the brief

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A BRIEF NOTE...

by Dato Zulkifly Rafique

Professionalism v Commercialism

April was an exciting month for Zul Rafique & Partners (ZRp). We had a visit from a special guest – our very own Law Minister, Datuk Seri Nazri Aziz. At a luncheon hosted on 6 April 2006, Datuk Seri Nazri Aziz presented ZRp with the National Law Firm of the Year (IFLR) Award 2006.

In his address at the luncheon, the Law Minister referred to the restrictive publicity rules that govern the legal profession. His call to the Bar Council was to amend the rules, if not repeal them altogether. We are definitely in support of the Law Minister's suggestion.

We recognise the fact that the rationale for the rule against advertising is based on the tradition that it was professionalism and not commercialism that dictated and defined the legal profession. Today, however, with the advancement of science and technology, things have changed. The world has become flat; communications are made at the speed of lightning where you may be at the North Pole sealing a deal with your client at the South Pole. With that in mind, the legal profession has to move forward.

We have always been reminded that the most certain thing in life is change – and that we must be prepared to embrace it – especially in the light of globalisation and liberalisation of legal services – so let's grab the bull by its horns.

On that vigorous note, I am reminded of the catchy and interesting tagline by Adidas:

Impossible is Nothing !

in this issue...

ZUL RAFIQUE & partners

BRIEFING...

CONSTITUTIONAL LAW

A KISS IS STILL A KISS...IN KUALA LUMPUR The Federal Court case of ***Ooi Kean Thong & Siow Ai Wei v PP*** popularly known as the ***Hugging and Kissing*** case has sparked a debate that has got almost every Malaysian engaging in a discussion about it. The perception of the ruling of the Federal Court is that the acts of hugging and kissing in public were declared illegal by the apex court.

In this article we examine the decision of the Federal Court on this matter and what laws were actually involved which resulted in such decision.

BACKGROUND FACTS The applicants were accused of behaving in a disorderly manner, in that they were allegedly 'hugging and kissing' under the trees at the Kuala Lumpur City Centre Park, thus violating sections 8(1) and 10 of the Parks (Federal Territory) By-Laws 1981 ('the by-laws').

The matter was initially compounded by the Dewan Bandaraya Kuala Lumpur (DBKL). The applicants were supposed to pay the fines but had subsequently decided otherwise. The matter is still pending at the Municipal Court for its disposal. Meanwhile the applicants raised a constitutional point before the High Court and requested that that question of law be referred to the Federal Court.

FEDERAL COURT The main question before the Federal Court was whether the power of the Local Authorities (DBKL) under section 102 of the Local Government Act 1976 included the powers to make by-laws relating to indecent behaviour. The appellants argued that in legislating such a by-law, the local authority had infringed articles 5 and 8 of the Federal Constitution.

THE LAW Section 102 of the Local Government Act 1976 reads:

> In addition to the powers of making by-laws expressly or impliedly conferred upon it by any other provisions of this Act every local authority may from time to time make, amend and revoke by-laws in respect of all such matters as are necessary or desirable for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority areas and in particular in respect of all or any of the following purposes...*(followed by paragraphs (a) to (u)).*

The by-law reads:

> Any person found behaving in a disorderly manner in any park commits an offence.

The applicants argued that neither sections 102 nor the by-law states that 'hugging and kissing' in a public park are offences per se.

THE DECISION It was held by the Federal Court that it was within the power of a local authority to legislate by-laws in order to cater for the maintenance of the health, safety and well-being of the inhabitants or for the good order and government of the local authority area. In order to give effect to its powers it is for the local authority to disallow users of its public park from behaving in a disorderly manner.

The Federal Court, however, went on to say that whether the acts of hugging and kissing are within the ambit of 'behaving in a disorderly manner' was not an issue before such court.

Following the ruling, the applicants, Ooi Kean Thong, 24, and Siow Ai Wei, 22, will have to defend themselves against the charge at the Kuala Lumpur City Hall Court. Their case is

fixed for mention on 1 June 2006. Both had pleaded not guilty to committing the offence at the park at 5.20pm on 2 August 2003.

ANALYSIS What sparked off the controversy were the remarks made by Chief Justice, Tun Ahmad Fairuz.

On 3 April 2006, it was reported that counsel for the applicants had submitted:

> ...that the Datuk Bandar had failed to consider the fact that Malaysia is a multiracial country and that hugging and kissing [are expressions] of love which should be encouraged.

According to reports, the Chief Justice responded:

> So, they should be given freedom to live as they like? The constitution allows all citizens to do that (hugging and kissing) even by the roadside, in public park? In England, those acts are acceptable to the people in that country but is kissing and hugging acceptable to Malaysian citizens? Is the act according to the morality of the Asian people?

CONCLUSION In the written judgment (dated 25 April 2006) however, the Federal Court took pains to clarify its position in relation to the merits of the case. In the words of Richard Malanjum FCJ:

> For now we are not considering specifically whether kissing or hugging in the public park of DBKL is within the ambit of the impugned by-law. That is for the trial court to decide applying matured consideration and thereafter any aggrieved party to the case has the right of appeal to the higher courts of this country.

It is therefore important to note that the point before the Federal Court was purely constitutional in nature and that the Federal Court had no jurisdiction to deal with the merits of the case.

CORPORATE

THE INSIDE ON INSIDER TRADING We all have heard of the phrase 'insider trading' and the material on it is abundant – from fact to fiction novels and even in movies, reference has been made to insider trading. We examine the legal definition of insider trading with reference to local legislation.

WHAT IS 'INSIDER TRADING' 'Insider trading' is a term often heard and usually associated with illegal dealings. However, in the US, the term can also mean the perfectly legal buying and selling of the corporation's stock by its own insiders, as long as the trades are reported to the US Securities and Exchange Commission (SEC). The illegal side of it is when there is misappropriation of price sensitive, non-public information used as the basis to trade in securities related to it. This sort of information would, on becoming known, cause a significant effect on the prices of the stock.

In Malaysia however, insider trading is a security fraud, and in 1998, amendments were made to the Securities Industry Act 1983 (SIA) to deter such practices, where Division 2 of Part IX of the SIA is devoted to deal with the topic.

THE SECURITIES INDUSTRY ACT 1983 Insider trading used to be mainly associated with directors and chief executive officers (CEOs) of a corporation. Due to the fiduciary duties they owe to the companies, they were prevented from placing themselves in a conflict of interest situation, namely to use information not generally available, acquired by them due to their positions in the companies, to make profits by dealing in the company's shares.

The new insider trading regime came into operation in Malaysia on 1 April 1998. The amendments to the SIA provide the framework for regulating insider trading in Malaysia. This framework is modelled on reforms introduced to the Australian Corporations Law 1991. The legislation is directed at the misuse of non-public, price-sensitive information by any person regardless of a connection or relationship with the company or entity whose shares are traded. The amendments seek to broaden the definition of 'insider trading'; increase the range of sanctions, including civil sanctions, to deter insider trading and market manipulation; require additional disclosure from directors and CEOs; and increase the Securities Commission's power over directors and CEOs.

The relevant provisions may be found in sections 89 to 89P of the SIA.

The aim of these new amendments is to enhance transparency and corporate disclosure in line with the Securities Commission's plan to move towards disclosure-based regulation. In order to deter such corrupt practices, the SIA has been amended to allow the Securities Commission or any person who has suffered loss or damage from market manipulation practices and insider trading, to bring civil action against the offender under sections 90 and 90A respectively, even if the offender has not been charged or even proven guilty for the offence.

Civil penalties allow for full compensation for loss or damages suffered, and the full range of orders under section 100 of the SIA as well as the inherent powers of the Malaysian courts are also available. Investors are thus provided with a relatively easier option of taking an offender to court without a heavy burden of proof required. In addition, under section 90A(5), where the Securities Commission institutes a civil action against the insider, it is allowed to recover three times the amount of gain or loss avoided by the insider and claim a civil penalty of not more than RM1 million. The monies collected may be used to compensate the investors who have suffered losses.

A new section 99B empowers the Securities Commission to require a CEO or director of a public listed company to disclose their interests in securities of the company. The far-reaching effect of the amendments can be seen in section 99B(5) where the spouse, child or parent of the CEO or director is also caught under this provision.

THE COMPANIES ACT 1965 Besides the SIA, the Companies Act 1965 also seeks to regulate insider trading in sections 132, 132A and 132B.

Section 132 refers to the duty and liability of officers (de facto and shadow directors included). Sections 132A and 132B provide that an officer, agent or employee making gains on specific price-sensitive information acquired by virtue of his position shall be liable for the loss of the affected person, unless the affected person is reasonably expected to know the information. An affected party can take action for recovery of amount lost after the expiration of two years from the date of the completion of dealing in securities related to the loss suffered. Agents which include bankers, lawyers, auditors, accountants, stockbrokers or persons within the preceding six months who have been knowingly connected to the corporations and have information by virtue of their connection, are expected not to disclose any information (especially price-sensitive information) except for proper performance of their prescribed functions. This provision prescribes a penalty of a 5-year imprisonment and/or RM30,000 fine. This is in addition to any claim for damages by the affected person.

CONCLUSION In the light of the stringent provisions dealing with insider trading, it appears that the famous quote from the movie 'Wall Street' that 'greed, for the lack of a better word, is good' may not hold water.

CONSTITUTIONAL LAW

GENDER BENDER AND ALL THINGS TENDER... The main issue which concerns transsexuals pertains to the post-operative gender and whether he/she may apply to the National Registration Department for a declaration to reflect the change of his/her post-operative gender. In this article, we explore those implications with some comparison to the other commonwealth countries.

To avoid any confusion between a 'transsexual', 'transvestite' or even a 'homosexual', in the context of this article, a transsexual is a person who has undergone gender-reassignment surgery.

ENGLISH LAW Until recently, Malaysian courts have been bound by the celebrated English case of ***Corbett v Corbett***. In that case, it was stated that the 'biological constitution of an individual is fixed at birth (at the latest), and cannot be changed, either by the natural development of organs of the opposite sex, or by medical or surgical means.' The respondent's operation therefore, cannot affect her true sex. The only case where the term 'change of sex' is appropriate is one in which a mistake as to the sex is made at birth and subsequently revealed by further medical investigation.

MALAYSIAN LAW There were two recent local cases that highlighted the dilemma of transsexuals.

In ***Wong Chiou Yong v Pendaftar Besar / Ketua Pengarah Jabatan Pendaftaran Negara*** (2005, High Court), the applicant whose gender was reflected in her birth certificate and identity card as 'female', underwent gender-reassignment surgery to change her gender to male. She applied to the High Court that she be declared a man and for a direction to the Registrar to amend the BC and NRIC accordingly. The application was rejected on the basis that the only ground for which a rectification of the BC or NRIC is allowed is on the ground of error, and in this case there was no error when the gender of the applicant was registered at birth. Since there was no express legislation to re-register the gender of a transsexual, the applicant's gender at birth still stood.

In comparison to ***Wong Chiou Yong's*** case, it is interesting to note the more recent decision of ***J-G v Pengarah Jabatan Pendaftaran Negara*** (2005, High Court). In that case the applicant had undergone gender-reassignment surgery to change from a male to female. He then applied to the High Court to be declared a female after he was informed that the MyKad would state the plaintiff's gender as male. James Foong J allowed the application, stating that the case of ***Corbett v Corbett*** may be outdated, taking into account the fact that 'social policy has changed and medical science has advanced, particularly in the area of gender-reassignment'. His Lordship chose instead to adopt the dissenting judgment of Thorpe LJ in the House of Lords case of ***Bellinger v Bellinger*** (2002) where it was stated that emphasis should be given to the psychological factor and that the psychological factor cannot be considered at birth because they do not yet manifest and that it becomes an overriding consideration as the individual develops.

AUSTRALIAN LAW In the Australian case of ***AG for the Commonwealth v Kevin & Ors*** (2003), a more liberal approach was adopted. The Court of Appeal of the Family Court declined to follow ***Corbett v Corbett*** on the basis that biological factors were entirely secondary to psychological ones. The Court therefore upheld the principle that the gender of the person is not determined in medicine but in which 'it is best for the individual to live.'

CONCLUSION Whilst there is no law prohibiting a person from undergoing gender-reassignment surgery, what is required is some policy on their status and the need for the re-registration of their post-operative gender.

LEGAL PROFESSION

THAT'S WHAT (MCKENZIE) FRIENDS ARE FOR... On 17 May 2006, the Chief Justice of Singapore, Chan Sek Keong, while addressing judicial officers on the plans for the judiciary, had suggested a scheme for those who cannot afford a lawyer but may not be eligible for any of the legal aid schemes.

In this article we examine the concept of a ***McKenzie Friend*** and how valuable that 'friend' can be.

MCKENZIE V MCKENZIE The phrase ***'McKenzie friend'*** has its origins in the 1970 Court of Appeal case of ***McKenzie v McKenzie.***

That case was a divorce petition which involved complex questions of fact necessitating a lengthy trial. The husband petitioner had been granted legal aid but his legal aid certificate had been subsequently discharged. An Australian lawyer, Mr Hanger was sent to assist the husband petitioner but the judge prevented Mr Hanger from taking part in any proceedings.

On appeal, it was held that Mr Hanger should have been allowed to remain as every party had the right to have a friend present in court beside him to assist by prompting, taking notes and quietly giving advice.

In fact, the Court of Appeal referred to a case decided in 1831, ***Collier v Hicks,*** where it was stated by Lord Tenterden CJ:

> Any person, whether he be a professional man or not, may attend as a friend of either party, may take notes, may quietly make suggestions and give advice.

THE *MCKENZIE FRIEND* The assistant that was referred to in ***McKenzie v McKenzie*** is now called the ***McKenzie friend***. Although the ***McKenzie friend*** is someone who assists a party who appears in person in court, he does not represent the litigant and does not have the right of audience.

R V LEICESTER CITY JUSTICES The ***McKenzie case*** was followed subsequently in ***R v Leicester City Justices*** (1991). In that case the Leicester City Council had taken Mr and Mrs Barrow to court for non-payment and applied for a 'liability order' against them. During the proceedings, the Barrows wanted the assistance of one Robert John to act as a ***McKenzie friend***. The magistrate was of the opinion that the ***McKenzie friend*** was not required as the case was fairly straightforward but the Court of Appeal decided otherwise. However it was decided that the ***McKenzie friend*** is merely an assistant and nothing more. In the words of Staughton LJ:

> The title *McKenzie friend* suggests status and a mystique which are not justified. In my view it would be better not used in the future, and that the person should be referred to simply as an assistant or a friend.

CONCLUSION The comments of Chief Justice Chan Sek Keong bring to mind the hardship that several litigants have had to endure. A good example in Singapore would be the case of a Briton, Jane Ong who subsequent to separating from her husband, had taken her husband and his family to court over her share of assets. Ms Ong was awarded a share of her husband's estate but she had to attend court without the assistance of a lawyer.

In Malaysia, the maximum amount required to be earned by those who intend to apply for legal aid is ridiculously low. The ***McKenzie friend*** would therefore be a friend indeed !

BRIEF-UP...

BANKING & FINANCIAL INSTITUTIONS (AMENDMENT) ACT 2005

No
A1256

Legislation amended
Banking & Financial Institutions Act 1989

Amendments
Sections 4, 7, 45, 46, 49 *and* **81**

Introduction
Section 98A

Date of coming into operation
1 April 2006

ISLAMIC BANKING (AMENDMENT) ACT 2005

No
A1255

Legislation amended
Islamic Banking Act 1983

Amendments
Sections 2, 3, 11, 16, 22, 34 *and* **45**

Date of coming into operation
1 April 2006

GUIDANCE NOTES 8C, 12C AND 6D TO THE SC POLICIES AND GUIDELINES ON ISSUE/ OFFER OF SECURITIES

On the 26 April 2006, the Securities Commission (SC) introduced a set of enhanced guidelines for greater shareholders and investor protection vide Guidance Notes 6D, 8C and 12C in relation to the SC's Policies and Guidelines on Issue/Offer of Securities ('Issues Guidelines') which replace completely the relevant paragraphs on placement of securities set out in the Issues Guidelines (i.e. paragraphs 6.07, 8.03-8.09, 10.02-10.05 and in relation to chapter 12).

These Guidance Notes provide that in an ***issue or placement of securities for cash (other than rights issues) under a general mandate given to the directors by the shareholders of the issuer via resolution in general meeting,*** the nominal value of the securities placed during the preceding 12 months shall not exceed 10% of the nominal value of the issued and paid-up capital of the issuer. The price of such securities must also be not more than a 10% discount of the weighted average market price of the shares for the five market days prior to the price-fixing date. Another requirement introduced by these Guidance Notes is that the principal adviser must act as the placement agent or joint placement agent. A placement agent is prohibited from retaining any securities placed for its own account.

Securities may not be placed with directors, substantial shareholders or chief executive officer of the issuer or its holding company ('interested persons') or persons connected to such interested persons, or nominee companies, unless the ultimate beneficiaries are disclosed or are persons connected to the placement agent, except where such connected persons are statutory institutions managing funds contributed from the public or collective investment schemes representing public investors, which are not substantial shareholders of the issuer.

Placement of securities that depart from the above mentioned guidelines must be subjected to the prior approval of the issuer's shareholders in general meeting for the precise terms and conditions of the issue/placement. Where the securities are placed with interested persons or persons connected to them, then such persons must abstain from voting on the resolution approving the issue/placement. Furthermore, the price of shares and the conversion price of convertible securities issued/placed with interested persons or persons connected must be priced at least at the weighted average market price for the five market days prior to fixing date.

However, securities that are placed with:

- independent directors with individual shareholdings of less than 5% of the issued and paid-up capital of the issuer upon completion of the placement;

- substantial shareholders with individual shareholdings of not more than 15% of the issued and paid-up capital of the issuer upon completion of the placement and are either statutory institutions managing funds contributed from the public or collective investment schemes representing public investors; and

- interested persons or persons connected to them who are approved Bumiputera shareholders to meet the requirements of the National Development Policy;

need not be priced at the weighted average market price for the five market days prior to fixing date.

These new guidelines explained above shall also apply in relation to ***placement of securities that are undertaken as part of public offerings and listings on Bursa Malaysia Securities Berhad (Bursa Malaysia) or that are undertaken as part of restructuring schemes resulting in significant changes in business direction of listed companies.*** The prohibition that a placement agent may not retain any securities being placed for its own account still applies save for when it is pursuant to an underwriting agreement. Securities may not be placed with persons connected with the placement agent unless such connected persons are statutory institutions managing funds contributed from the public or collective investment schemes representing public investors or that the placement is made pursuant to a book-building exercise. The total number of securities placed with such connected persons shall not exceed 25% of the total amount of securities available for placement by the placement agent.

In addition to the above, in relation to ***placement of securities that are undertaken as part of public offerings and listings on Bursa Securities,*** another instance where the placement agent may retain securities being placed for its own account is when such securities are over and above the total number of securities required to meet the public shareholding spread requirement of Bursa Malaysia, subject to a maximum of 5% of the enlarged issued and paid-up capital of the applicant. Also, paragraph 6.05 of the Issues Guidelines still applies where the placement of securities may be made to directors and employees of the applicant, its subsidiaries and holding companies, to persons who have contributed to the success of the applicant, to the shareholders of listed holding companies and any other persons allowed by the SC.

As soon as practicable after the placement and prior to the listing of the securities, the principal adviser must submit to the SC the final list setting out the details of the placement and a confirmation that the information set out therein is accurate and the placement exercise complies with the earlier mentioned requirements. The SC maintains the discretion to require further information to establish the propriety of the exercise and independence of the places.

The SC confirmed that all applications for placements under a general mandate that fully comply with these new guidelines and the

Format and Content of Applications for Fund Raising under the Issues Guidelines will be given immediate decision upon application.

OTHER GUIDELINES/RULES/ PRACTICE NOTES ISSUED BY BANK NEGARA MALAYSIA/ SECURITIES COMMISSION/ BURSA MALAYSIA SECURITIES BHD BETWEEN APRIL AND JUNE 2006

BURSA MALAYSIA SECURITIES BERHAD (BMSB)

- Bursa Malaysia Establishes Clearing Guarantee Fund – *1 July 2006*
- Bursa Malaysia Unveils An Enhanced Framework For The MESDAQ Market – *May & 3 July 2006*
- Revamped MESDAQ Market Listing Requirements – *May & 3 July 2006*
- Amendments to Listing Requirements in Relation to Bonus Issues – *29 May 2006*
- Amendments to the Listing Requirements of Bursa Malaysia in Relation to Financial Condition and Level of Operations – *5 May 2006*
- New Admission into Amended Practice Note 17/2005 – *5 May 2006*
- Amendments to the Listing Requirements (For Main Board and Second Board) In Relation to the Cessation of Consultation with the Securities Commission – *24 March 2006*

SECURITIES COMMISSION (SC)

- SC Circular on Guidelines on Unit Trust Funds – Investments in Foreign Markets – *29 May 2006*
- SC Introduces Online Unit Trust Database – Promotes Capital Market Research – *25 May 2006*
- SC Consultation Paper No. 1 on Establishing A Single Licensing System – *25 May 2006*
- SC Consultation Paper No. 2 on Establishing A Framework For Regulating Self-Regulatory Organisations – *25 May 2006*
- SC Guidelines on Employment of Non-Malaysian Citizens in the Securities and Futures Industries
- SC Guidelines on Chinese Walls for Dealers and Futures Brokers – *11 May 2006*
- Guidance Note 11 to the SC Guidelines on Unit Trust Funds – Investment in Warrants and Options – *17 May 2006*
- Guidance Note 12 to the SC Guidelines on Unit Trust Funds – Investments in Structured Products – *17 May 2006*
- Updated List of Shariah-Compliant Securities by SC's Shariah Advisory Council – *28 April 2006*
- Practice Note 4 to the SC Guidelines on the Offering of Islamic Securities – Application of the Guidelines on the Offering of Islamic Securities to an Issuance of Islamic Commercial Papers or a Combination of Commercial Papers and Medium Term Notes – *24 April 2006*
- Practice Note 4 to the SC Guidelines on the Offering of Private Debt Securities – Application of the Guidelines on the Offering of Private Debt Securities to an

Issuance of Commercial Papers or a Combination of Commercial Papers and Medium Term Notes – *24 April 2006*

- SC Guidelines on Restricted Investment Schemes – *7 April 2006*
- Securities Commission RIS Returns Declaration/Verification Form - *7 April 2006*
- SC Guidelines on Restricted Investment Scheme – Application for Increase in the Approved Size of a Restricted Investment Scheme – *7 April 2006*
- SC Guidelines on Restricted Investment Scheme – Application for Approval of a Foreign Market Investment by a Restricted Investment Scheme – *7 April 2006*
- SC Guidelines on Restricted Investment Scheme – Application for Establishment of a Restricted Investment Scheme – *7 April 2006*
- Practice Note 2A to the SC Guidelines on the Offering of Private Debt Securities – Application of the Guidelines on the Offering of Private Debt Securities to Foreign Governments and Agencies or Organisations of Foreign Governments – *23 March 2006*
- Practice Note 2A to the SC Guidelines on the Offering of Islamic Securities – Application of the Guidelines on the Offering of Islamic Securities to Foreign Governments and Agencies or Organisations of Foreign Governments – *23 March 2006*

BRIEF-CASE...

CONTRACT OF EMPLOYMENT – Eligibility of Employee Share Option Scheme (ESOS)

TAN MENG YUNG V TELEKOM MALAYSIA BHD 2006, High Court

FACTS The plaintiff retired from the permanent employment of the defendant on 27 June 2002. He was reemployed by the defendant as a contract staff a month later from 1 August 2002 until 31 July 2003.

Just before the retirement of the plaintiff, the defendant had decided to allot to all eligible employees who were in the employment of the defendant as at 31 May 2002, shares under the defendant's Employee Share Option Scheme (ESOS).

Although the plaintiff had accepted the offer, the defendant had failed to allot to the plaintiff the shares he was entitled to have on the basis that the letter of offer was dated 1 August 2002, whereas the plaintiff has ceased permanent employment on 27 June 2002. The action by the plaintiff therefore was for specific performance.

ISSUE Whether the plaintiff was entitled to the ESOS.

HELD It was held that although the letter of offer was dated 1 August 2002, the requirement of eligibility was for so long as the employee was in the service of the defendant as at 31 May 2002. The plaintiff was therefore entitled to ESOS as he had only ceased permanent employment on 27 June 2002.

TRUST – Proof of resulting trust

ABDUL MANAP AHMAD V WERSUAH AMOON 2006, High Court

FACTS The plaintiff had decided to purchase an apartment for his mother-in-law who happened to be the defendant's mother. The plaintiff decided to include the defendant as a co-owner of the apartment on the understanding that the defendant would hold a 50% share of the property on trust for the plaintiff and would care for the plaintiff's mother-in-law.

The dispute arose when the plaintiff objected to the defendant's plan to transfer 50% share of the property to one Sahar bin Abdul Manap. The plaintiff argued that that 50% share of the property in the name of the defendant was held in trust for the plaintiff as the sole beneficiary.

ISSUE Whether the plaintiff had proved the resulting trust.

HELD It was held that a resulting trust arises where property is purchased in the name or placed in the possession of the person without any intimation that he is to hold it in trust, but the retention of the beneficial interest by the purchaser or disposer is presumed to have been intended.

Although the burden fell on the plaintiff to establish the existence of the resulting trust, he did prove it by adducing the relevant facts, namely that it was the plaintiff who had paid for the property and even continued with the monthly payments and that the defendant had not contributed whatsoever to the payment of the purchase price.

EMPLOYMENT LAW – Award of backwages up to 63 months

JT INTERNATIONAL TOBACCO SDN BHD V LAU THOW SIN 2006, High Court

FACTS The respondent employee was dismissed from the service of the applicant employer on 5 March 1998. The matter was referred to the Industrial Court where the employee challenged his dismissal. It was held that the dismissal of the employee was without just cause or excuse. The employer was ordered to pay the employee backwages which amounted to 63 months.

ISSUE Whether the Court should have limited the award of backwages to 24 months in accordance with Practice Note No 1 of 1987.

HELD Practice Note No 1 of 1987 was formulated to avoid arbitrariness in the award of backwages and thus provides that the award of backwages should be subjected to a maximum of 24 months.

In allowing the employer's application, it was held that although the Practice Note is merely a guideline, it should only be disregarded when and if it can be proved that a company mainly contributed to the delay of disposing a case. In the instant case, the employer was not solely responsible as the delay was due to several factors. It was thus unfair for the Industrial Court to award the respondent full backwages without limiting the same to 24 months.

LEGAL PROFESSION – Whether an opinion from solicitor to client was privileged by virtue of section 126 of the Evidence Act 1950

SEE TEOW CHUAN & ANOR v DATO ANTHONY SEE TEOW GUAN

2006, Court of Appeal

FACTS The plaintiffs and defendant were brothers and shareholders/directors of a company. The defendant approached their solicitor and made some very serious allegations against the plaintiffs. Based on the information and instructions by the defendant, the solicitor provided a legal opinion. That legal opinion was subsequently published to various persons including the auditors of the company. The plaintiffs instituted defamation proceedings for libel and slander against the defendant.

At the trial, the plaintiffs sought to call the solicitor as a witness and to admit the legal opinion. The defendant objected to this request on the ground that it was privileged.

ISSUE Whether the legal opinion was privileged by virtue of section 126 of the Evidence Act 1950 which provides for the legal professional privilege between solicitor and client.

HELD In allowing the opinion to be adduced, it was held that the privilege extends only to communications made to the lawyer confidentially and with a view to obtaining professional advice. In this case it was the defendant who had caused the publication of the legal opinion to the external auditors with knowledge that the auditors will furnish the legal opinion to the plaintiffs and those present at the meeting. The communications between the defendant and his solicitor therefore were not intended to be confidential.

COMPANY LAW – Whether gratuity payment to CEO/ Chairman/ Director amounts to breach of section 137 of the Companies Act 1965

RHB CAPITAL BERHAD v TAN SRI DATO' ABDUL RASHID HJ MOHAMED HUSSAIN 2006, High Court

FACTS The plaintiff employed the defendant as the Executive Chairman/Chief Executive Chairman/Chairman/Director of the plaintiff and its subsidiaries. After the defendant submitted his resignation as the Executive Chairman, he was paid RM20 million gratuity payment upon his retirement by virtue of his contract with RHB Securities Sdn Bhd.

ISSUE The issues for consideration were (a) who, in fact and in law, made and bore the payment of RM20 million to the defendant; and (b) whether such payment was in contravention of section 137 of the Companies Act 1965 which prohibits payment to be made to directors for loss of office, etc.

HELD It was not the plaintiff who made the payment but RHB Securities Sdn Bhd. This attracts the exception in sub-section (5)(b) of section 137* of the Companies Act. The RM20 million was part of the remuneration package of the defendant and was not intended to be paid with the object of compensating the defendant for loss of his office or as consideration for or in connection with his retirement.

*(5) Any reference in this section to payments to any director of a company by way of compensation for loss of office or as consideration for or in connection with his retirement from office shall not include –

(b) any payment under an agreement, particulars whereof have been disclosed to and approved by special resolution of the company.

BRIEF-FLASH...

- **ABOLISH ARCHAIC ADVERTISING RULES** In his speech at a luncheon hosted by Zul Rafique & Partners, de facto Law Minister, Datuk Seri Mohd Nazri bin Abdul Aziz urged the Bar Council to allow lawyers to advertise. The rules against advertising which are contained in the Legal Profession (Publicity) Rules 2001 are said to be deeply embedded in tradition as the legal profession is said to represent professionalism and not commercialism. Although amendments have been made in recent years to relax the advertising rules, in comparison to other jurisdictions, they are still considered restrictive.

- **BENCHMARK FOR DATA COLLECTION** The Statistics Department has teamed up with Bank Negara to create a benchmark for Malaysia against the world's best practices in terms of data collection. This was announced after the launching of the Economic Census 2006. The Economic Census is conducted once every five years and is vital to the collection and dissemination of statistical information pertaining to growth, composition and distribution of the main economic sectors of the country.

- **WASTE MANAGEMENT BILL SOON** A National Solid Waste Management Bill will be drafted soon. A law is being formulated to streamline the policies on solid waste management and recycling activities.

- **GENDER EQUALITY ACT?** The Ministry of Women, Family and Community Development has set up a committee to hold discussions on the viability of a Gender Equality Act. It was reported that reference to the models in other countries may be necessary before proceeding to implement any form of equality law in this country.

- **GROUSE OF THE GATED COMMUNITY RESIDENTS** In a recent dispute between a resident of a gated community and the developer, the decision of the Consumer Claims Tribunal has left many residents of gated communities feeling shortchanged and dissatisfied. The suit between the resident and the developer was the result of a burglary that took place in the former's unit. In favouring the developer, Tribunal President, Hussain Mohd Dewa said that the duty of the security guards in the condominium complex is to provide minimal security by merely alerting police of the break-in and this duty they had discharged.

- **IP COURT SOON?** The setting up of the Intellectual Property (IP) Court is expected to materialise by the end of 2006. The IP Court is established with a view to disposing cases expeditiously. The current process requires the infringed party to file the case individually in a civil court and generally takes a longer time to dispose of.

- **ISLAMIC REIT** The country's first Islamic REIT will be announced soon. Since the guidelines were released last year, it was reported that two applications have been received by the Securities Commission.

- **IPO RULES TO BE RELAXED** At the Invest Malaysia Conference, it was announced that the IPO Rules were to be relaxed. This is to enable the listing on the Bursa Malaysia, foreign companies and Malaysian companies with foreign assets. The guidelines are being finalised.

- **LAWS ON CLEAN WATER?** Along the lines of the US Safe Drinking Water Act or UK's Clean Water Act, it has been suggested by a senator that the government should enact a water quality control legislation to ensure that users receive clean water supply.

- **NEW LAWS TO PUNISH BUILDING OWNERS?** In what has been described as a bold and brazen move, the Recording Industry Association of Malaysia has filed a civil suit against the owner of a mall in Kuantan, for allegedly allowing its tenants to sell pirated optic materials such as CDs. The sale of these materials is said to violate both the Copyright Act 1987 and Trade Descriptions Act 1972. In a related move, it has been reported that the Ministry of Domestic Trade and Consumer Affairs has proposed a new law to attach criminal liability to the owners of the malls. The new law is expected to be implemented by next year.

- **NEW ENVIRONMENTAL LAWS** Proposals are being made to amend the Environmental Quality Act 1974 and one of the suggestions made is for a jail term for developers and consultants if their projects damage the environment or trigger landslides and other disasters. With the number of landslides in the recent years, the environmental groups are in full support of these proposed amendments. The same however could not be said of the developers' reaction.

- **OPR REMAINS AT 3.5%** According to Bank Negara Malaysia, the Overnight Policy Rate (OPR) will remain at 3.5%. This is based on the assessment of the economic outlook.

- **OMBUDSMAN TO HANDLE COMPLAINTS?** In the name of transparency and accountability a suggestion has been made to establish an independent body to deal with public complaints against the authority which should include ministers and elected representatives. An ombudsman is a government appointee who investigates complaints by private persons against the Government. The ombudsman was suggested as an alternative to the Independent Police Complaints and Misconduct Commission, the reason being that it was not fair to target only the police.

- **PFI INITIATIONS** On 24 April 2006 the Prime Minister announced that the government will be promoting a new form of partnership with the private sector based on private finance initiatives. Any future PFI is expected to be characterised by a fair agreement for both the government and the private sector. The arrangement is to ultimately transform the Malaysian economy and prepare her for a more challenging economic landscape.

- **SC AND CCM TO MERGE** Although a merger of the Securities Commission and the Companies Commission of Malaysia was announced recently, it has not taken place yet.

- **EMPLOYMENT ACT TO BE AMENDED?** Amendments to the Employment Act and Employment Social Security Act are being considered to enable women to work from home. The draft on guidelines for working from home will be presented to the Cabinet some time in June 2006. Although the work-at-home concept is still at its infancy stage, the Human Resources Minister has emphasised the importance to adapt to changes brought about by globalisation and development in science and technology.

- **CHINA ISSUES NEW RULES ON IPO FIRMS** New rules on IPO firms have been issued by the China Securities Regulatory Commission (CSRC). These rules require investment bankers to investigate enterprises more cautiously before funding their IPOs. IPOs in China were suspended in April 2005 and resumed in May 2006.

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