the brief

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Words & Phrases

Sine qua non :

(Without which not)
An indispensable condition

in this issue...

ZUL RAFIQUE & partners

BRIEFING

CORPORATE

IN WITH THE NEW, OUT WITH THE OLD... Bursa Malaysia Securities Berhad (BMSB) recently announced several amendments to its Listing Requirements (LR) for the Main Board and Second Board companies. These amendments have the effect of modifying certain provisions in respect of related party transactions entered into by listed companies or its subsidiaries. In this article we get acquainted with these new provisions.

RPT PROVISIONS The provisions relating to related party transactions (RPT provisions), primarily contained in Chapter 10 of the LR, are designed to prevent listed companies from entering into related party transactions which may not be in the interest of such company but may be beneficial to certain related parties. Such transactions would certainly jeopardise the interest of minority shareholders.

While RPT provisions are necessary and good for investors in general, these provisions are very technical in nature and can lead to ambiguity in certain circumstances. In fact, a literal interpretation of the provisions may prevent or hinder listed companies from pursuing bona fide commercial transactions.

The recent amendments indicate that Bursa Malaysia has taken positive steps to minimise the ambiguity as well as to make it more conducive for listed companies to pursue bona fide commercial transactions which were previously considered related party transactions and hence subject to strict regulation.

WHO IS A RELATED PARTY? The term 'related party transaction' simply means a transaction entered into by a listed issuer or its subsidiaries which involves the interest, direct or indirect, of a related party. The interpretation of the RPT provisions hinges on the meaning of 'related party'. A 'related party' means a director, major shareholder or person connected with such director or major shareholder.

A key amendment introduced by BMSB relates to the definition of 'director' and 'major shareholder'. These definitions are important because they form the key criteria in determining whether a transaction is between related parties.

Directors

Previously, the definition of a director included 'any person who is or was within the preceding 12 months of the date on which the terms of the transaction were agreed upon, a director of the listed issuer (or any other company which is its subsidiary or holding company or a ***subsidiary of its holding*** company).'

In light of the amendments, the LR now provides that a director includes 'any person who is or was within the preceding 12 months of the date on which the terms of the transaction were agreed upon, a director of the listed issuer or any other company which is its subsidiary or holding company ***or a chief executive officer of the listed issuer, its subsidiary or holding*** company.'

The amendments to the definition of director are twofold: firstly, it is specified that a 'related party' director is a director of the listed company or a director of its subsidiary or its holding company. No longer is the director of a subsidiary of the holding company of the listed issuer considered a related party. Secondly, the amendments include the chief executive officer within the meaning of the term 'director'. This is sensible as there are some companies in which the person managing the company as chief executive officer does not sit on the board of directors. Such a person also has

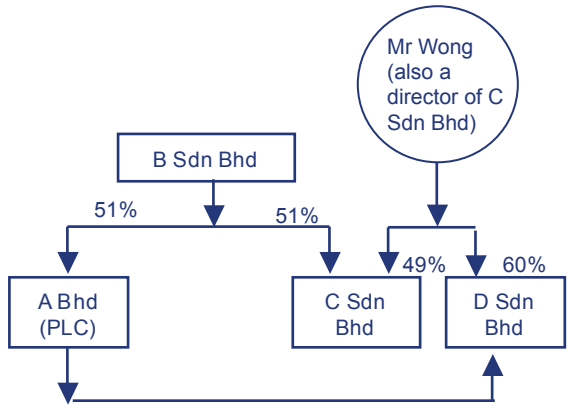
the ability to exert control or influence over the listed company and hence should be classified as a related party.

Major Shareholder
In relation to a 'major shareholder' the previous definition included 'a major shareholder of the listed issuer as defined under paragraph 1.01 (or any other company which is its subsidiary or holding company or ***a subsidiary of its holding*** company)'.

The amended definition of a 'major shareholder' now includes 'a major shareholder of the listed issuer as defined under paragraph 1.01 or any other company which is its subsidiary or holding company'.

The amendments made to the definition of 'major shareholder' are therefore similar to those affecting 'director'. This means that a major shareholder of a subsidiary of the holding company of the listed company is no longer regarded as a related party for the purposes of the LR.

OLD VERSUS NEW An illustration of the difference between the previous RPT provisions and the amended RPT provisions is set out below:



A Bhd enters into transaction with C Sdn Bhd D Sdn Bh

In the scenario above, the transaction between A Bhd (a public listed company) and D Sdn Bhd would have been deemed a related party transaction under the previous RPT provisions simply because Mr Wong is a 'director' of a subsidiary of the holding company of the listed company.

However under the amended RPT provisions, the transaction described above between A Bhd and D Sdn Bhd is no longer regarded as a related party transaction.

This is an admirable stand taken by BMSB which would facilitate more bona fide transactions by listed issuers. It may not be fair or logical to assume that a person who, merely by virtue of being a director or even a major shareholder of a listed issuer's sister company (which is not a subsidiary or the holding company of the listed issuer), such person is in a position to exercise influence or control over the listed issuer.

ISSUANCE OF SHARES A further key amendment to the LR relates to the issuance of shares by a listed company's subsidiary to a related party. The previous RPT provisions of the provide that the listed issuer must ensure that the listed issuer or any of its subsidiaries shall not issue shares or other convertible securities to a director, major shareholder or person connected with any director or major shareholder unless shareholders in a general meeting have approved of the specific allotment to be made. The only exception that was made to this rule is for the issue of securities on a pro rata basis. This meant that a listed issuer's subsidiary not even allowed to issue shares to the subsidiary's director or major shareholder without the listed issuer's shareholders' approval (regardless of whether such director or major shareholder is also a director or major shareholder of the listed issuer). The amended provisions relax these restrictions so that they now apply only to an issue of securities to the director (including chief executive officer) and major shareholder of the listed issuer or the listed issuer's holding company or a person connected to such director or major shareholder.

Notwithstanding the above, the issuance of securities to the directors, major shareholders or chief executive officers of the subsidiary would still be regulated, albeit only to a limited extent. Such issuance of securities,

while not requiring the approval of the listed company's shareholders, is still subject to the following safeguards:

(i) prior approval of the board of directors of the listed issuer must be obtained;

(ii) the board of directors of the listed issuer must ensure that the allotment is fair and reasonable to the listed issuer and in the best interests of the listed issuer;

(iii) an announcement of the specific allotment must be made.

This also appears to be a progressive amendment which would make it more conducive for subsidiaries of listed companies to implement bona fide share issues to its directors and major shareholders.

RPT AT SUBSIDIARY LEVEL Another key amendment made to the LR is with regard to the related party transaction at subsidiary level, that is to say, where the related party is either a director or major shareholder of the listed issuer's subsidiary. Under the previous RPT provisions, such related party transactions are treated no differently from the situation where the related party transaction is at the listed issuer's level. However under the amendments, such a transaction is not regarded as between related parties. This appears to be a progressive amendment which would facilitate bone fide transactions involving subsidiaries of listed companies.

OTHER AMENDMENTS TO THE LR

Net assets The term 'net assets' is substituted for the definition of 'net tangible assets'. This has an impact on the calculation of the percentage ratio for an RPT. As such it is also an important amendment because the calculation of the percentage ratio determines the relative 'size' of the RPT and consequently the regulations applicable to the RPT.

The role of Independent Advisers For certain related party transaction, an independent adviser must be appointed to advise the minority shareholders on whether the transaction is fair and reasonable insofar as the shareholders are concerned and whether it is to the detriment of minority shareholders. The amendments to the LR place even more duties and obligations on the independent adviser including advising the minority shareholders on whether they should vote in favour of the transactions.

Introduction of a threshold for the requirement to disclose There is a threshold for the requirement to disclose, in the annual report, the aggregate value of recurrent related party transactions for which mandate has been obtained. The threshold for disclosure is as follows:

(a) Where the consideration, value of the assets, capital outlay or costs of the aggregated transactions is equal to or exceeds RM1 million; or

(b) Where any one of the percentage ratios of such aggregated transactions is equal to or exceeds 1%, whichever is lower.

Prescription of a timeframe for the issuance of circulars which do not require clearance from BMSB (exempt circulars) Printed copies of exempt circulars must be issued as soon as possible and in any event not later than two months from the date of the announcement or the date the last approval necessary for the corporate proposal is obtained from the relevant authority, whichever is later.

CONCLUSION The amendments to the LR are indeed a welcome relief as they remove the ambiguity, making it more conducive for listed companies and their subsidiaries to enter bona fide commercial transactions.

CONTRACT

PUBLIC POLICY...REVISITED, REVIEWED OR REINVENTED? The case of the ***Ritz Hotel Casino Limited & Anor v Datu Seri Osu Haji Sukam*** brings to fore the age-old debate of the scope of 'public policy'. We examine the meaning of 'public policy' and whether gambling activities are against its purports.

THE CASE In the High Court case of ***Ritz Hotel Casino Limited & Anor v Datu Seri Osu Haji Sukam (Osu Sukam)*** the respondent had incurred a gambling debt amounting to over RM7 million in a casino in London. The applicants applied to register a foreign judgment pursuant to the Reciprocal Enforcement of Judgments Act 1958 (REJA). The judge however held that gambling was against public policy not only because it was injurious to public welfare but also because it offended the principles of the ***Rukun Negara,*** namely ***Belief In God*** and ***Good Social Behaviour.*** The application to register the judgment therefore was denied on the basis of section 5(1)(v) of the REJA where it is stated:

> (1) On an application in that behalf duly made by any party against whom a registered judgment may be enforced, the registration of the judgment -
>
> (a) shall be set aside if the registering court is satisfied:
>
> (v) that the enforcement of the judgment would be contrary to public policy in Malaysia;

This raises the issue of the scope of 'public policy' and the types of contracts or dealings that would be against 'public policy'.

CONTRACTS ACT 1950 According to section 24(e) of the Contracts Act 1950 (CA), 'the consideration or object of an agreement is lawful, unless the court regards it as immoral, or opposed to public policy.' The CA does not define the expression 'public policy' or what is 'opposed to public policy'. However, although incapable of precise definition, it connotes some matter which concerns the public good and public interest. It is a contract which has the tendency to injure public interest or public welfare.

According to ***Pollock & Mulla*** (renowned authors in Contract Law):

> 'What constitutes an injury to public interest or welfare would depend upon the times and the climes. The social milieu in which the contract is sought to be enforced would decide the factum, the nature and the degree of the injury. The concept of public policy is not immutable since it must vary with the changing needs of the society.'

SCOPE OF PUBLIC POLICY Although the definition remains unclear, there are recognised heads of public policy based on case precedent - and though theoretically it may be permissible to evoke a new head under exceptional circumstances in a changing world, it has been advised that in the interest of stability of society, there should not be fervent attempts to create new heads.

In ***Teresa Chong v Kin Khoon & Co*** (1976), the Federal Court endorsed the comments by ***Pollock & Mulla*** where the heads of public policy were recognised as agreements (a) tending to the prejudice of the state in time of war (trading with enemies, etc); (b) tending to the perversion or abuse of municipal justice (stifling prosecutions, champerty and maintenance); (c) attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage; and (d) attempting to restrict an individual's liberty to exercise any lawful trade or calling.

It was further stated in that case that '... it is now understood that the doctrine of public policy will not be extended beyond the classes

of cases already covered by it. No court can invent a new head of public policy.'

ANALYSIS What makes the case of ***Osu Sukam*** interesting is that it raises issues pertaining to conflict of laws and the differing concepts of public policy, religion being a common standard, though not necessarily in every jurisdiction.

Although the issue of whether the contract is against public policy should refer to the public policy where the award is sought to be registered, and not that of the foreign country, it has been cautioned by authors in Contract Law that great care should be exercised by the courts in determining whether the domestic policy demands such refusal of enforcement when the contract is valid and binding under foreign law.

On this point, although it was argued that gambling should not be deemed to be against public policy as it not entirely illegal in this country, the judge rejected the argument stating that gambling was legalised merely 'to prevent it from being run by the underworld and it was not that it was something that was good'.

"There are three ways of ruining oneself - women, gambling and farming. My father chose the most boring." - Pope John XXIII

CONCLUSION The decision of ***Osu Sukam*** therefore is something to ponder considering that gambling is not entirely illegal in this country, let alone in the UK. Judges should bear in mind the caution that the 'doctrine' should be invoked only in clear cases in which the harm to the public is substantially incontestable and should not 'depend upon the idiosyncratic inferences of a few judicial minds.'

PROPERTY/ HOUSING DEVELOPMENT

WANDERING WITHIN WONDER WALLS... What do Country Heights, Sierramas and Tropicana have in common? They are gated community schemes that have sprouted in the country in the last 7 years.

Although a gated community scheme is usually associated with a development that includes terrace houses, townhouses as well as bungalows (coupled with common services and amenities), it technically encompasses condominiums or even shops.

We examine the legal framework of gated community schemes and the extent of exclusivity and security that they offer.

WHAT ARE GCS Gated communities (GCs) have been defined as 'a cluster of houses or buildings that are surrounded by a wall or fence or a perimeter with the entry or exit of these houses or buildings in the areas controlled by certain measures or restrictions like guards or ropes of strings or boon gates or chains or blocks and normally includes 24-hour security, guard patrols, central monitoring systems and CCTVs.' The concept of a GC started in the United States and now many such schemes may be found in Brazil, South Africa and Bulgaria.

"M. Night Shyamalan's 'The Village' is the ultimate gated community. In fact it's entirely surrounded by a big gate: not to keep everybody else out but to keep the people of the Village in."

The features of a GC include land with individual title, a surrounding fence, amenities, parks and a clubhouse.

LEGISLATIVE FRAMEWORK First and foremost it must be noted that there is no specific legislation governing GCs. The Strata Titles Act 1985 (STA) in its present form cannot apply to bungalows, terraces or semi-detached houses because of the way section 6(1) is drafted:

> Any building or buildings having two or more storeys on alienated land held as one lot under final title (whether Registry or Land Office title) shall be capable of being subdivided into parcels; and any building or buildings having only one storey on the same land shall also be capable of being subdivided, into parcels to be held under strata titles or into accessory parcels.

Therefore, by virtue of section 6(1), a single-storey type of real estate can be issued strata titles, but not a two-storey building within a GC, unless it is a townhouse comprising two units with separate entrances from the main road.

With no specific legislation governing GCs, many issues remain vague, in particular whether roads within the gated area are private and the scope of the residents' rights if their expectations of security are not met.

ILLUSIVELY EXCLUSIVE? According to the usual practice in GC schemes involving landed property, one of the developer's obligations is to apply for sub-division of the land as provided in section 136 of the National Land Code 1965, so that individual titles could be issued in favour of the property owners. The developer may then need to apply for surrender and re-alienation of the land forming the GC. The surrender of the land to the State is for the purpose of reserving certain areas for access roads, playgrounds, parks and other amenities. It is upon surrender that these areas become State land and the roads become public roads.

Barriers and fences erected by the developer therefore will not change the status of the roads and other public amenities. In fact such obstruction may amount to an offence under section 46 of the Street Drainage & Building Act 1974 and section 80 of the Road Transport Act 1987. In relation to the amenities, although such facilities are regarded as common property for the residents under the GC, according to section 63 of the Local Government Act 1976, such amenities are deemed to be public places that fall within the jurisdiction and control of the local authority and NOT the developer.

This brings us to the poser: ***How exclusive are GCs in Malaysia?***

SAFETY SUIT There is also the issue of the developer's obligation to provide security as this representation is generally found in the Deed of Mutual Convenants (DMC) that reflects the contractual relationship between the developer and purchaser. Failure of the developer to do so will result in a breach of the contract and the resident's right to sue, as seen in the High Court case of ***Datuk Soo Lai Sing v Kumpulan Sierramas (M) Sdn Bhd*** (2004).

In that case the purchaser of a house built under a GC scheme sued the developer for breach of contract based on the developer's failure to provide the security (as represented in the promotional brochures) which resulted in the burglary of the purchaser's home. The purchaser was successful.

CONCLUSION The whole scheme is based on the contractual relationship with the developer and though there may be various clauses in the DMC, they are inadequate to protect the purchasers.

The introduction of specific uniform laws to regulate and control GC schemes in Malaysia is imperative. What is needed is a standard form DMC between developers and purchasers.

A good start may perhaps be in examining the provisions of the Australian Community Land & Development Act 1989 and the Community Land & Management Act 1989.

CONTRACT/ EMPLOYMENT LAW

OFFICE ROMANCE...CONDONED OR CONDEMNED? Does the employer have a right to incorporate a no-marriage policy between co-workers into the contract of employment? Can the services of an employee who breaches this condition be terminated? We examine the validity of such a clause in a contract of employment.

FROM BOARDROOM TO BEDROOM

Given the number of hours people spend at work, it is not surprising that office romances occur as a result of working together in the same environment and facing similar challenges. Quite apart from the question of whether they are a potential boost to morale or burden on the business, wedding bells in the office may not be the herald of fairytale endings.

NO-MARRIAGE POLICY It is quite common for employers to incorporate a clause into the employee's contract of employment prohibiting marriage between co-workers. The issue that arises revolves around the validity of such clauses and whether an employee who violates a no-marriage policy may have his contract of service terminated on that ground.

CONTRACTS ACT 1950 Such clauses are clearly prohibited by virtue of section 27 of the Contracts Act 1950 where it is stated:

> Every agreement in restraint of the marriage of any person, other than a minor during his or her minority is void.

Agreements in restraint of marriage are void also because they are against public policy and this is provided for in section 24(e) of the Contracts Act 1950.

This is because the status of marriage is viewed as a matter of public interest and anything 'that impairs the sanctity of its solemn obligations or weakens the loyalty that one spouse owes to the other' should not be allowed. Marriage, like any other contract ought to be based on free will and therefore a clause that restrains a person from marrying whom he pleases is void as being hostile to the social welfare of the state. This is the situation both in Malaysia and India as the relevant provisions of the Malaysian Contracts Act are ***in pari materia*** with that of the Indian Contracts Act.

Even in England, such policies are frowned upon. In ***McLean v Paris Travel Service Ltd*** (1976), it was held that a company's policy not to employ married couples was contrary to the Sex Discrimination Act 1975 and the employee who was dismissed because of her intention to marry the Assistant Manager was awarded 200 pounds.

TO TERMINATE OR TO TRANSFER? What may be allowed, however, is for the employer to impose a condition in the contract of employment that in the event co-workers within the same department get married, one or the other will have to transfer to another department, branch or company (in the case of a group of companies).

In the case of ***Fordham v Huntingdonshire District Council*** (1989), the claimant had married a colleague who was an officer in the same department of the District Council. The claimant was then transferred to a different location and therefore claimed that he was a victim of marriage discrimination. The reason given for the transfer was the impracticability of allowing two people in a relatively small department to be absent at the same time and this had apparently occurred during the couple's honeymoon. Incidentally it was the Council's policy that in a department with five or fewer employees, no two should be allowed to take leave at the same time. The claimant failed as the Tribunal had decided that his relocation was not due to the fact that he was married but rather because of whom he was married to.

CONCLUSION Although it may be necessary to effect a transfer of the employee should he marry a co-worker in his department, the employer may have to justify the policy by proving that the relationship/ marriage has affected his business.

LAND LAW/ HOUSING DEVELOPMENT

10:90 - BUILD FIRST, SELL LATER... The Build-then-Sell model has launched a debate amongst several quarters, most notably the House Buyers' Association (HBA) on one hand and the Real Estate Housing Developers Association (REHDA) on the other. We examine the issues pertaining to a 10:90 model and the arguments for and against it.

ORIGIN OF THE BTS The Build-Then-Sell (BTS) model was first proposed by the Government in 2004 because of the concerns of a number of honest hard-working Malaysians who had allegedly been duped by unscrupulous developers.

The BTS model (commonly referred to as 10:90) is based on the Australian system regulated under section 9AA of the Sale of Land Act 1962 of the State of Victoria. This model requires buyers to pay 10% of the property price as down-payment into an escrow account held by a stakeholder, with the balance payable only when the house is completed and delivered.

"A build-sell formula will weed out the fly-by-night and inefficient developers - big or small. This is a good thing."

WHY BTS? The idea was mooted primarily because of the numerous complaints filed by purchasers with the Tribunal for Homebuyer Claims, the majority of these complaints being claims for late delivery.

A PANACEA? Although the 10:90 model appears attractive to the purchaser, certain quarters have cautioned against it, saying that such model may backfire and compromise the interest of the house-buyer. The main worry is the probable increase in cost which will be due to the reduction in annual housing production.

This would mean that whilst a purchaser's rights may be strengthened under the 10:90 model, he could be more disadvantaged economically as affordable housing may no longer be within his reach.

There are also concerns about the suitability of an imported model in light of local conditions and circumstances. It may be too simplistic to adopt a foreign idea. It has been said that the 10:90 model gained success in Australia because of the absence of bureaucracy and the efficient mechanism in place for submission and approval of building plans, whereas in Malaysia, such a model may not necessarily be workable in light of procedural and government policies. Other local conditions such as the mandatory 30% low-cost housing and Bumiputera allocation play a significant part in adding cost to the total expenditure of the developer.

It has also been argued that if the rationale for switching to a 10:90 model is to protect housebuyers, then perhaps the focus should be on the enforcement of the current laws rather than adopting a new model altogether.

On the other hand, advocates of the 10:90 model have cited Thailand as a success story to be emulated in implementing the BTS system where the exigencies of the 1997 economic crisis had forced Thailand to convert to a 10:90 model.

CONCLUSION Whether a bane or boon to the construction industry, the Housing & Local Government Ministry has requested for the various industry players to submit a firm written opinion on the proposed 10:90 model before discussion with the Cabinet.

BRIEF-CASE...

EMPLOYMENT LAW - Whether contract of employment was a genuine fixed-term contract

M VASAGAM MUTHUSAMY V KESATUAN PEKERJA-PEKERJA RESORTS WORLD, PAHANG & ANOR

2005, Court of Appeal

FACTS It was stipulated in the appellant's contract of employment that his employment was '...for a period of one year and subject to renewal at the discretion of the Resorts World Employees Union'.

ISSUE Whether such contract of employment was a genuine fixed-term contract.

HELD It was held that the contract was in fact a genuine fixed-term contract. The terms and conditions of the contract were clear that there was no ulterior motive on the part of the employer.

The 1990 case of ***Han Chiang High School/ Penang Han Chiang Associated Chinese School Association v National Union of Teachers in Independent Schools, West Malaysia & Anor*** was distinguished by the court:

> It is observed that in the Han Chiang case the Industrial Court made a finding that the system of fixed term contracts in the school was employed not out of a genuine necessity but as a means of control of the teachers concerned. The intention of the school was to rid itself of the Union, which was why the school relied on the fixed term contracts to flush out the teachers who were members of the Union. The Han Chiang case therefore can be distinguished from the instant case...

COMPANY LAW - Section 176 of Companies Act 1965 - Application for extension of restraining order

JIN LIN WOOD INDUSTRIES SDN BHD V MULPHA INTERNATIONAL BHD (NO 2)

2005, High Court

FACTS On 3 March 2004, the applicants had been granted an order to call for a meeting of creditors and a restraining order based on section 176(10) of the Companies Act 1965 to restrain further proceedings against the applicants. The applicants applied for both orders to be extended on the basis that they wanted to receive feedback from some of the scheme creditors in order that the scheme could be prepared and perfected. The respondent, Mulpha International Bhd, objected to an extension stating that the restraining order was unconscionable, mala fide and an abuse of the process of the court on the basis that the proposed scheme was said to cover only a certain class of creditors who would benefit whilst depriving non-scheme creditors from enforcing their legal rights against the applicants.

ISSUE Whether an extension would be prejudicial to the respondent or any non-scheme creditors.

HELD It was held that an extension was necessary in order for the scheme to be carried through. In any event the mere exclusion of a certain creditor does not open the applicants to imputations of mala fides and abuse of process. Under section 176(1) of the Companies Act 1965, the applicants have the discretion not to compromise with all creditors and the rights of the remaining creditors are merely stayed. Furthermore there are sufficient safeguards in section 176(10C), (10D), (10F) and 10G) of the Companies Act 1965.

HOUSING DEVELOPERS - Extent of housing developers' duty - Housing Developers (Control & Licensing) Regulations 1989

SYARIKAT KEMAJUAN PERUMAHAN NEGARA SDN BHD V LEE CHENG & ANOR 2005, Court of Appeal

FACTS The purchaser purchased a shophouse from the developer and the sale and purchase agreement was made pursuant to the Housing Developers (Control & Licensing) Regulations 1989. Pursuant to the agreement, the last date for the developer to deliver vacant possession was 16 May 1992. Water pipes and electricity were duly laid and connected to the shophouse on 13 January 1991 but electricity supply was connected to the shop house only on 18 January 1994.

ISSUE To what extent is the developer's obligation? Was it sufficient for him to merely connect the electricity and water mains?

HELD It was held that the purchaser was entitled to damages for late delivery from 16 May 1992 until 18 January 1994. This was based on clause 20(1) of the prescribed sale and purchase agreement listed under Schedule G of the Housing Developers (Control & Licensing) Regulations 1989 which provides that vacant possession with connection of water and electricity to a building must include the developer's duty to energise the water and electricity flow into the building. It was therefore not sufficient for the developer to merely lay the pipes and cables for electricity and water to connect the said building to the water mains. The developer must ensure that at the time of delivery of vacant possession of the said building, there is supply of water and electricity ready for tapping into the building.

MONEYLENDING - Whether the Moneylenders Act 1951 applies to the loan in question

PAN GLOBAL EQUITIES SDN BHD & ANOR V TAISHO COMPANY SDN BHD 2005, Court of Appeal

FACTS During a time of financial crisis, the appellant company had borrowed money from its shareholder, the respondent, who had charged interest at a rate. The respondent later sued to recover monies lent. It was argued that the loans were not recoverable as the respondent was an unlicensed moneylender under the Moneylenders Act 1951 ('the Act').

ISSUE Whether the Act applied to the loans given by the respondent.

HELD It was held that the Act did not apply to the loan in question as it was not designed to apply to case where only a single loan was made, albeit subject to an interest rate. To lend money is not the same thing as carrying on the business of moneylending. In order to prove that a man is a moneylender within the meaning of the Act, it is necessary to show some degree of system and continuity in his moneylending transaction.

It was further stated that that 'the Act by its spirit and intendment is designed to protect individuals who because of their impoverishment are caught in the jaws of unlicensed lenders. It was certainly not designed to apply to fact patterns such as those that exist in the present instance.'

"Never lend money to a friend. It's dangerous - it could damage his memory." - Sam Leveson

INTELLECTUAL PROPERTY/ PATENT
- Meaning of 'disclosure' and 'enablement'

SYNTHON BV V SMITHKLINE BEECHAM PLC 2005, House of Lords

FACTS On 10 June 1997, Synthon BV, a Dutch pharmaceutical company ('the appellant') filed an international application under the Patent Cooperation Treaty for a patent which claimed a broad class of sulfuric acid salts including paroxetine methanesulfonate (PMS), an active ingredient in the antidepressant Sexorat. The application was published on 17 December 1998.

Smithkline Beecham plc, a UK pharmaceutical company ('the respondent') filed a document dated 6 October 1998 which gave it a priority for a UK patent application filed on 23 April 1999.

On 7 March 2001, the appellants commenced proceedings to have the respondent's patent revoked on the ground that the latter's claim was not new.

ISSUE The court had to be satisfied in respect of two points, namely 'disclosure' and 'enablement', in that the appellant had to prove that its application disclosed the invention which had been patented, and secondly, that an ordinary skilled man would be able to perform the disclosed invention if he attempted to do so by using the disclosed matter and common general knowledge.

HELD It was held that the appellant's application did in fact disclose the existence of PMS crystals of 98% purity and claimed that they could be made. Enablement was also present as the ordinary skilled man would have been able to produce the invention based on the disclosed information and his general knowledge.

BRIEF-UP...

SECURITIES COMMISSION (SC) GUIDELINES FOR INITIAL PUBLIC OFFERING (IPO) AND LISTING ON THE MESDAQ MARKET

Date of coming into operation
29 November 2005

Notes
The ***Guidelines for Initial Public Offering and Listing on the MESDAQ Market (MESDAQ IPO Guidelines)*** would enable the SC to clarify and provide a better understanding on its role on assessing companies seeking a listing on the MESDAQ Market and promote the quality and investability of MESDAQ companies since it took over the role from BMSB with effect from 1 January 2005. The MESDAQ IPO Guidelines were issued to replace the admission requirements under the ***BMSB Listing Requirements for the MESDAQ Market.*** Companies seeking listing on the MESDAQ Market must comply with the following criteria:

- non-technology-based but high-growth firms must have an audited operating revenue for at least three years and must demonstrate an intensive application of technology and a growth rate surpassing the average growth rate of the industry and its peers;
- technology-based companies must display some degree of commercialisation of the technology that had been achieved;
- provide a profit forecast;
- provide a three-year business plan and a one-year financial forecast to be reviewed by reporting accountants (as opposed to the previous five-year plan with no requirement for financial forecasts);

- reporting accountants are required to review the submission of profit and cash flow forecasts (in order to enhance the reliability of financial forecasts and business plans submitted);

- submission of a follow-up questionnaire on the achievement of the business plan over the entire business plan period, financial forecasts and the use of proceeds.

The SC also wanted to encourage effective offerings via book-building while introducing enhanced requirements for offerings via placements. In the SC's ***Enhanced Requirements on Placements of Securities,*** the principal advisers must be the lead underwriters and placement agent and must provide an opinion on the adequacy of the applicant's procedures, systems and controls as well as the competency of the applicant's management

GUIDANCE NOTE ON THE CONTENT OF APPLICATION FOR IPO AND LISTING ON THE MESDAQ MARKET

Date of coming into operation
29 November 2005

Notes
Before this Guidance Note was issued, the requisite format and content for applications were prescribed under the ***BMSB Listing Requirements for the MESDAQ Market and SC's Format and Content of Applications under the Policies and Guidelines on Issue/Offer of Securities.*** The Guidance Note sets out the minimum information and documents required by the SC for applications under the ***MESDAQ IPO Guidelines.***

SC GUIDELINES FOR ISLAMIC REAL ESTATE INVESTMENT TRUSTS

Date of coming into operation
21 November 2005

Notes
On 21 November 2005, Malaysia became the first jurisdiction in the global Islamic financial sector to issue ***Guidelines on Islamic Real Estate Investment Funds (Islamic REITs).*** These guidelines complement the ***REITs Guidelines*** that were issued on 3 January 2005 and provides a guide to Islamic REITs fund managers in their activities relating to the same.

An Islamic REIT is generally a collective investment scheme in real estate, in which tenants operate permissible activities according to Syariah principles. If the tenants are found to be doing mixed activities (i.e. permissible and non-permissible activities), the total rental from the non-permissible activities must not exceed 20% of the total turnover of an Islamic REIT. An Islamic REIT is not permitted to own real estate in which all tenants operate non-permissible activities.

Non-permissible activities are financial services based on interest, gambling/gaming, manufacturing or sale of non-halal products and tobacco-based or related products, conventional insurance, hotels and resorts, stockbroking or share trading of non-Syariah compliant securities and entertainment activities that are non-permissible according to Syariah.

An Islamic REIT must use Takaful schemes to insure its real estate and ensure that all forms of investment, deposit and financing instruments comply with Syariah principles

SC GUIDELINES ON PROSPECTUS (REVISED EDITION)

Date of coming into operation
1 December 2005

Notes
These new guidelines were issued to facilitate the shift from a 'pre' to 'post' vetting prospectus registration regime. This measure is expected to further liberalise access to the capital market by expediting the process of corporate proposals with the reduction of turnaround time to register all public offering prospectuses from 30 market days under the previous guidelines to 14 market days upon submission of a full and complete registrable prospectus, boosting the overall efficiency of raising funds in the Malaysian capital market. The scope of responsibility of the SC under the pre-vetting regime is not diminished or reduced; in fact the post-vetting regime will strengthen compliance and enforcement operations to address defective disclosures.

According to the new guidelines, risk factors will no longer be prescribed and disclosure requirements for material agreements have been removed but disclosure of material contracts on which the company is highly dependent is still a requirement. Historical financial disclosures have been reduced to three years. However, there will be enhanced disclosures in respect of discussion and analysis of such financial information.

Furthermore, in addressing market trends, there will also be enhanced business information, expansion of corporate governance disclosures and additional statements of adverse records of promoters, directors and key management or key technical personnel.

In order to improve investor decision-making, the post-vetting regime makes it mandatory for MESDAQ companies to disclose forecast. Disclosure of approved waivers and highlighting the recourse available for investors are now mandatory. A valuation certificate must also be included in the prospectus when the related corporate exercises contain valuation or revaluation of property assets which include intangible assets. The valuation report, other than those submitted for approval by the SC under section 32 of the Securities Commission Act 1993, must be submitted with the prospectus if valuation or revaluation of the property assets is disclosed in the prospectus

SC GUIDELINES FOR THE ISSUE OF STRUCTURED WARRANTS

Date of coming into operation
28 October 2005

Notes
The ***Guidelines for the Issue of Structured Warrants (Structured Warrant Guidelines)*** recently issued by the SC on 28 October 2005 replaces the ***Guidelines for the Issue of Call Warrants*** that were introduced in 2003.

Under the ***Structured Warrant Guidelines***, certain requirements are enhanced whilst others are streamlined. The ***Structured Warrant Guidelines*** provide new alternative methods (which has a shorter time period) for the issuance of structured warrants, and introduces a new investment product known as Bull Equity Linked Structures to the Malaysian structured warrants market, which at the moment only consists of call warrants and basket warrants.

Enhanced or Streamlined Requirements
The enhanced or streamlined requirements include the following:

- More robust provisions on the criteria of eligible issuers for non-collateralised structured warrants.
- Reduction of the minimum issue size to RM5 million from RM20 million.
- Streamlining of the maximum size for both collateralised and non-collateralised

structure warrants to no more than 20% of the share capital of the underlying company.

- Streamlining the method of calculating the settlement price irrespective of whether the structured warrant issued is exercisable in European or American style.

Alternative Method For Issuance
In addition to the initial public offering method, multiple offerings by way of placement are now allowed using a 'base prospectus' supported by 'term sheets'. The placement method requires a shorter time frame for listing of structured warrants, namely 13 working days from the submission date of the placement term sheet to SC.

Bull Equity Linked Structures (Bull ELS)
Unlike call warrants which focus on capital gains, Bull ELS are high yielding investment instruments and would appeal to investors who are slightly bullish in a sideways trading market. The redemption value of the Bull ELS is linked to the market price of the underlying shares. The two possible forms of payback on maturity are:

- if on maturity date, the closing price of the underlying share is at or above the strike price of the Bull ELS, the holder of the Bull ELS will receive a cash payment at the total par value of the Bull ELS (total investment plus interest); or

- if on maturity date, the closing price of the underlying share is below the strike price of the Bull ELS, the holder of the Bull ELS will receive a predetermined quantity of the underlying shares at the strike price (ie total par value/ strike price) or if the Bull ELS is cash settled in lieu of share delivery, the investor or holder will receive cash payment based on the closing price of the underlying shares

SC Guidelines on the Offering of Private Debt Securities (PDS Guidelines) - Practice Note 1

Application of the PDS Guidelines to the Issue of, Offer for Subscription or Purchase, or Invitation to Subscribe for or Purchase, Foreign Currency Denominated Private Debt

SC Guidelines on the Offering of Islamic Securities (Islamic Securities Guidelines) Practice Note 1

Application of the Islamic Securities Guidelines to the Issue of, Offer for Subscription or Purchase, or Invitation to Subscribe for or Purchase, Foreign Currency Denominated Islamic Securities

Date of coming into operation
15 September 2005

Notes
On 15 September 2005, two Practice Notes 1 were issued by the SC - one under the ***PDS Guidelines*** and the other under the Islamic ***Securities Guidelines***. Both these practice notes mirror each other and exempt Malaysian public companies from having to comply with certain regulatory requirements (eg rating, underwriting, mode of issue) when making their submission to the SC for approval of their proposed non-RM denominated private debt securities or Islamic securities issuance exclusively to persons outside Malaysia and/or sophisticated investors in Malaysia.

'Sophisticated investor' refers to institutional investors or high net worth individual investors comprising corporations with minimum net assets of RM10 million and individuals with a net worth of RM3 million and as principal, enters into a transaction of a minimum value of RM250,000 or its equivalent

SC Guidance Note on the Secondary Trading of Foreign Currency Denominated Debentures and Foreign Currency Denominated Islamic Securities

Date of coming into operation
15 September 2005

Notes
The purpose of this Guidance Note is to allow investors to invest in non-RM securities listed on foreign exchanges recognised by BMSB and sophisticated investors to execute secondary trades of non-RM bonds amongst themselves without the approval of the SC under section 32 of the Securities Commission Act 1993. 'Sophisticated investors' that are commercial banks, merchant banks, Islamic banks, universal brokers are required to submit monthly reports to the SC on their non-RM bond sell trades.

The Guidance Note was introduced to compliment the liberalisation of ***Foreign Exchange Control Administration Rules*** on 1 April 2005 and to facilitate further flexibility in the capital market

SC REITs Guidelines Guidance Note 1

Date of coming into operation
15 September 2005

Notes
This Guidance Note was issued to increase the existing disclosure requirements (in respect of real estate investment trust prospectus) stipulated in Schedule F of the ***REITs Guidelines*** issued by the SC on 3 January 2005.

The additional information disclosure requirements are in relation to the following sections of the prospectus:

Key Data
- Brief but relevant details on the real estate to be acquired, including a table highlighting principal statistics of the real estate;

- A table of the income statement of the REIT (proforma or actual) for the past five years and for the latest audited accounts;

- The proforma net asset value and net asset value per unit after the proposed public offering;

Fund
- Where real estates to be acquired are to be financed through borrowings, details of the borrowings must be disclosed together with a clear explanation of the risks involved with respect to borrowings;

- The prospectus must also discuss and disclose the future plans including strategies to be adopted to ensure growth of the REIT.

Fund Performance
As the requirement of disclosure in respect of fund performance has been enhanced, a listed REIT is required to disclose historical financial information, future financial information and the proforma balance sheet.

Fees, Charges and Expenses
The fees, charges and expenses paid to the Property Manager must be clearly stated in the prospectus inclusive of the percentage rate to be paid by the REIT, the basis on which the property management fee is calculated and an illustration on how the property management fee is calculated.

Transaction Information
Details of public offering such as the critical dates for the public offering, details of the pricing of units, minimum subscription to be raised from the public offering and the basis for such minimum subscription level, etc.

The Management and Administration of the Fund

- The functions, duties, responsibilities and unit holding of the property manager in the REITs;

- Corporate information of the property manager and the information on its key personnel highlighting their academic and professional qualification as well as experience possessed.

Additional Information

- Information on promoters, substantial shareholders, directors and key personnel of the management company, direct and indirect unit holding in the REIT before and after the public offering;

- Existing and proposed related-party transactions and conflicts-of-interest involving the REIT, management company, vendors, tenants and other related parties;

- Salient terms of the deed of the REIT and material agreement relating to the proposed acquisition of the real estates

AMENDMENTS TO THE BMSB LR FOR MAIN BOARD & SECOND BOARD IN RELATION TO RELATED PARTY TRANSACTIONS AND OTHER REQUIREMENTS

Date of coming into operation
21 November 2005

Amendments

- **All paragraphs containing the term 'net tangible assets', 6.11, 8.30, 10.02, 10.03, 10.08, 10.09** and **10.11**
- **Appendices 10C** and **10D**
- **Practice Note 14/2002**

Notes
The amendments were meant to strike a balance between market regulation and the promotion of business efficacy. The amendments are, inter alia:

- the dispensation of shareholders' approval for issuance of securities to certain related parties;

- the expansion of the definition of 'related party' to include chief executive officer who is not a director and persons connected to him;

- the substitution of 'net assets' for 'net tangible assets' as one of the denominators used in calculation of percentage ratios;

- the dispensation of shareholders' approval for related party transactions where the related party is only at subsidiary level and where the related party is not in a position to influence the listed issuer or, if applicable, the subsidiary entering into the transaction;

- introduction of a threshold for the requirement to disclose any related party transaction which amounts to RM1 million or if any of the percentage ratios is equal to or exceeds 1%, whichever is lower, in the annual report;

- the issuance of circulars which do not require BMSB's clearance no later than two months from the date of the announcement or the date the last approval obtained from the relevant authority, whichever is later

AMENDMENTS TO THE BMSB LR FOR MAIN BOARD & SECOND BOARD CONSEQUENTIAL TO THE SC'S GUIDELINES FOR THE ISSUE OF STRUCTURED WARRANTS AND OTHER AMENDMENTS

Date of coming into operation
28 October 2005

Amendments
Appendices 3.22, 5.01, 5.02, 5.03, 5.04, 5.05, 5.06, 5.07, 5.07A, 5.12, 5.13, 5.14, 7.17 and ***8.29***
Appendices 4F, 4L, 5A, 5B, 5C and ***5D***

Notes

The amendments were made in conjunction with the Structured Warrants Guidelines released by the SC on 28 October 2005. The purpose of the amendments was to set out the procedures for listing and quotation of structured warrants, to enhance the current continuing listing obligations (particularly to include certain obligations of the issuer of the new investment instrument called the bull equity linked structure) and to shorten the current settlement timeframe to minimise investors' risk. This should be read together with the ***Structured Warrants Guidelines*** and ***Prospectus Guidelines.***

OTHER RULES/ GUIDELINES/ PRACTICE NOTES ISSUED BY THE SC, BMSB AND BNM BETWEEN OCTOBER AND DECEMBER 2005

BMSB

- *Amendments to the Rules of BMSB In Relation to the Liberalisation of Central Depository System Account Structure Requirements Introduced in 1998 ('R/R 17 of 2005')* - 21 October 2005
- *Corrigendum to Participating Organisations' Circular R/R17 of 2005 Dated 7 October 2005 ('R/R 17 of 2005')* - 21 October 2005
- *Directives for Participating Organisation on the Use of Clearing Account, Error or Mistake Account and Investment Account* - 21 October 2005
- *Directives for Participating Organisation on the Use of Clearing Account, Error or Mistake Account and Investment Account - Erratum* - 21 October 2005
- *Amendments to the Rules of BMSB Pertaining to Credit Facilities Granted to the Spouse, Parent and Child of Commissioned Dealer's Representatives* - 3 October 2005
- *Directive Issued Pursuant to Rule 601.3(1)(C) in Relation to Recognised Stock Exchange* - 26 September 2005

SC

- *Guidelines on Permitted Activities for Stockbroking Companies* - 26 October 2005
- *Guidance Note 8 to the Guidelines on Unit Trust Funds - Marketing and Distribution of Unit Trust Funds Outside Malaysia* - 26 October 2005
- *Guidance Note 7 to the Guidelines on Unit Trust Funds - Amendment to the procedures for registration and lodgement of prospectus* - 21 October 2005
- *Circular on Guidelines on Unit Trust Funds - Financial Derivatives For Hedging Purpose* - 11 October 2005

BNM

- *Licensing Guidelines On Application For Financial Adviser's Licence Under The Insurance Act 1996* - 28 October 2005

ACTS ENFORCED BETWEEN OCTOBER AND DECEMBER 2005

- *Labour Ordinance of Sarawak (Amendment) Act 2005* - 1 October 2005
- *Labour Ordinance of Sabah (Amendment) Act 2005* - 1 October 2005
- *Aviation Offences (Amendment) Act 2005* - 30 September 2005

BRIEF-FLASH

- **AGENCY HAS SET SAIL** The newly-incepted Malaysian Maritime Enforcement Agency (APPM) has finally set sail on 30 November 2005. The idea of a maritime agency was mooted more than a decade ago. APPM will be responsible primarily for search and rescue, surveillance of the waters, and providing support services in the maritime zone to other related agencies. It will also take over ownership of boats and ships belonging to the other agencies which include the Fisheries Department, Maritime Department and Customs Department.

- **AMENDMENTS TO THE INSURANCE ACT 1996** As a result of the recent amendments to the Insurance Act 1996 as announced by Bank Negara Malaysia, a regulatory framework will now be provided for financial advisers to ensure an orderly and ethical development in the insurance industry. With the amendments, independent financial advisers will not only be required to be licensed, they also must possess a minimum professional indemnity insurance of RM200,000 and have a paid-up capital of at least RM100,000.

- **DANAHARTA - COMPLETION OF A MISSION** National asset management company, Pengurusan Danaharta Nasional Bhd (Danaharta) is expected to wind up its operations on 31 December 2005. Its remaining assets will revert to the Minister of Finance Incorporated (MOF Inc). It is said that MOF Inc has appointed its wholly-owned subsidiary, Prokhas Sdn Bhd to act as a collection agent for the residual recovery assets.

- **DIRECT MARKET ACCESS?** It has been reported that BMSB is contemplating the introduction of Direct Market Access (DMA) primarily to shorten execution time. DMA is a mode of electronic trading that allows an investor to buy or sell securities directly via an execution venue, hence bypassing a third party, such as brokers. Examples of execution venues include exchanges, alternative trading systems and electronic communication networks.

- **MALAYSIAN CO-OPERATIVE COMMISSION TO BE ESTABLISHED** A Bill to establish the Malaysian Co-operative Commission (MCC) is expected to be tabled in the Dewan Rakyat in March 2006. The MCC will replace the existing Department of Co-operative Development and its functions will include managing cooperative funds and assisting and facilitating cooperative credit requirements.

- **MALAYSIA ELECTED TO IMO COUNCIL** Although a member of the International Maritime Organisation (IMO) since 1971, it was only in 2005 that Malaysia contested for a seat in the IMO Council and was elected a member on 25 November 2005 at the IMO's 24th meeting securing 103 votes from 147 nations that voted.

- **NEW CONSUMER LAWS** Unreasonably high prices and monopolistic practices will be history when new laws under the Fair Business Practices Policy are enacted. Aimed at weeding out cartels and monopolies, companies will be subject to penalties if found to have engaged in unfair business practices.

- **SEXUAL HARASSMENT COMMITTEE A MUST** Amendments are expected to be made to the Employment Act 1955 to have companies incorporate sexual harassment guidelines implemented by the Human Resources Ministry. Companies will be required to form sexual harassment committees to investigate complaints by employees on the matter.

- **MINIMUM WAGES TO BE MONITORED** A Minimum Wage Monitoring Council which will be responsible for monitoring payment of a minimum wage to employees is in the process of being formed. Although not a guarantee in increasing workforce productivity, the minimum wage scheme is aimed at ensuring that employees, especially estates workers, receive income over the poverty level.

- **LAWS TO PROTECT HERITAGE BUILDINGS** A National Heritage Act has been proposed by the Culture, Arts and Heritage Ministry to protect old buildings against works that may destroy their historical and unique characteristics. Commenting on Central Market, the Minister Datuk Seri Rais Yatim said that the new law would also prevent such buildings from falling into the hands of the private sector.

- **INTEREST RATES INCREASED** Since it was introduced in April last year (to replace the three-month intervention rate), Bank Negara Malaysia has for the first time, on 30 November 2005, raised its market-based benchmark overnight policy rate (OPR) by 30 basis points to 3%. The move is said to be timely in the light of strong economic growth and recent capital outflows.

- **WATER BILLS DEFERRED** The tabling of the Water Services Industry Bill and National Water Services Commission Bill has been deferred to March 2006 due to overwhelming public response. It was decided that the contents of the controversial bills should be made public for feedback before being tabled in Parliament.

"It's amazing that the amount of news that happens in the world always just exactly fits the newspaper." - Jerry Seinfeld

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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