced amounts in excess of RM1 million, in the meantime, instructed his solicitors to send a formal demand under section 218 of the Companies Act 1965. The plaintiff obtained an injunction to restrain the presentation of the winding up. The defendant appealed.

ISSUE The issue that arose was whether the court had taken into consideration the factors in granting such injunction.

HELD In relation to the kind of injunction sought, the test was whether the debt claimed was bona fide disputed on substantial grounds. This case was NOT concerned with a debt due on demand. Although there was no dispute about the sum owing, there were disputes about the terms of repayment. There was also a prima facie inference that the statutory demand and the threat to present a winding-up petition were made for a collateral purpose, namely to bring pressure on the plaintiff. In the words of Gopal Sri Ram JCA:

This is not a normal case of a creditor demanding a debt due to him in the ordinary course of business. There is a story lying behind the debt. It is alleged by the plaintiff that although there is no dispute about the sum owing to the defendant, the terms of repayment were agreed between the brothers and the nephew collaterally. In short, this was not a debt due on demand. 

LAND LAW/ PROCEDURE – Application for order to take possession of land – Whether Danaharta had power to take possession – Whether approval of court required

ISMAIL MUDA V DANAHARTA URUS SDN BHD [2007] 1 CLJ 517, Court of Appeal

FACTS By virtue of a statutory vesting pursuant to section 14 of the Pengurusan Danaharta Nasional Berhad Act 1998 (the Danaharta Act), the respondent acquired from Bank Bumiputra Malaysia Bhd the rights, title and interests relating to the loan given to Gabungan Penarek Sdn Bhd – a loan which was secured by a third party charge over immoveable property (the land) belonging to the appellant.

The appellant, however, refused to vacate the land despite the fact that the respondent had entered into a sale agreement with a purchaser for the sale of land. This resulted in the failure of the respondent to discharge its obligation to deliver vacant possession of the land.

The respondent filed for the following orders, namely to restrain the appellant from carrying out specific activities on the land; and to permit the respondent to enter upon and to take possession of the said land.

ISSUE The issue that arose was whether the respondent was entitled to such orders.

HELD According to section 57 of the Danaharta Act, the respondent is entitled to take steps to preserve the value of the land or to facilitate the disposal of the land by way of private treaty. Furthermore, the amendment of the National Land Code by the inclusion of a new 15th Schedule reinforces the rights and powers of Danaharta and its subsidiaries. It is also to be noted that in the circumstances of the case, damages would not be an adequate remedy. ❧

EMPLOYMENT LAW – Unfair dismissal – Employee using company's computer to chit-chat using derogatory language – Whether dismissal justified

MALAYSIA NATIONAL INSURANCE BERHAD V RATNAWATI MOHAMED NAWAWI Industrial Court Award No 2277 of 2006

FACTS The employee claimant was dismissed from the employer Company after the latter found out that the former had used the Company's computer to chit-chat with her colleagues using derogatory and vulgar language against her senior officers.

ISSUE The issue before the Industrial Court was whether the dismissal was justified.

HELD The issue was resolved in favour of the claimant as the court took the view that it is quite common and natural for staff to gossip about their superior officers.

The court believed the claimant's story that it was not meant to undermine any senior officers but merely a tea-room gossip and it was only meant to be within the knowledge of the four friends. It would, however, be a clear case of misconduct if it was said directly to the officers concerned. There was no complaint lodged against the claimant or investigation carried out. Furthermore, there was no domestic inquiry held against the claimant to give her a chance to state her case.

Even if the misconduct was committed, the punishment meted out was too severe. The claimant was awarded back wages and compensation totaling RM66,850 but the company did not have to give her job back, as 'the trust between her and her employer was broken'. ❧

LAND LAW – Indefeasibility of charge – Whether fraud of the agent could be imputed to the principal – *Adorna Properties v Boonsom Boonyanit* considered

ABU BAKAR ISMAIL & ANOR V ISMAIL HUSIN & ORS [2007] 3 CLJ 97, Court of Appeal

FACTS The plaintiff who was the registered proprietor of the land entered into a sale and purchase agreement with the first defendant. The second defendant, a solicitor, prepared the documents. After two initial payments were made, the plaintiff discovered that the land had been charged to the fourth defendant bank for a loan in favour of the fifth defendant. The plaintiff brought an action to recover the said land. The learned judge found that the first and second defendant had perpetrated fraud using forged documents and that such fraud could not be imputed to the fourth defendant. The plaintiff appealed.

ISSUE Whether the fraud of the second defendant (as agent) could be imputed to the fourth defendant bank (as principal). Alternatively, on the basis that the fourth defendant was not a party or privy to the fraud, whether the charge could be defeated by virtue of section 340(2)(b) on the ground of forgery – in that the documents used to create the charge were forged.

HELD The fourth defendant bank was a party to the fraud by virtue of the fraud of its agent, the second defendant, and by virtue of that fact the charge was defeasible under section 340(2)(a).

Obiter dicta:

The Federal Court's judgment in *Adorna Properties Sdn Bhd v Boonsom Boonyanit* must be disregarded. ☹

SECURITIES LAW – Issue of shares declared null and void – Effect and consequences thereof – Securities Industry Act 1983, s 100(1)(hh) – Contracts Act 1950, s 66

SECURITIES COMMISSION V OMEGA HOLDINGS BHD [2007] 2 CLJ 747, HC

FACTS On 28 August 2003, the plaintiff, Securities Commission (SC), had given its approval to a scheme of arrangement submitted by the first defendant, Omega Holdings Bhd (Omega). By virtue of this scheme, Energro Berhad was to be listed on 20 May 2004. The approval of the SC was subsequently withdrawn on the basis of a material misrepresentation. On 28 April 2005, the SC obtained a court order declaring void *ab initio* the contract relating to the sale/ offer for sale or subscription of Energro shares.

ISSUE The issue for consideration revolved around the effects and consequences of the SC's withdrawal of approval of the scheme.

HELD Since the SC had obtained an order declaring the contract void *ab initio*, the general principle of restoration in section 66 of the Contracts Act is applicable. ☹

Brief - take



Pupils (from left) – Nadira binti Rosman, Idrina binti Abdul Khalil, Afifuddin bin Ahmad Hafifi and Harlinda binti Abdul Halim

BRIEF-UP...

ANTI-MONEY LAUNDERING (AMENDMENT) ACT 2003

No
A1208

Act amended
Anti-Money Laundering Act 2001

Date of coming into operation
6 March 2007 – except paragraph 14(a)

Amendments
Sections 1, 3, 10, 12, 14, 32, 44, 45, 47, 48, 49, 50, 51, 52, 53, 55, 56, 59, 61, 67 and 82

Incorporation
Part VI A (Sections 66A – 66F)

Notes
The Anti-Money Laundering Act 2001 is now known as the Anti-Money Laundering & Anti-Terrorism Financing Act 2001. 

ARCHITECTS (AMENDMENT) ACT 2007

No
A1287

Act amended
Architects Act 1967

Date of coming into operation
1 April 2007


Amendments
Sections 2, 3, 4, 6, 7A, 8, 12, 15A, 17, 20, 22, 24, 25, 26, 26A, 33, 34, 34A, 34B, 35B, Schedule, Part II (Heading)

Incorporation
Part VA 

BASELINE OF MARITIME ZONES ACT 2006

No
660


Date of coming into operation
1 May 2007

Notes
An Act to provide for the declaration of geographical co-ordinates of base points for the purpose of determining the baselines of Malaysia and for other matters connected therewith. 

BUILDING AND COMMON PROPERTY (MAINTENANCE AND MANAGEMENT) ACT 2007

No
663

Date of coming into operation
12 April 2007

Notes
This statute was enacted to provide for the proper maintenance and management of buildings and common property, and for matters incidental thereto. 

EXCLUSIVE ECONOMIC ZONE (AMENDMENT) ACT 2006

No
A1277

Act amended
Exclusive Economic Zone Act 1984

Date of coming into operation
1 May 2007

Amendments
Section 3 

FACTORIES AND MACHINERY (AMENDMENT) ACT 2006

No
A1268

Act amended
Factories and Machinery Act 1967

Date of coming into operation
1 January 2007

Amendments
Sections 2, 3, 5, 6, 8, 9, 19, 22, 31, 32, 33, 36, 37, 38, 40, 41, 44, 48, 51, 52, 52A, 55, 56 and Third Schedule

Incorporation
Sections 7A, 7B, 7C, 7D, 7E, 7F, 19A, 29A, 47A and 51A 

Brief-take...



Leong Kon Fai (Intellectual Property)

HOUSING DEVELOPMENT (CONTROL & LICENSING) (AMENDMENT) ACT 2007

No
A1289

Act amended
Housing Development (Control & Licensing) Act 1966

Date of coming into operation
12 April 2007

Amendments
Sections 2, 3, 7, 7A, 8A, 11, 16C, 16E, 16M, 16N, 16O, 16P, 16Y, 16AC, 16AD, 18, 19, 20, 21, 22, 22C, 24

Incorporation
Sections 3A, 7C, 10K, 22D, 22E, 22F 

POPULATION AND FAMILY DEVELOPMENT (AMENDMENT) ACT 2006

No
A1280

Act amended
Population and Family Development Act 1966


Date of coming into operation
8 February 2007

Amendments
Sections 2, 3, 4, Heading of Part III, Part IV and Schedule

Substitution
Sections 6, 7, 8

Deletion
Section 5

Incorporation

Sections 3A, 3B, 3C, 4A, 4B, 4C, 4D, 4E, 4F, 4G, 7A, 8A, 9A, 9B, 9C, Part II A, Part V and Second Schedule 

**REGISTRATION OF ENGINEERS
(AMENDMENT) ACT 2007**

No

A1288

Date of coming into operation

1 April 2007

Amendments

Sections 2, 3, 4, 6, 7A, 10, 10A, 15, 17, 19, 22, 24, 24B, 25, 28, First Schedule

Incorporation

Part IIIA 

RETIREMENT FUND ACT 2007


No

662

Date of coming into operation

1 March 2007

Notes

This is an Act to incorporate the Retirement Fund (Incorporated), to establish the Retirement Fund and to provide for matters consequential and incidental thereto. 

**STRATA TITLES (AMENDMENT) ACT
2007**

No

A1290

Act amended

Strata Titles Act 1985

Date of coming into operation

12 April 2007

Amendments

Preamble, sections 2, 4, 6, 7, 8, 9, 10, 10A, 13, 14A, 15, 17, 20, 22B, 37, 39, 40, 41, 41A, 43, 44, 45, 47, 49, 50, 53A, 55, 67A, B, K, L, M, N, O, P, Q, R, W, heading of Part II, First Schedule, Second Schedule, Third Schedule

Incorporation

Sections 4A, 10B, 40A, Fifth Schedule

Deletion

Part IX 

**STREET, DRAINAGE & BUILDING
(AMENDMENT) ACT 2007**

No

A1286

Act amended

Street, Drainage and Building Act 1974

Date of coming into operation

12 April 2007

Amendments

Sections 3, 58, 65, 70, 70A, 70B, 75, 85A, 123, 127, 133 

**GUIDELINES/RULES/
PRACTICE NOTES ISSUED BETWEEN
APRIL AND JUNE 2007
BY BANK NEGARA MALAYSIA/
SECURITIES COMMISSION/
BURSA MALAYSIA SECURITIES BHD**

BANK NEGARA MALAYSIA (BNM)

- Revised Capital Frameworks for Banking Institutions and Insurers on a trial run basis – *Effective Date: April 2007*
- Amendments to the Exchange Control Notices pursuant to the Announcement of the Liberalisation of Foreign Exchange Administration Rules on 21 March 2007 – ECM 2, 4, 6, 7, 9, 10, 15 and 16 – *Date Issued: 1 April 2007*
- Joint Information Note on the Issuance of Foreign Currency-Denominated Bonds & Sukuk in Malaysia (to be read together with the SC's Practice Note 1A issued on 27 March 2007) – *Date Issued: 27 March 2007*

SECURITIES COMMISSION (SC)

- Guidance Note 21 to the SC Guidelines on Unit Trust Funds Prospectus – In relation to Information Required in a Prospectus – *Date Issued: 15 May 2007; Effective Date: 1 July 2007*
- Guidance Note 20 to the SC Guidelines on Unit Trust Fund – In relation to Single Pricing – *Date Issued: 15 May 2007; Effective Date: 1 July 2007*
- Guidelines on Bonds – In relation to the Offering of Structured Products – *Revised Edition: 27 April 2007*
- Guidelines for the Annual Certification for Tax Incentives for the Venture Capital

Industry – Pursuant to the Income Tax (Exemption) (No. 11) Order 2005 as amended by the Income Tax (Exemption) (Amendment) (No. 2) Order 2006 and the Income Tax (Deduction for Investment in a Venture Company) Rules 2005 – *Effective Date: 2007*

- Practice Note 1A on the Offering of Private Debt Securities – In relation to Issuance of Foreign Currency-Denominated Bonds by Qualified Issuers - *Date Issued: 27 March 2007*
- Practice Note 1A on the Offering of Islamic Securities – In relation to Issuance of Foreign Currency-Denominated Islamic Securities or Sukuk by Qualified Issuers – *Date Issued: 27 March 2007*
- Clarification to section 12(1) of the Malaysian Code of Take-Overs & Merger 1998 – On Immediate Approvals in relation to Exemptions from Mandatory Offer Obligations under Practice Notes 2.9.1, 2.9.8 and 2.9.10 of the Code – *Effective Date: 21 March 2007*
- Guidance Note 7 to the SC Guidelines on Real Estate Investment Trusts – In relation to Placement of Units – *Date Issued: 8 March 2007*

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- Amendments to the Listing Requirements of Main Board/Second Board in relation to Cross Border Listings, Structured Warrants and Related Party Transactions – pursuant to the issuance of Guidance Notes 7D, 7E and 7F by the SC on Cross Border Listing – *Date Issued: 9 April 2007*
- Amendments to the Listing Requirements of BMSB for the MESDAQ Market in relation to Structured Warrants, Transactions and Related Party Transactions – *Date Issued: 9 April 2007*

- Revised Annual Report Checklist pursuant to the Amendments on Various Enhancements to the Listing Requirements of Main Board/Second Board and the MESDAQ Market – *Date Issued: 19 March 2007*
- Amendments to the Listing Requirement of Main Board/Second Board and the MESDAQ Market in relation to Subdivision of Shares, Share Consolidation and Bonus Issue Exercise - *Date Issued: 9 March 2007; Effective Date: 30 March 2007*

Brief - take



(from left) – Gan Mei San (Research Assistant – Knowledge Management) and Joanne Ching Shan Mae (Editor of the ZRP Brief and Associate – Knowledge Management)

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The ZRp Brief is published for the purposes of updating its readers on the latest development in case law as well as legislation. We welcome feedback and comments and should you require further information, please contact the Editors at:

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