

the *ZRp* brief

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Muhammad Hamim bin Mohd Nizar, 7

is the winner of the "CIUM" art competition held to showcase the best art work for the Aidilfitri greeting card. Hamim, who won a cash prize of RM1000 is the son of a member of staff, Normaliza Md Nor.

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A BRIEF NOTE...

by Dato' Zulkifly Rafique



Salam Aidil Fitri, Maaf Zahir Batin

It has been a busy, yet exciting time for us. The highlight in this quarter would definitely be our involvement in assisting in the launch of Petronas's USD1.5 billion inaugural *sukuk*. The transaction, which was referred to by the Asian Legal Business as the "Petronas 'jumbo' *sukuk* deal," has put us in the news once again.

We have also won an award for Asian-Counsel Firm of the Year in Real Estate and Islamic Finance. Thanks to all who made these happen for us.

These are accolades that I am not only proud of, but I am also thankful for as we have been blessed with many opportunities to showcase our legal expertise.

Although I know that I should be grateful each and every day of the year, I tend to become philosophical and over-reflective about life's fortune and fortitude during the holy month of Ramadhan. After all it has been said that if you are thankful for what you have, you will end up having more, but if you focus on what you don't have, you will never ever have enough.

On that note, let me take this opportunity to wish everyone Selamat Hari Raya Aidil Fitri and a special thanks to Muhammad Hamim for providing us with his masterpiece as seen on the cover of this Brief.

Salam Aidil Fitri
Maaf Zahir Batin

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- *Sexual Grooming...has it reached our shores?*
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[2009] 3 CLJ 540, Court of Appeal
- *Dato' Dr Zambry bin Abd Kadir v Dato' Seri Nizar bin Jamaluddin*
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- *Mirza Mohamed Tariq Beg Mirza HH Beg v Margaret Low Saw Lui & Ors*
[2009] 4 CLJ 303, Court of Appeal
- *Quah Poh Keat & Ors v Ranjit Singh Taram Singh*
[2009] 4 CLJ 316, Court of Appeal
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- Guidelines/ Rules/ Practice Notes issued between July and September 2009 by Bank Negara, Securities Commission and Bursa Malaysia Securities Berhad

BRIEF-FLASH...

• **ABUSE AND ANTI-TRAFFICKING**

Employers are cautioned against ill-treating their maids as this may be caught under the Anti-Trafficking In Persons Act 2007. The abuses which may be caught under the Act range from withholding salaries to failure to renew work permits. ☞

• **BANKRUPTCY ACT TO BE AMENDED?**

According to Minister in the Prime Minister's Department, there is a possibility of the Bankruptcy Act being amended to make it more client-friendly. ☞

• **CREDIT REFERENCE COMPANIES**

LAW According to reports, the government is planning to introduce legislation relating to credit reference companies. The purpose of this move is to ensure that borrowers are not prejudiced. ☞

• **CMSA TO BE AMENDED?**

According to the Prime Minister in his keynote address at the Invest Malaysia in June 2009, the Capital Market & Services Act 2007 is expected to be amended to enhance the enforcement powers of the Securities Commission on corporate governance transgression. ☞

• **DATA PROTECTION LAWS NEEDED**

In a recent public lecture delivered by Professor Abu Bakar Munir at the Law Faculty, University of Malaya, it was suggested that data protection laws should be comprehensive enough to encompass both private and public establishments. ☞

• **DNA IDENTIFICATION BILL PASSED**

The DNA Identification Bill, which was subject to much hue and cry, was passed after several amendments were made, with most notable ones to clauses 7, 13, 14 and 24. ☞

• **E-COURT SYSTEM TO BE INSTALLED**

An electronic court system (known as e-kehakiman) will soon be installed, with the letter of award already being given to Formis Network Services which tendered for the project in May 2009. ☞

• **FRAMEWORK ON INSURANCE PRODUCTS**

In order for consumers to have access to sufficient information on insurance products, a framework developed by Bank Negara Malaysia will be implemented in January 2010. ☞

• **GENDER DISCRIMINATION LAWS**

It has been reported that the government will continue to review laws that perpetuate gender discrimination. ☞

• **I AM SAM**

In a re-branding exercise, the International Shipowners' Association will now be known as the Shipping Association of Malaysia (SAM). ☞

• **JUDGE AND EXECUTIONER?**

On 26 June 2009, a sessions judge caused a stir when he ruled that he would personally carry out the caning sentence he imposed on a 20-year-old who had pleaded guilty to armed robbery. In setting aside the decision, the High Court judge said that although the sentence itself was not illegal, the judge was not allowed to execute it himself. ☞

• **LLP TO DEBUT?**

The Limited Liability Partnership (LLP) concept of business vehicle is expected to be introduced in Malaysia. One of the main criteria of the LLP is that it will limit the liability of partners up to the capital contributed by them. This will be one of the departures from the conventional partnership. ☞

- **MINIMUM WAGE ANNOUNCEMENT SOON** A minimum wage is expected to be announced soon by the government. Employees who will benefit from the minimum wage policy include those from the following sectors, namely, hospitality, textile, electronic and safety. ❧
- **NO INTERNET CENSORSHIP BUT...** Although the Government will not censor the Internet, those who violate the laws will have to face the consequences. ❧
- **OUT WITH THE OLD** Several statutes considered to be outdated and archaic will be reviewed soon. This task has been assigned to a special committee which has been set up under the Prime Minister's department. ❧
- **PARK AT OUR RISK!** In April 2009, the Magistrate's Court awarded a lawyer RM1,668 for the loss incurred as a result of theft of items from his car at a parking lot. The parking lot operator was held liable despite the ubiquitous sign "Park At Your Own Risk". The decision has been described by FOMCA as a landmark decision. ❧
- **PRACTICE NOTE 1.2 DELETED** Practice Note 1.2 of the Malaysian Code on Take-Overs and Mergers 1998 (the Code) has been deleted with effect from 16 July 2009. The implication of this deletion is that an acquirer who has obtained control in a private company will no longer be subjected to the takeover provisions of the Code. ❧
- **PEOPLE'S ASSOCIATION ACT** To strengthen the unity among people, the government is contemplating enacting a law akin to Singapore's People's Association Act. The People's Association Act of Singapore came into force in July 1960, with the aim of building social cohesion and fostering interactions among the people. ❧
- **PUPILS IN POLITICS?** Amendments to the Private Higher Education Bill will be made to enable students in private institutions of higher learning to dabble in politics. The Amendment Bill was tabled for second reading in March 2009. ❧
- **SBLNT INTRODUCED** The Securities Borrowing and Lending Negotiated Transactions (SBLNT) was introduced in August 2009 by the Securities Commission and Bursa Malaysia. This is a model that will offer an option to borrow and lend on an over-the-counter basis. The current Securities Borrowing and Lending Central Lending Agency and the new SBLNT will operate concurrently. ❧
- **SECTION 233 OF THE CMA INVOKED!** A bank employee was charged under section 233 of the Communications & Multimedia Act 1998 (CMA) for posting obscene content on a weblog site in an attempt to embarrass his former boss. Section 233 of the CMA deals with the improper use of network facilities or network service. ❧
- **TENANT V LANDLORD** It was held by the Court of Appeal that a house tenant is allowed to sue his landlord for defamation. This arose from a dispute where the landlord, who is residing in Australia, sent his tenant a notice, claiming outstanding rental and breach of the terms of the tenancy agreement. ❧

FOREIGN FLASH

- ANTI-CYBER BULLYING PROJECT LAUNCHED** In light of the rampancy of cyber bullying, the Australian Government has decided to launch a project aimed at addressing this menace. The project is expected to cost AUD3 million.
- CANADIAN COURT RULES ON HYPERLINKING** The Supreme Court of British Columbia in *Crookes v Wikimedia Foundation Inc.* ruled that providing a hyperlink to a website containing defamatory material does not constitute defamation as long as the hyperlink is not provided for the purpose of endorsing such material.
- TO CATCH A (DOMAIN NAME) THIEF** The world's first criminal arrest has been made of domain name theft suspect, 25-year-old Daniel Goncalves for allegedly stealing the P2P.com domain name. The development of this case is being followed as it will be a landmark judgment in determining whether the concept of 'property' may be extended to encompass domain names.
- IS A SEARCH ENGINE A PUBLISHER?** In the recent case of *Metropolitan International Schools Ltd v Designtechnica Corporation & Others* involving defamation, it was held that an Internet search engine is not a publisher.
- SINGAPORE TO LIBERALISE FURTHER?** Singapore may allow more foreign law firms to practise local corporate law if the economic climate is favourable. This appears to be a sequel to the award of licences to the six foreign law firms in December 2008.

BRIEFING...

LEGAL PROFESSION

JUDGES JUDGED! The much talked-about Judges' Code of Ethics 2009 has finally come into force on 1 July 2009.

In this article, we examine several aspects of the Code of Ethics and whether it is viable.

GENERAL CONDUCT The Judges' Code of Ethics (the Code), which applies to judges throughout their period of service, is intended to set the basic standards to govern the conduct of all judges and to provide guidance to judges in setting and maintaining high standards of personal and judicial conduct.

Paragraph 5 of the Code provides that judges must uphold the dignity and independence of the judiciary. Judges must exercise their judicial functions independently by assessing the facts and in accordance with the law. In doing so, they must remain free from any extraneous influence, inducement, pressure, threat or interference, direct or indirect from any quarter or for any reason. This is further elaborated in paragraph 6 of the Code whereby a judge should not allow any relationship to influence his judicial conduct or judgment; lend the prestige of his judicial office to advance his other private interest; and create the impression that they are in a position to exercise influence. Judges must therefore act in a manner that promotes the integrity and independence of the judiciary.

JUDICIAL CONDUCT Paragraph 7 of the Code sets out the requirement of performing judicial duties fairly and efficiently. Among others, it states that a judge should not participate in the determination of a case which involves any member of that judge's

family. Judges are also required to diligently hear and complete cases and promptly write judgments. Conduct which is not befitting of a judge and brings disrepute to his office is also prohibited.

The Code also aims to ensure that judges minimise the risk of conflict between their judicial obligations and extra-judicial activities they may be involved in. In order to achieve this, judges are required to avoid close association with individual members of the legal profession, especially those who frequently appear before him. This is because such an association may give rise to an appearance of favouritism. Judges are also prohibited from participating in any political activity or involvement as this may create the impression that a judge is engaged in politics. However, the Code does not prohibit a judge from giving lectures, teaching or participating in activities concerning the law, the judicial system, the administration of justice and other related matters subject to the written approval of the Chief Justice.

Judges ought to be more leaned than witty, more reverent than plausible, and more advised than confident. Above all things, integrity is their portion and proper virtue. – Francis Bacon

CONFLICT OF INTEREST A judge must also refrain from being engaged in financial or business dealings which may impair the performance of his duties or reflect adversely on his impartiality. If a judge is to receive compensation or reimbursement for his extra-judicial activities permitted by the Code, he cannot be paid more than what would ordinarily be paid to a person who is not a judge.

Further requirements are the declaration of assets and the cessation of ties with the firm where the judge was practising as an advocate and solicitor prior to his appointment as a judge.

With regard to the latter, a judge must relinquish all interests in the firm, ensure that he does not have any dealing with the firm or with persons from the firm and ensure that his name is removed from the firm's list of solicitors.

DISCIPLINARY PROCEEDINGS If a judge commits a breach of any of the provisions of the Code, he may be subject to disciplinary proceedings. Part IV of the Code addresses the procedure in addressing complaints. Where a complaint is received by the Chief Justice, two consequences follow. If the complaint lacks merit, the matter will be dismissed. If the complaint contains merit, the Chief Justice will have to determine whether the complaint should be addressed by a tribunal appointed under Article 125(4) of the Federal Constitution or whether it may be referred to the Judges' Ethics Committee (the Committee).

I have heard that a man might be his own lawyer, but you can't be your own judge. – Margaret Deland

If the Chief Justice is of the opinion that the complaint should be dealt with by the Committee, the judge complained of must be informed in writing of the facts relating to the alleged breach. He is also to be given an opportunity to make a written representation. Once the Committee has considered the judge's representation, it will then consider whether the complaint still has merit. If there is no merit, the complaint is dismissed. However, if the complaint still has merit, the judge will then be invited to appear before the Committee so that he may be heard. If the breach is proven, the Committee may impose either two of the sanctions provided in paragraph 16: the recording of an admonition to the judge or the suspension of the judge from his office for a period not more than one year. A judge who is subject to disciplinary proceedings is entitled to be represented by a lawyer. ✍️

CORPORATE LAW

LABUAN OFFSHORE FINANCIAL SERVICES AUTHORITY (AMENDMENT) ACT 2008

The Labuan Offshore Financial Services Authority (Amendment) Act 2008, which amended the Labuan Offshore Financial Services Authority Act 1996, came into force on 27 August 2008. The amendments were important to balance the need to protect the information of offshore institutions while at the same time maintaining Labuan's reputation as a credible international financial centre.

In this article, we examine some of the relevant amendments.

THE AMENDMENT ACT The Labuan Offshore Financial Services Authority (LOFSA) (Amendment) Act 2008 was gazetted on 27 August 2008 to amend the Labuan Offshore Financial Services Authority Act 1996 (the Act). The amendments were important to balance the need to protect the information of offshore institutions while at the same time maintaining Labuan's reputation as a credible international financial centre.

Besides being part of efforts to tighten offshore regulations in order to attract more investors to the financial and trading centre of Labuan, the amendments were also aimed at expanding the role of the local law enforcement authority's agencies and the local supervisory body.

DEFINITIONS Among the notable amendments were those made to section 28A of the Act whereby the definitions of "domestic law enforcement agency", "criminal offence" and "home supervisory authority" were amended and definitions of "financial institution" and "home monetary authority" were deleted. This effectively

expanded the local law enforcement authorities to include authorities such as the Securities Commission, Anti-Corruption Agency, Customs, Immigration and others tasked with the responsibility of enforcing the said law. The amendments would also allow the LOFSA to work with regulators from the international level, such as the International Monetary Fund and Financial Task Force, to carry out more supervision and monitoring of Labuan's offshore financial institution.

The issue of confidentiality and protection of information which is the core strength of an international financial centre will have to be balanced with the provision that enables LOFSA to have access to information on the institutions and their operations in Labuan. – Datuk Ahmad Husni Hanadzlah, Deputy Finance Minister I, Bernama - 29 January 2009

ACCESS TO INFORMATION Section 28B was also amended by substituting subsections (1), (2)(b), (4) and (5), and deleting subsection (3). The substitution of subsection (1) was done to enable the LOFSA to have access to information on the offshore financial institutions and their operations in Labuan; while subsection (2)(b) covers the provision to share information on offending financial institutions with any regulatory bodies. Subsection (5) was substituted after taking into account the suggestion made by the Asia Pacific Group on Money Laundering and the Offshore Group of Banking Supervisors, to allow the authority to disclose any information regarding the commission of fraud, money laundering offence, financing terrorism offence or any criminal offence by an offshore financial institution or a corporation related to the offshore financial institution or any person, to the home supervisory authority or domestic law enforcement agency.

ISSUING DIRECTIONS Subsection (5) of section 4 was also amended by inserting paragraph (d) to empower the LOFSA to issue directions to an offshore financial institution with problems, especially those failing to meet a regulation in respect of action to be taken by that offshore financial institution relating to its members or servants.

NON-DISCLOSURE Section 17A is a newly-incorporated section. Subsection (1) provides that a member, officer, servant, agent or consultant of the authority or any person who has by any means access to any record, book, register, correspondence, document, material or information, relating to the business and affairs of the LOFSA shall not disclose that information unless he is lawfully required to do so. Subsection (2) provides for the punishment to any person who contravenes subsection (1).

The last notable amendment was made to section 2 whereby the definition of "offshore financial services" was amended to also include any service provided by an exchange established under the Labuan Offshore Securities Industries Act 1998.

It is also intended to create a conducive environment for companies operating in the area. – Datuk Ahmad Husni Hanadzlah, Deputy Finance Minister I, Bernama - 29 January 2009

CONCLUSION With these amendments, it is hoped that it would create a more conducive environment for companies operating in Labuan. ✨

CYBER LAW

SEXUAL GROOMING... HAS IT REACHED OUR SHORES? The offence of sexual grooming may be unheard of in Malaysia but in Singapore, Australia and the UK, prosecution of such offence is gaining momentum as the authorities clamp down on Internet predators preying on child victims.

In this article, we examine the offence of sexual grooming and its implication in some of the countries where the law has already been put in place.

M logs onto an Internet chat room and starts chatting with a 13-year-old. After several encounters in the chat room, he asks the girl to meet with him at a parking lot with the intention of having sexual relations with her.

Without even engaging in any form of sexual conduct, M has committed the offence of sexual grooming.

WHAT IS SEXUAL GROOMING? Sexual grooming is an offence in countries such as the UK, Australia and Singapore. The offence is meant to capture the conduct of sexual predators at its early stage. In essence, sexual grooming refers to the deliberate conduct taken by an adult to form a trusting relationship with a child, with the intent of later having sexual contact with such child. The act of grooming a child sexually may include activities that are not illegal by themselves but later lead to sexual contact. Typically, this is done to gain the child's trust as well as the trust of those responsible for the child's well-being. Furthermore, research has shown that children are less likely to report a crime if it involves someone that he or she knows, trusts and cares about. Additionally, a trusting relationship with the family means that the child's parents will be less likely to believe any potential accusations.

Examples of grooming activities include taking an undue interest in someone's child; giving gifts or money to the child for no apparent reason; taking the child on outings, away from protective adults; talking about sexual topics that are not age-appropriate or even talking to the child about problems that would normally be discussed with adults.

RECENT CASES With the advancement of science and technology, Internet sexual grooming has become rampant. In the UK, several cases have been reported. The latest involves a woman who "groomed" a 15-year-old for six months by engaging in conversations about sex and sending her explicit messages. Sarah Wilson was sentenced to 20 months' imprisonment for the offence of sexual grooming.

In Australia, in the case of *R v Kennings*, a 25-year-old man had groomed what he thought to be a 13-year-old girl in a chat room by sending e-mails inviting her to engage in sexual activity. However, it was discovered that the 13-year-old was in fact a police officer pretending to be the child in question. The defendant was convicted.

In Singapore, the offence of sexual grooming is found in section 376E of the Singapore Penal Code, and the section reads:

(1) Any person of or above the age of 21 years (A) shall be guilty of an offence if having met or communicated with another person (B) on 2 or more previous occasions

(a) A intentionally meets B or travels with the intention of meeting B; and

(b) at the time of the acts referred to in paragraphs (a) (i) A intends to do anything to or in respect of B, during or after the meeting, which if done will involve the commission by A of a [relevant offence]; (ii) B is under 16 years of age; and (iii) A does not reasonably believe that B is of or above the age of 16 years

(2)

(3) For the purposes of this section, it is immaterial whether the 2 or more previous occasions of A having met or communicated with B referred to in subsection (1) took place in or outside Singapore.

In essence, the Singapore provision means that a person above 21 years commits the offence of sexual grooming if while harbouring the intention to commit a sexual offence with a minor, he intentionally meets or travels with the intention of meeting the minor. The accused must also have met or communicated with the minor on at least two prior occasions.

"That's the first protection, to try to catch this behaviour and stop it before a meeting and any risk of any sexual activity with the child takes place... Secondly there's the grooming offence ... committed at the moment the meeting takes place - you have to prove that they intended to commit a sexual offence with that child..." – UK Home Office Minister Hilary Benn, BBC News - 29 January 2003

PROVING SEXUAL GROOMING The main issue relating to the offence of sexual grooming is proving the offence. The gist of the offence is the intention to commit a sexual offence with the child. The question that arises therefore revolves around proving that particular intention. Focus has to be on the language employed by the alleged sexual predator. This means the evidence may be gathered from the Internet and chatroom transcripts. Although not an easy task, it is believed that the existence of the offence itself may make the predators think twice before grooming a minor. ☞

LAND LAW

LEGAL STATUS OF SQUATTERS IN MALAYSIA It was hoped that by 2005, Malaysia would achieve zero squatter occupation. This goal, however, has yet to be achieved. The existence of squatters in Malaysia can be seen, to a certain extent, to have affected the Malaysian image, especially in her effort to become a developed country. Therefore, serious efforts have been put in by the Federal Government as well as the State governments to address the issues affecting squatters without jeopardising the rights of the public.

SINCE TIME IMMEMORIAL... In Malaysia, several squatter settlements are as old as the cities. For example, in Kuala Lumpur itself, settlements such as Kampung Kerinchi and Kampung Puah have existed for more than 100 years. There are at least 40 reported cases addressing the legal rights of squatters in Malaysia. The squatters in Malaysia comprise several sectors of society – Malaysian citizens themselves and immigrants, both legal and otherwise.

SQUATTERS DEFINED 'Squatting' is the unilateral act of occupying land especially abandoned or unoccupied, which is not owned. More often than not, the claim made by squatters is based on the premise that they have occupied the land for a long period of time, without any objection from the owner concerned.

SQUATTER V ADVERSE POSSESSION To some, 'squatting' is also known as adverse possession. It must be noted, however, that adverse possession, which is a common law concept, is a process by which the title of another is acquired. Squatters, however, have no rights whatsoever under the law. In fact, the National Land Code 1965 (NLC) makes the position of squatters rather clear.

SECTION 48 Section 48 of the NLC states that there can be no adverse possession against the State. This particular provision is vital as this means that there is no room for any person to claim that they have been in possession of a state land for a number of years, thus has the right to require State Authority to alienate the land to them.

SECTION 40 According to section 40 of the NLC, only the State Authority has the power to alienate land in Malaysia and that any person occupying land without the consent of the land owner shall be construed as illegally occupying the land. Hence, it can be seen that squatters shall be penalised for occupying a land without consent of the owner of the land.

CASE LAW There are several cases decided previously in Malaysia regarding squatters and their legal status. In the landmark decision of *Sidek v The State Government of Perak* [1], it was decided that there is no right in law or in equity for squatters who occupy the land without the consent of the owner. This decision, by Sultan Azlan Shah, CJ, was subsequently followed in several cases, such as *Chong Wooi Leong & Ors v Lebbey Sdn Bhd* (No 2) [2] and *Murni Sdn Bhd v Ahmad Amirudin bin Kamarudin & 3 Ors* [3]. In these cases, the

¹ [1982] 1 MLJ 313

² [1998] 3 CLJ 685

³ [2000] 4 AMR 4092

court ruled that the alienation of a land can only be carried out according to procedure provided for in the NLC. Hence, mere occupation on the land over a period of time, without having the legal ownership over the land, would not suffice for such land to be alienated to the occupant.

KAMPUNG BUAH PALA Kg Buah Pala, Penang was a land that was occupied by settlers for more than 200 years. The village was originally occupied by those who worked at a British-owned plantation. After the planters left the land, the settlers, based on a trust administered by the colonial administration, inhabited the village. After independence, however, the land was converted to temporary occupational licence (TOL).

The recent controversy regarding Kg Buah Pala is due to the land owners' intention to build apartments on the land, which will inevitably lead to the demolition of the village.

The situation appeared to take a heated slant after the Federal Court issued an order in June 2009, for the families to vacate the 2.6 hectare land. After several appearances on various other applications and claims, the residents of Kg Buah Pala found themselves back in the Federal Court in August 2009, and on 21 August 2009, it was decided that the residents must vacate the land and hand it over to the developer who had obtained approval to redevelop the area.

CONCLUSION It is clear that under Malaysian law, squatters do not have legal rights over a land which has been occupied without the consent of the land owner. Therefore, in order to achieve a zero squatter occupation, all parties including media and NGOs have to embark upon the problem in all aspects as prevention is better than cure. 🧩



At Sin Sin's farewell party
From left – *Farah Shuhadah Razali; Nik Azli Abu Zahar; Boo Sin Sin; Raja Kumar Raja Kandan and Irene Lim Pei Ling*



At the KPUM-TUC Legal Career Fair at Taylors' University College, Subang Jaya
Front row from left – *Joe Teoh; Mohd Salehuddin Mohd Salleh and Muhammad Zayd Bohorudin*
Back row from left – *Janice Wong; Rofitah Ahmad Fuad; Teoh Alvare; Joanne Ching and Irene Arikisamy*
Standing – *Dazrin Mohd Darbi*



Aaron Olivie Kebah, from the Agathians Shelter, the winner of the "CIUM" competition held to showcase the best artwork for the Deepavali greeting card.


BRIEF-CASE...

INTELLECTUAL PROPERTY – Passing off – Whether McCurry Restaurant passing off as McDonald's

MCCURRY RESTAURANT (KL) SDN BHD V MCDONALD'S CORPORATION
[2009] 3 CLJ 540, Court of Appeal

FACTS The respondent/ plaintiff is McDonald's, a fast-food outlet whereas the appellant/ defendant, McCurry Restaurant offers Indian and other Malaysian cuisine. The appellant does not serve any kind of food available at the respondent's outlets.

ISSUE The issue for consideration was whether the appellant had represented his business to be that of the respondent's.

HELD In allowing the appeal, it was held that the appellant was not liable for passing off for the following reasons, namely that: (a) the appellant's get-up was distinctively different from that of the respondent's; (b) the items of food available at the respondent's outlets are very different from that served at the appellant's sole outlet; and (c) the type of customers who patronise the appellant's outlet is very different from those who patronise the respondent's several outlets. 


(Following this Court of Appeal decision, the respondent applied for leave to appeal to the Federal Court. On 8 September 2009, the Federal Court dismissed the respondent's application and held that the questions posed by the respondent were unclear and not properly framed. The Federal Court also ordered the respondent to pay RM10,000 cost to the appellant.)

CONSTITUTIONAL LAW – Validity of appointment of Menteri Besar by Sultan of Perak – Constitution of Perak, article 16

DATO' DR ZAMBRY BIN ABD KADIR V DATO' SERI NIZAR BIN JAMALUDDIN
[2009] Court of Appeal

FACTS The events that started the political upheaval in Perak were the resignations of three assemblymen of the Perak State Assembly. They had written to the Sultan of Perak stating the following, that: (a) they were leaving their respective political parties, PKR and DAP; (b) they had lost confidence in the respondent as the Menteri Besar; and (c) they had now supported Barisan Nasional. After several meetings with the respective parties, the Sultan of Perak invoked His Royal Highness's powers under article 16(6) of the Perak State Constitution, ordering that the respondent and his Executive Council resign, failing which the post of the Menteri Besar and the Executive Council would deem to be vacant. The High Court declared that the respondent was at all times and is the Menteri Besar of Perak. The appellant now appeals.

ISSUE Whether the Sultan of Perak was entitled to declare the position of Menteri Besar vacant.

HELD In allowing the appeal, it was held by the Court of Appeal that article 16(6) of the Perak Constitution requires the Menteri Besar to tender the resignation of the Executive Council if he ceases to command the confidence of the majority of the members of the Legislative Assembly. There is no option for the Menteri Besar who does not command the confidence of the majority of the members of the Legislative Assembly to remain in office. Furthermore, based on article 8(2)(a), His Royal Highness has the right to appoint an individual who has the command or support of the majority. 

LEGAL PROFESSION – Disqualification of lawyer – Whether situation of conflict arose

MIRZA MOHAMED TARIQ BEG MIRZA HH BEG V MARGARET LOW SAW LUI & ORS [2009] 4 CLJ 303, Court of Appeal

FACTS This is an appeal by the plaintiff/appellant against the decision of the High Court in granting the defendant's application to disqualify one Ms Renu Zechariah (RZ) from acting for the plaintiff in a suit against the defendant. The defendant's application was based on the claim that RZ had attended a company (seventh defendant) meeting. The plaintiff and the first to sixth defendants were directors and shareholders of the company. The defendants claimed that RZ attended the meeting in her capacity as solicitor for the company, and was therefore in a situation of conflict of interest if she was to continue to represent the plaintiff in the suit, as she was privy to the confidential information disclosed at the meeting. The plaintiff claimed that RZ attended that meeting in her capacity as solicitor for the plaintiff.

ISSUE Whether RZ should be disqualified from representing the plaintiff in the suit.

HELD In allowing the appeal, it was held that there was no evidence to show that RZ had ever acted for the company. In fact, based on the facts, RZ was acting for the plaintiff when she attended the meeting. In any event, there was nothing confidential about the minutes of the meeting and even if RZ was not present at the meeting, there was nothing to stop the plaintiff from revealing the contents of the minutes to RZ for the purposes of preparing the plaintiff's case against the defendant. ❧

LEGAL PROFESSION – Disqualification of lawyer – Whether situation of conflict arose

QUAH POH KEAT & ORS V RANJIT SINGH TARAM SINGH [2009] 4 CLJ 316, Court of Appeal

FACTS This is an appeal by the defendants/appellants against the decision of the High Court in granting the respondent's application to disqualify the firm of solicitors Lee Hishamuddin Allen & Gledhill (LHAG) from acting for the appellants. The respondent, who was a partner in KPMG, instituted an action against the 27 appellants (also partners in KPMG), claiming that he was unfairly excluded from the partnership. The exclusion was based on allegations of rape and sexual misconduct by a female employee against him. Two solicitors from LHAG were involved in the processes leading to the respondent's exclusion from the partnership. The respondent claimed that on that basis, the solicitors could not act for the appellants in this action by the respondent, as those solicitors were potential witnesses to his exclusion.


HELD In dismissing the appeal, it was held that since the respondent was denying the allegations of sexual misconduct in his action against the appellant, the solicitors for the appellants who were involved in the processes leading to his dismissal were potential witnesses and were thus in a position of conflict. ❧

LEGAL PROFESSION – Right of audience of advocates from Peninsular Malaysia and Sabah and Sarawak to appear as counsel in appeal arising from a matter originating from the High Court in Sabah and Sarawak which is to be heard by the Court of Appeal sitting in Putrajaya

DATUK HAJI MOHAMMAD TUFAIL MAHMUD & ORS V DATO' TING CHECK SII [2009] 4 CLJ 449, Federal Court

FACTS In an appeal against the decision of the High Court in Sarawak, which was heard at the Court of Appeal sitting at Putrajaya, the appellant had raised a preliminary objection to Mr. Tommy Thomas, an advocate of the High Court in Malaya, from representing the respondent.

ISSUES The issues for consideration were: (a) whether an advocate and solicitor from Peninsular Malaysia is entitled to appear as counsel in an appeal which is to be heard in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching; and (b) whether an advocate and solicitor from Sarawak is entitled to appear as counsel in an appeal which is to be heard in Putrajaya arising from a matter originating from the High Court in Sarawak and Sabah at Kuching.

HELD In allowing the appeal, the Federal Court held that since advocates from Sarawak still retained their exclusive right to represent cases arising from the courts in Sarawak, advocates from Peninsular Malaysia were not allowed to assert their right of audience to appear in cases originating from Sarawak that are heard outside of Sarawak, as the application of the Legal Profession Act 1976 (LPA) was limited by section 2 of the same Act, which requires a modification order by the Yang di-Pertuan Agong. Since no such order has been made or published in the Gazette to date, the LPA remains inapplicable in those two states. 

BRIEF-UP...

**GUIDELINES/RULES/
PRACTICE NOTES ISSUED BETWEEN
JULY AND SEPTEMBER 2009
BY BANK NEGARA MALAYSIA/
BURSA MALAYSIA SECURITIES BHD/
SECURITIES COMMISSION**

BANK NEGARA MALAYSIA (BNM)

- *BNM Guidelines & Circulars Listing – In relation to Shariah – Shariah Parameter Reference 1: Murabahah – Guidelines and FAQs* – Updated: 3 September 2009
- *BNM Guidelines & Circulars Listing – In relation to Banking on Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel I – Risk-Weighted Assets Computation)* – Updated: 24 July 2009
- *BNM Guidelines & Circulars Listing – In relation to Banking on Capital Adequacy – Capital Adequacy Framework for Islamic Banks* – Updated: 24 July 2009
- *BNM Guidelines & Circulars Listing – In relation to Banking on Capital Adequacy – Risk-Weighted Capital Adequacy Framework (Basel II – Risk-Weighted Assets Computation)* – Updated: 27 July 2009
- *BNM Guidelines & Circulars Listing – In relation to Banking on Prudential Limits & Standards – Statutory Reserve Requirement* – Updated: 1 July 2009
- *BNM Guidelines & Circulars Listing – In relation to Development Financial Institutions on Prudential Limits & Standards – Guidelines on Best Practices for the Management of Credit Risk for Development Financial Institutions* – Updated: 27 July 2009

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- *Consolidated Q&A in relation to Main Market Listing Requirements* – Date Issued: 3 August 2009
- *Consolidated Q&A in relation to ACE Market Listing Requirements* – Date Issued: 3 August 2009

SECURITIES COMMISSION (SC)

- *Malaysian Code on Take-overs & Mergers 1998 – Deletion of Practice Note 1.2* – Date Issued: 16 July 2009
- *Equity Guidelines (UPDATED) and FAQs (UPDATED) – (Supersedes the Guidelines on the Offering of Equity & Equity-Linked Securities, issued on 1 February 2008)* – Date Issued: 8 May 2009; Updated / Effective Date: 3 August 2009
- *Asset Valuation Guidelines [UPDATED] and FAQs [UPDATED] – (Replacing the Guidelines on Asset Valuation, issued on 1 May 2003 and all guidance notes issued pursuant to that)* – Date Issued: 8 May 2009; Updated / Effective Date: 3 August 2009
- *Principal Adviser Guidelines [UPDATED] and FAQs [UPDATED] – (Replacing the Guidelines on Principal Advisers for Corporate Proposals issued on 1 February 2008)* – Date Issued: 8 May 2009; Updated / Effective Date: 3 August 2009
- *Prospectus Guidelines [UPDATED] and FAQs [UPDATED]* – Effective Date: 3 August 2009 (Except for Prospectus Guidelines on Structured Warrants, which came into effect on 9 May 2009)
- *Securities Borrowing & Lending Guidelines (replacing the Guidelines on Securities Borrowing & Lending in Malaysia, issued in December 1995) – Securities Borrowing & Lending Model Enhanced For More Flexibility: Introduction of Securities Borrowing & Lending Negotiated Transactions (SBLNT)* – Updated: 4 August 2009; Effective Date: 17 August 2009
- *Registration of Shariah Advisers Guidelines and FAQs* – Date Issued / Effective Date: 10 August 2009

ZRp IN-BRIEF...

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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BRIEF-TAKE...

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Upon joining **ZUL RAFIQUE & partners**, Rahman was kept busy with his involvement in the study on the development of the water services industry in Malaysia, where he not only conducted a review and assessment of the issues, challenges and problems faced by the water and sewerage industry, he also assisted in the drafting of the Constitutional Amendment Act 2005, the Water Services Industry Bill and the National Water Services Commission Bill.

ZUL RAFIQUE & partners would like to congratulate Rahman on his promotion to partnership on 1 July 2009.

THAYANANTHAN BASKARAN (Thaya) was admitted to the Malaysian Bar in 2000. A graduate of King's College (University of London), Thaya also holds a diploma in Investment Analysis from the Royal Melbourne Institute of Technology.

Thaya joined **ZUL RAFIQUE & partners** in 2001 and was promoted to partnership on 1 July 2009.

Thaya specialises in several aspects of construction law, from drafting to dispute resolution. His draftsmanship and advisory extend to projects that included the construction of the Kuala Lumpur Convention Centre, the Light Rail Transit project in Kuala Lumpur and the first Penang Bridge.

From Malaysia to Mumbai, Thaya has also acted as counsel in several dispute resolution matters.

Although inundated with work, Thaya manages to de-stress by exercising. He swims and cycles on a regular basis.



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ZUL RAFIQUE & partners would like to congratulate Thaya on his promotion to partnership. 🎉