the ZRp brief

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ZUL RAFIQUE *& partners* is named ***Malaysia Deal Firm of the Year 2013***
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ZUL RAFIQUE *& partners*

A BRIEF NOTE...
by Dato' Zulkifly Rafique

Of accolades and achievements...

This quarter has been yet another eventful one.

In May 2013, we were declared *Malaysia Deal Firm of the Year* by the *Asian Legal Business*.

The firm's deals that made it into the final list are the *Astro Malaysia IPO, Abu Dhabi National Energy Company Sukuk Murabahah Program, Itochu Corp Acquisition of Dole Food* and the *SapuraCrest Petroleum-Kencana Petroleum Merger*.

In June 2013, we were once again declared *Employer of Choice* by the *Asian Legal Business*. This is our fifth consecutive win since 2009.

In July 2013, we were named an *ASIAN-MENA COUNSEL In-House Community Firm of the Year* in the areas of Employment Law, Litigation and Dispute Resolution, Projects and Project Financing and Real Estate & Construction.

I would like to thank everyone who made this possible.

On a separate note, special mention is to be made of S Nantha Balan (former partner) and Abdul Rahman Redza. Mr Balan, who is now Yang Arif Tuan S Nantha Balan, has been appointed Judicial Commissioner of the High Court of Penang while Abdul Rahman Redza achieved a personal victory when he won the Linggi seat at the General Elections 2013.

My best wishes to both of them in their future undertakings.

in this issue...

IN BRIEF...

- **APPEALS COURT RULES IN FAVOUR OF TNB** The Court of Appeal set aside a High Court decision in favour of Tenaga Nasional Berhad (TNB) against Irham Niaga Sdn Bhd (INSB) and Irham Niaga Logistik Sdn Bhd (INLSB). The matter involved the termination of a rental agreement by TNB Transmission Network Sdn Bhd (TNBT), a wholly owned subsidiary of TNB. INSB and INLSB have a month to appeal to the Federal Court. Tan Sri Dato' Cecil Abraham and Natalia Izra Nasaruddin from ZUL RAFIQUE *& partners* represented TNB.

- **EFFORTS TO CURB HOUSEHOLD DEBT** Bank Negara Malaysia ('BNM') has implemented new measures to curb household debt including limiting the maximum tenure of personal loans and property financing to 10 and 35 years respectively. The new measures apply to all financial institutions regulated by BNM and credit cooperatives regulated by Suruhanjaya Koperasi Malaysia, Malaysia Building Society Bhd and Aeon Credit Services (M) Bhd.

- **FINANCIAL SERVICES ACT AND ISLAMIC FINANCIAL SERVICES ACT COME INTO FORCE** The Financial Services Act 2013 and Islamic Financial Services Act 2013 have come into force on 30 June 2013. With the coming into force of these two statutes, the following Acts have been repealed, namely, the Banking and Financial Institutions Act 1989, Exchange Control Act 1953, Insurance Act 1996, Payment Systems Act 2003, Islamic Banking Act 1983 and Takaful Act 1984.

- **KLRCA'S EFFORTS IN IMPROVING ITS SERVICES** The Kuala Lumpur Regional Centre for Arbitration (KLRCA) aims to arbitrate 250 cases per year by 2016. This is in light of its efforts to promote Malaysia as the preferred alternative dispute resolution centre in the region.

- **LANDMARK RULING ON MISFEASANCE OF PUBLIC OFFICE** The High Court, in a landmark ruling on 26 June 2013, found the Government liable for the death of one Kugan Ananthan, a suspected car thief who died in police custody in 2009. The family of Kugan brought the action against the Government and was awarded damages of more than MYR800,000.

- **LANDMARK RULING ON GENDER DISCRIMINATION UPHELD** A landmark ruling of the High Court has been upheld following the Government's decision to withdraw its appeal. The ruling, which was made in 2011, declared unconstitutional the decision of Hulu Langat district education officer, for withdrawing an offer for the position as a teacher, on the basis that the applicant was pregnant.

- **MEDIATION BY MCMC** The Malaysian Communications and Multimedia Commission has been asked to mediate an Internet-related spat between a Canadian man and Malaysian woman. The Malaysian woman was cited for contempt for violating a court order which ordered her to refrain from posting defamatory comments about the Canadian.

- **MINISTRY RENAMED** The Ministry of Information, Communications and Culture is now the Communications and Multimedia Ministry. Datuk Seri Ahmad Shabery Cheek is the Minister whilst his Deputy is Datuk Jailani Johari.

- **WHEN PINK IS THE NEW WHITE** The Federal Court, in a landmark decision, held that pink forms allotted in initial public offerings (IPOs) are subject to the terms of the form and prospectus. They are no longer a guarantee of offer of shares but instead, are merely an invitation to treat.

AROUND THE WORLD... IN BRIEF

- **A BOOST FOR CORPORATE COUNSEL** The Association of Corporate Counsel (ACC), a US based legal organisation has set up a Chapter in Singapore. The Singapore Chapter is ACC's 55th, and the second such body for in-house lawyers in Singapore, the first being Singapore's own SCCA (Singapore Corporate Counsel Association) which was set up in 2002.

- **CHINA TO 'HONOUR THY FATHER AND MOTHER'** *The Law of the People's Republic of China on the Protection of the Rights and Interests of Elderly People* will make it an obligation in China for adult children to visit their ageing parents. Although it has been criticised, the law came into force on 1 July 2013.

- **INTERNATIONAL CHILD ABDUCTION ACT** Based on the International Child Abduction Act, the High Court of Singapore has dismissed an appeal from a Singaporean woman to keep her son in Singapore citing failure to establish exposure to 'grave risk' upon the son's return to Germany. The dispute arose when the woman claimed difficulties settling in Germany and differences between her husband and in-laws.

- **HUMAN DNA NOT PATENTABLE** In quashing patents held by an American firm, the United States Supreme Court ruled that human genes cannot be patented. The suit was brought by the American Civil Liberties Union against Myriad Genetics, a company based in Salt Lake City.

- **JAKARTA TO RATIFY ASEAN HAZE PACT?** Indonesia, in its efforts to combat the haze pollution, has begun preparations to ratify the 2002 *ASEAN Agreement on Transboundary Haze Pollution* after it came under fire in the recent open burning in Riau which caused the problem to escalate. The ratification is currently pending agreements from the affected ministers before it is submitted to Parliament.

- **LANDMARK RULING ON INJURY CLAIMS** The Singapore Court of Appeal, in a recent decision, held that an engineer, who was injured whilst trespassing a shipyard, was able to claim damages for negligence. The landmark ruling now places all injury claims under the law of negligence instead of the previous occupier's liability.

- **NEW RULES FOR SINGAPORE WEBSITES AND BLOGS** The Media Development Authority of Singapore has announced that with effect from 1 June 2013, sites which put up Singapore news regularly with at least 50,000 unique visitors from Singapore every month, have to apply for an individual licence and put up a SGD50,000 bond.

- **SINGAPORE ANTI-GAY LAWS UPHELD** A legal claim by a gay couple on the constitutionality of section 377A of the Singapore Penal Code which prohibits sexual acts amongst men, was dismissed by Singapore's High Court. The High Court, in reaching its decision, took into consideration the social norms within the country. An appeal has been filed against this decision.

- **TEMPLE DISPUTE TO BE HEARD AT ICJ** The dispute between Thailand and Cambodia regarding the *Preah Vihear* temple will be heard at the International Court of Justice. Although Thailand is not disputing ownership of the temple itself, it is claiming an adjacent 4.6 square km patch of land.

BRIEFING...

CIVIL PROCEDURE

THE WONG KIN HOONG CASE... AN ANALYSIS On 20 May 2013, the Federal Court ruled on the validity of the decision of the Director General of the Department of Environment in approving the Environmental Impact Assessment Report by Raub Australian Goldmining Sdn Bhd in respect of a Carbon-In-Leach plant near Kampung Bukit Koman.

In this article we analyse the judgment of the Federal Court in *Wong Kin Hoong & Anor (suing for themselves and on behalf all of the residents of Kampung Bukit Koman Raub Pahang) v Ketua Pengarah Jabatan Alam Sekitar & Anor*[1] .

THE HISTORY Raub Australian Gold Mining Sdn Bhd ('RAGM') was granted mining rights, under a lease, in order to process old gold mine tailing. At that time, RAGM was in the midst of building a Carbon-in-Leach Plant ('CIL Plant') near Kampung Bukit Koman, Raub.

THE TIMELINES The following outlines the chronology of events:

13 January 1997 (the first decision) – The Director General of the Department of Environment (the first respondent) approves an Environmental Impact Assessment ('EIA') report submitted to it by RAGM (the second respondent). However, the residents and owners of properties in Kampung Bukit Koman (the appellants) allege that the EIA is not in compliance with section 34A[2] of the Environmental Quality Act 1974 (the 'EQA'). The appellants then apply to the first respondent to require the second respondent to submit to it a detailed EIA of the CIL plant.

21 February 2008 (the second decision) – The first respondent informed the appellants that the EIA was approved on 13 January 1997.

21 March 2008 – An application for leave is made to the High Court for judicial review seeking to quash the first decision, and for a declaration that the second decision is unfair, unreasonable, goes against the principles of natural justice and violates their human rights.

An application is also made for an extension of time for leave in respect of the first decision since the said application was filed beyond the specified time frame of 40 days under Order 53 rule 3 of the Rules of the High Court 1980[3] (the RHC 1980).

THE HIGH COURT On 1 June 2009, the High Court dismissed the application on the ground of inordinate delay, as the filing of the application was made more than 11 years after the first decision. The High Court further held that the second decision was also not capable of judicial review, and therefore the merits of the case need not be considered in the hearing of the application for an extension of time.

The appellants appealed to the Court of Appeal

THE COURT OF APPEAL On 3 August 2011, the Court of Appeal, in dismissing the appeal, unanimously affirmed the decision of the High Court.

1 [2013] MLJU 412

2 Section 34A deals with *Report on impact on environment resulting from prescribed activities*.

3 This provision is now in Order 53 rule 3 of the Rules of Court 2012.

THE FEDERAL COURT Following the decision of the Court of Appeal, the appellants appealed to the Federal Court. On 11 January, leave was granted to the appellants to determine the following question of law, namely whether a court is required to consider the merits of the case when hearing an application for an extension of time to file the said leave application.

Encik Malik Imtiaz, counsel for the appellants, argued that the amendment made to Order 53 rule 3(6)[4] of the RHC 1980, in effect, allows the court to consider the merits of the case in an application for an extension of time.

On behalf of the second respondent, Tan Sri Dato' Cecil Abraham submitted that in 2000, amendments were made to Order 53 of the RHC 1980 to extend the time limit within which an applicant may file an application for leave. The amendment, however, did not provide for consideration of the merits of the case in an application for an extension of time.

THE ANALYSIS The Federal Court reiterated that the procedure for judicial review under Order 53 of the RHC 1980 is a two-stage process whereby the first stage concerns the leave application, while the second stage concerns the hearing of the substantive application argument on its merits, should leave be granted. Order 53 rule 1A[5] of the RHC governed the procedure for leave for judicial review prior to the amendment in 2000 but was later replaced with Order 53 rule 3(6) of the RHC 1980. The purpose of the amendment was to increase the time limit, for the filing of leave applications, from 6 weeks to 40 days[6].

The court has the discretion to grant an extension of time if there is good reason for doing so. The Federal Court held that the appellate court rarely interferes with the exercise of the discretion of the lower court, unless the discretion was wrongly exercised.

The approach adopted by the Malaysian Courts on the issue of delay has been consistent.

THE CONCLUSION The decision in the *Wong Kin Hoong Case* reiterates the law that the court will not consider the merits of a case at the leave stage. This decision has important implications in the future of judicial review applications in Malaysia.

Tan Sri Dato' Cecil Abraham, Sunil Abraham and Farah Shuhadah Razali from **ZUL RAFIQUE** *& partners* represented the second respondent, Raub Australian Goldmining Sdn Bhd.

4 'An application for judicial review shall be made promptly and in any event within 40 days from the date when the grounds for the application first arose or when the decision is first communicated to the applicant provided that the court may, upon application and if it considers that there is a good reason for doing so, extend the period of 40 days.'

5 'Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, conviction or other proceedings for the purpose of its being quashed, unless the application for leave is made within weeks after the date of the proceedings or such other period (if any) as may be prescribed by any enactment or, except where a period is so prescribed, the delay is accounted for to the satisfaction of the Court or Judge to whom the application for leave is made and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the Court or judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.'

6 This provision is now found in the Rules of Court 2012 where the time frame is extended to 3 months.

CYBER LAW

THINK BEFORE YOU TYPE... Section 233 of the Communications and Multimedia Act 1998 addresses improper use of network facilities and network service. It provides, amongst others, for the creation or transmission of obscene or offensive communication, which is intended to annoy, abuse or threaten another.

The case of *PP v Rutinin Suhaimin*[7] illustrates the application and extent of this section.

THE FACTS The accused was charged under section 233 of the Communications & Multimedia Act 1998 ('the CMA') for posting an offensive remark regarding the Sultan of Perak. The prosecution adduced circumstantial evidence to show that the Internet Protocol address together with the Internet account and Media Access Control address of the computer used belonged to the accused. The accused was acquitted in the Sessions Court on the ground that there had been a break in the chain of evidence when the computer was transported from the Kota Kinabalu Airport to the Kuala Lumpur International Airport. The prosecution appealed.

THE SECTION Section 233 reads:

A person who -

(a) by means of any network facilities or network service or applications service knowingly —

(i) makes, creates or solicits; and

(ii) initiates the transmission of,

any comment, request, suggestion or other communication which is obscene, indecent, false, menacing or offensive in character with intent to annoy, abuse, threaten or harass another person; or

b) initiates a communication using any applications service, whether continuously, repeatedly or otherwise, during which communication may or may not ensue, with or without disclosing his identity and with intent to annoy, abuse, threaten or harass any person at any number or electronic address, commits an offence.

ISSUE The issues before the High Court were (i) whether there had been a break in the chain of evidence; and (ii) whether the communication was made 'with intent to annoy, abuse, threaten or harass any person' pursuant to section 233 of the CMA.

HELD In allowing the appeal and ordering for the defence to be called, the court held that the communication was made from the computer and Internet account of the accused. There was no break in the chain of evidence as there was no necessity for the computer seized to remain in sight of the Investigating Officer at all times. Since the posting had the tendency to cause annoyance or abuse to any person, the intention of the accused was, therefore, proved through inferential evidence. There was no necessity to prove that the victim actually felt annoyed or abused.

AN ANALYSIS Unlike defamatory and seditious publications, statements that are obscene, indecent, false, menacing or offensive may encompass a wide scope as such adjectives are not defined. To compound the effect of section 233 of the CMA, it is not necessary to prove that the victim actually felt annoyed or abused. Although most of the cases prosecuted under section 233 involved insults against royalty[8], the application of the section is not confined to a specific category of persons. Therefore, those who post their views and opinions, especially on social media platforms must be cautious of the nature of their comments before publishing them on the Internet.

7 [2013] 2 CLJ 427, HC

8 A similar case is *PP v Muslim Ahmad* [2013] 5 CLJ 822 where the respondent, Muslim bin Ahmad was convicted for an offence under the same provision of the CMA posting offensive comments on the Perak State Government Official Portal.

CIVIL PROCEDURE

RULE 137 OF THE RULES OF THE FEDERAL COURT On 22 May 2013, the Federal Court, in its review application, ruled on the issue of the scope and application of Rule 137 of the Rules of the Federal Court 1995 on grounds of bias and plagiarism by the judge in reproducing submissions of the respondents' counsel as part of his judgment.

In this article, we analyse the judgment of the Federal Court in *Dato' See Teow Chuan & Ors v Ooi Woon Chee & Ors and other applications* [2013] 4 CLJ 922.

FACTS A petition was filed to wind up Kian Joo Holdings Sdn Bhd ('the company'). There were two groups which had shares in the company – the majority contributories on one hand and minority contributories on the other. The liquidators of the company ('the liquidators') were partners of KPMG Peat Marwick and KPMG Corporate Services Sdn Bhd, an entity used by the liquidators to carry out some of their duties.

The liquidators wanted to have the shares of the company sold. The first share sale agreement was aborted due to differences of opinion between the contributories. The liquidators then put up the shares for sale by open tender. Before accepting the best offer, the liquidators met Dato' See Teow Chuan and his son for a discussion in which he alleged that an offer to sell the shares was to his company, Gold Pomelo. Subsequently, however, the liquidators accepted an offer from Can-One International Sdn Bhd ('Can-One') whom they claimed was the highest bidder.

THE TIMELINES The following outlines the chronology of events:

18 March 2009 – A civil suit against the liquidators is filed by the majority contributories for alleged fraud and corrupt practice.

23 March 2009 – The Company and Can-One enter into an agreement for the sale of shares in Kian Joo Can Factory Bhd.

6 April 2009 – The majority contributories led by Dato' See Teow Chuan file a notice of motion, seeking (i) to remove the liquidators; and (ii) an order that the majority contributories be granted leave to proceed with a civil suit ('the leave application').

5 May 2009 – The minority contributories file an application to strike out the leave application. The liquidators also apply for directions from the High Court on whether to proceed with the sale of shares to Can-One.

THE HIGH COURT The High Court dismissed the leave application and allegations of corrupt practice by the liquidators and directed the liquidators to proceed with the sale of shares to Can-One.

THE COURT OF APPEAL The court allowed the appeal against the decision of the High Court.

THE FEDERAL COURT On appeal to the Federal Court, the decision of the Court of Appeal was reversed, thus reinstating the decision of the High Court. It was concluded that the liquidators had acted properly in exercising their discretion in accepting Can-One's offer.

THE REVIEW The respondents were dissatisfied with the decision and applied to the Federal Court to review the decision. In the application, the scope of rule 137 of the Rules of the Federal Court was raised and the grounds relied upon for the review were plagiarism and bias.

THE RULE Rule 137 reads:

> *For the removal of doubts it is hereby declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.*

THE CONFLICTING VIEWS There have been divergent views regarding the powers of review of the Federal Court pursuant to rule 137. Whilst there are authorities[9] to say that rule 137 does not confer power to the Federal Court to review its own decisions, other cases take the view that a review is allowed but only in very 'limited and exceptional circumstances' which include remedying an injustice arising from procedural unfairness, quorum failure, breach of the rule of natural justice and actual bias.

THE GROUNDS The arguments were based on the grounds that (i) the earlier judgment of the Federal Court was a reproduction of a substantial portion of the written submissions filed by the respondents' counsel, which amounted to plagiarism; (ii) the judgment of the Federal Court in the Appeal was 'devoid of an impartial and fair consideration of the issues' raised by the various parties concerned; and (iii) the judgment was tainted with bias.

Plagiarism The main thrust of applicant's argument in the review application was that the judgment of the Federal Court in the substantive appeal contained a large portion of the written submissions of counsel for the liquidators. The respondents relied on the dissenting judgment of Justice Smith in the case of *Cojocaru (Guardian Ad Litem of) v British Columbia Woman Hospital and Health Centre*[10] and argued that such conduct of copying did not constitute a challenge under which Rule 137 could be mounted.

The Federal Court, in rejecting the argument of 'plagiarism', and 'copying', stated that the current application was a review and not an appeal. All appeals had already been heard, and all the submissions on the law and facts had been exhaustively dealt with.

It was held that the copying, in any event, was not wholesale, and that the Federal Court had used its own words in several parts of the judgment to arrive at its conclusion.

Bias The allegation of bias was raised as an alternative ground. It was held that a judgment may only be challenged on the ground of real danger of bias[11].

In this case, there was no evidence either in the grounds of judgment, or the conduct of the judge to substantiate the allegation of a real danger or actual likelihood of bias with regard to any member of the court that presided in the case.

CONCLUSION Although the Federal Court's decision clearly stipulates that the courts have jurisdiction to review its decisions, some enlightening comments from the Federal Court regarding the previous conflicting views on the scope of rule 137 would have been timely, since the previous conflicting views on the scope of rule 137 have yet to be reconciled.

Tan Sri Dato' Cecil Abraham and Sunil Abraham from **ZUL RAFIQUE** *& partners* represented the first and second respondents.

9 *Amalan Tepat Sdn Bhd v Panflex Sdn Bhd* [2012] 2 MLJ 168

10 [2011] 7 NWR 82.

11 *R v Gough* [1993] AC 646, *Re Pinochet (No.2)* [1999] 1 All ER 577, *Metramac Corporation Sdn Bhd (formerly known as Syarikat Teratai KG Sdn Bhd) v Fawziah Holdings Sdn Bhd* [2007] 5 MLJ 501

INTERNATIONAL LAW

HAZY SHADES OF THE LAW
Haze pollution is such a common recurrence that Malaysians have become indifferent to it. However, when the air pollutant index (API) hit an all-time high of 750 in Muar in June 2013, and reached the highest ever pollutant standards index (PSI) reading in Singapore, the topic dominated the ASEAN summit as well, with State leaders increasingly incensed over the lackadaisical attitude of certain quarters.

In this article, we examine the legal implications of the haze and the rights and liabilities of the affected nations.

WHAT IS HAZE POLLUTION? Haze pollution is defined under the *ASEAN Agreement on Trans-boundary Haze Pollution* (ATHP) as 'smoke resulting from land and/or forest fire which causes deleterious effects of such a nature as to endanger human health, harm living resources and ecosystem and material property and impair or interfere with amenities and other legitimate uses of environment.' Trans-boundary haze pollution, also defined in the ATHP, refers to 'haze pollution whose physical origin is situated wholly or in part within the area under the national jurisdiction of one Member State and which is transported into another under the jurisdiction of another Member State.'

THE LAW The governing laws are found in both case law and international agreements. In the *Trail Smelter Arbitration 1941*, smoke from a smelter in Canada had spread over the border and had caused air pollution in the United States. Canada was held liable for the environmental damage caused by the trans-boundary pollution. In 1949, the International Court of Justice in the *Corfu Channel* case declared the principle in the *Trail Smelter Arbitration* as a general principle of international law.

The *Stockholm Declaration* 1972[12] also contains a principle which expounds that although States enjoy full rights to exploit their own resources, they have the responsibility to ensure that the activities carried out within their jurisdiction do not cause damage to the environment of other States or areas beyond the limits of its national jurisdiction. The *Rio Declaration on Environment and Development* 1992 reaffirms the *Stockholm Declaration* 1972.

Thus, the trans-boundary haze pollution originating from Indonesia has indeed, breached International law.

ASEAN AND THE HAZE LEGAL FRAMEWORK The ASEAN pact had undertaken various measures to ensure more effective and concerted action to prevent as well as mitigate trans-boundary haze pollution. Various soft laws have been adopted from 1990 until 1997. In 2002, the Member States adopted the ATHP specifically targeted at the haze in Indonesia although it applies to all Member States. The ATHP is important because each State agrees to undertake individual and joint action from national to regional level in dealing with haze-pollution. Indonesia, however, has not ratified the instrument to date, although it claims of preparations to do so.

CONCLUSION Although the preparations by Indonesia is viewed as a positive step, the ratification may have little or no effect at all, since there is no provision for a compensatory scheme for the affected Member States. The agreement merely offers to implore the State parties to pass domestic laws to prohibit open burning, to monitor the situation within their own jurisdiction, to cooperate with one another by sharing information, scientific and technical knowledge, and to provide cross-boundary firefighting services at the request of the affected States.

12 Also known as the *Declaration of the United Nations Conference on the Human Environment 1972*.

BRIEF-CASE...

CONSTITUTIONAL LAW – Central Bank of Malaysia Act 2009 – Whether sections 56 and 57 are unconstitutional – Reference to Shariah Advisory Council – Whether Shariah Advisory Council had usurped the powers and jurisdiction of the High Court

TAN SRI ABDUL KHALID IBRAHIM V BANK ISLAM (M) BHD

[2013] 3 MLJ 269, Court of Appeal

FACTS The appellant in this case was granted an *Al-Bai Bithaman Ajil* facility by the respondent. Both parties had filed suits against each other which culminated in a reference to the Shariah Advisory Council ('the SAC') from the court pursuant to sections 56[13] and 57[14] of the Central Bank of Malaysia Act 2009. Section 56 provides reference to the SAC for a ruling from the court or arbitrator.

ISSUES The issues before the Court of Appeal were (i) whether sections 56 and 57 of the Central Bank of Malaysia Act 2009 are unconstitutional; and (ii) whether the SAC had usurped the powers and jurisdiction of the High Court.

HELD In dismissing the appeal, it was held that since banking is a matter within the Federal List of the Federal Constitution, and that the Islamic Banking Act 1983 and Central Bank of Malaysia Act 2009 are federal laws, sections 56 and 57 are, therefore, not unconstitutional. Thus the SAC had not usurped the powers and jurisdiction of the High Court.

13 Section 56 provides for *Reference to Shariah Advisory Council for ruling from court or arbitrator.*

14 Section 57 provides for the *Effect of Shariah rulings*.

COMPANY LAW – Unauthorised transactions – Whether the appellants had knowledge of such transactions – Estoppel – Whether the appellants were estopped from denying the transactions

AZMAN BIN MAHMOOD & ANOR V SJ SECURITIES SDN BHD

[2012] 6 MLJ 1, Federal Court

FACTS The respondent stockbroking company, after issuing to the appellants contra statements showing losses in the accounts, subsequently force-sold the shares to off-set the losses. After receiving the contra statements, the first appellant complained to the respondent's executive director that it was a dealer ('Megat') who had misused the accounts without the appellant's authority. Megat was dismissed. The respondent then sued the appellants in the High Court to recover losses incurred on their trading accounts. The appellants counterclaimed for losses arising from the respondent's negligence in managing the accounts and return of monies used to set off the losses. The High Court dismissed the respondent's claim which was then reversed by the Court of Appeal. An appeal was then made to the Federal Court.

ISSUES The issues before the Federal Court were (i) whether the appellants had knowledge of the unauthorised transactions; and (ii) whether the appellants in failing to object or question the unauthorised transactions were estopped from denying such transactions.

HELD In allowing the appeal, the court held that material evidence showed that the transactions were unauthorised. There was no estoppel since the appellants had in fact complained against Megat upon knowledge of losses in the account. Therefore the losses were due to the respondent's own negligence in allowing Megat to misuse the accounts.

COMPANY LAW – Directors – Breach of Listing Requirements – Penalty imposed by Listing Committee of Bursa (M) Securities Bhd – Whether directors' guilt must first be proved – Capital Markets & Services Act 2007 sections 11 and 360

TENGKU DATO' KAMAL IBNI SULTAN SIR ABU BAKAR & ORS V BURSA (M) SECURITIES BHD AND ANOTHER APPEAL

[2013] 1 MLJ 158, Court of Appeal

FACTS The appellants were directors of Cepatwawasan, a company listed on Bursa Malaysia. Their conduct raised issues of breach of the Listing Requirements ('the LR'), specifically paragraphs 8.23 and 16. They were summoned, but failed to attend the hearing of the Listing Committee of the respondent, and were, therefore, ordered to pay fines. The respondent then applied to enforce the penalties against the appellants, an application which the latter opposed on the grounds that (i) only the Securities Commission could bring such action; and (ii) the respondent should have first brought an original action to prove that the appellants had breached the LR or any provision in the Capital Markets & Services Act 2007('the CMSA').

ISSUE The issue was whether proof of guilt of the appellants had to be established first in court before an order to enforce penalties could be invoked.

HELD There is no need to prove guilt before the court as the word 'appears' instead of 'proof' in section 360(1)(c) of the CMSA indicates that the court, in determining if there was a breach of the LR, was governed by a lower standard of proof. The respondent being a stock exchange, therefore, had a statutory duty to act in the interest of the public under sections 11 and 360 of the CMSA.

BRIEFLY...

ACTS

FINANCIAL SERVICES ACT 2013

No
758

Date of coming into operation
30 June 2013

Notes
An Act to provide for the regulation and supervision of financial institutions, payment systems and other relevant entities and the oversight of the money market and foreign exchange market to promote financial stability and for related, consequential or incidental matters.

With the coming into force of the Financial Services Act 2013, the following statutes, namely, the Banking and Financial Institutions Act 1989, the Exchange Control Act 1953, the Insurance Act 1996 and the Payment Systems Act 2003 are repealed.

ISLAMIC FINANCIAL SERVICES ACT 2013

No
759

Date of coming into operation
30 June 2013

Notes
An Act to provide for the regulation and supervision of Islamic financial institutions, payment systems and other relevant entities

and the oversight of the Islamic money market and Islamic foreign exchange market to promote financial stability and compliance with *Shariah* and for related, consequential or incidental matters.

With the coming into force of the Islamic Financial Services Act 2013, the following statutes, namely, the Islamic Banking Act 1983 and Takaful Act 1984 are repealed.

MEDICAL DEVICE ACT 2013

No
737

Date of coming into operation
30 June 2013

Notes
An Act to regulate medical devices, the industry and to provide for matters connected thereto.

INTERNATIONAL TRANSFER OF PRISONERS ACT 2012

No
754

Date of coming into operation
21 February 2013

Notes
An Act to provide for the transfer of prisoners to and from Malaysia, and for matters connected therewith.

FOOD ANALYSTS ACT 2011

No
727

Date of coming into operation
15 March 2014

Notes
An Act to provide for the establishment of the Malaysian Food Analysts Council, to provide for the registration of persons practising as food analysts and to regulate the practice of food analysts and for matters connected therewith.

POSTAL SERVICES ACT 2012

No
741

Date of coming into operation
1 April 2013

Notes
An Act to provide for the licensing of postal services and the regulation of the postal services industry, and for incidental or connected matters.

AMENDMENT ACTS

INDUSTRIAL DESIGNS (AMENDMENT) ACT 2013

No
A1449

Date of coming into operation
1 July 2013

Notes
The highlights of the amendment include registration of industrial design as personal property and the publication of an Intellectual Property Official Journal by the Registrar.

PERBADANAN KEMAJUAN FILEM NASIONAL MALAYSIA (AMENDMENT) ACT 2013

No
A1451

Date of coming into operation
1 April 2013

Notes
The highlights of the amendment include the introduction of new sections 11A and 11B which deals with employment of Government employees and the salaries, terms and conditions of service of Government employees that are to be taken into account.

GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN JUNE 2013 AND AUGUST 2013 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

BANK NEGARA MALAYSIA (BNM)

- Guidelines on Guidance Notes on Sell and Buy Back Agreement – *Date Updated: 28 June 2013*
- Guidelines on Related Party Transactions – *Date Issued: 28 June 2013*
- Guidelines on Granting Credit Facilities – *Date Issued: 28 June 2013*
- Guidelines on External Auditor – *Date Issued: 28 June 2013*
- Guidelines on Application to be Approved as Financial Holding Company pursuant to Financial Services Act 2013 and Islamic Financial Services Act 2013 – *Date Issued: 28 June 2013*
- Guidelines on Information Requirement pursuant to Financial Services Act 2013 – *Date Issued: 28 June 2013*
- Guidelines on Financial Reporting in relation to Banking – *Date Issued: 28 June 2013*
- Guidelines on Holding of Immovable Properties – *Date Issued: 27 June 2013*

BURSA MALAYSIA

- Revamp of the Rules of Bursa Malaysia Securities Berhad – *Effective Date: 2 May 2013*
- Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd in connection to the Revamp of the Rules of Bursa Malaysia Securities Berhad – *Effective Date: 2 May 2013*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd – *Effective Date: 2 May 2013*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd in relation to Business Trusts – *Effective Date: 25 March 2013*
- Amendments to the Main Market Listing Requirements in relation to Business Trust and Foreign Collective Investment Schemes – *Effective Date: 25 March 2013*

SECURITIES COMMISSION

- Guidelines on Private Retirement Schemes – *Date Updated: 5 April 2013*
- Guidelines on Sales Practices of Unlisted Capital Market Products – *Date Updated: 29 March 2013*

ZRp IN-BRIEF...

The ZR*p* **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:

mariette.peters@zulrafique.com.my
amylia.soraya@zulrafique.com.my

The contributors for this **Brief** are:

- *Mariette Peters*
- *Amrit Gill*
- *Amylia Soraya*
- *Natasha Abdullah Sani*
- *Victoria Yap*

BREAKING NEWS...

ZUL RAFIQUE *& partners* WINS MALAYSIA DEAL FIRM OF THE YEAR 2013

, awarded by *Asian Legal Business* at the ALB SE Asia Law Awards 2013. The award was jointly won with another Malaysian firm.

The firm's deals that made it into the final list are the ***Astro Malaysia IPO, Abu Dhabi National Energy Company Sukuk Murabahah Program, Itochu Corp Acquisition of Dole Food*** and the ***SapuraCrest Petroleum-Kencana Petroleum Merger***.

The ***Astro Malaysia IPO*** deal involved the initial public offering of 1,518,300,000 ordinary shares of the par value of RM0.10 each representing 29.2% of the enlarged issued and paid-up share capital of Astro Malaysia Holdings Berhad and the subsequent listing of and quotation for the entire issued and paid-up share capital of Astro Malaysia on the Main Market of Bursa Malaysia Securities Berhad. Our partners involved in the transaction are ***Jerry Ong*** and ***Cathryn Chay.***

The ***SapuraCrest Petroleum-Kencana Petroleum Merger*** refers to the SapuraCrest Petroleum Berhad and Kencana Petroleum Berhad merger by way of disposal of their entire business and undertakings including assets and liabilities of SapuraCrest Petroluem Berhad and Kencana Petroleum Berhad to SapuraKencana Petroleum Berhad via a special purpose vehicle for a total consideration of MYR11.85 billion. The transaction was led by our consultant, ***Au Wei Lien*** and partner, ***Geraldine Chan Poh Ching.***

In the ***Itochu Corp Acquisition of Dole Food***, ZUL RAFIQUE *& partners* acted as the Malaysian local counsel for Itochu Corporation in the acquisition of a Malaysia subsidiary of Dole, Dole Fruit and Vegetable Malaysia Sdn. Bhd. The entire transaction is valued at USD1.7 billion and ***Darren Kor Yit Meng*** was the partner involved.

The awards ceremony was held on 17 May 2013 at the Shangri-La Hotel, Singapore.

The Asian Legal Business is a source of intelligent information, providing insights and networking and business development opportunities to legal professionals throughout Asia-Pacific and the Middle East.

The event is a culmination of months of intensive research in the past year, recognising the excellence and outstanding achievements of South East Asia's leading law firms and in-house legal teams as well as top deals and dealmakers.

ZUL RAFIQUE *& partners* NAMED IN-HOUSE COMMUNITY FIRM OF THE YEAR

ZUL RAFIQUE *& partners* has been named an ASIAN-MENA COUNSEL ***In House Community Firm of the Year*** in the areas of Employment Law, Litigation and Dispute Resolution, Projects and Project Financing and Real Estate & Construction.

In addition, the firm has been voted (joint) winner in the prestigious category of ***Most Responsive Domestic Firm of the Year in Malaysia***.

The award is based entirely on the nominations and testimonials of the in-house counsel surveyed as part of the **2012-13** ASIAN-MENA COUNSEL In-House Community 'Representing Corporate Asia & Middle East' Survey.