

THE ZR_p BRIEF

ZUL RAFIQUE & partners as a co-sponsor at the **ALB Malaysia In-House Legal Summit**
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From left: *Ermira Faridah Mohd Said, P Jayasingam, T Kuhendran, Dato' Zulkifly Rafique* (Managing Partner), *Khairuzzaman Muhammad, Lukman Sheriff Alias* and *David Lee*.



A BRIEF NOTE...

by Dato' Zulkifly Rafique

Balance v Integration...

In the last few months, my conversations with Millennials seem to revolve around how to achieve work-life balance.

Those of my generation probably never encountered such 'buzz-word' as it was ingrained in us that work was our life and life our work.

So what is work-life balance? It is being able to compartmentalise work-life and home-life, with work being confined between 9am and 6pm, and the rest of the 15 hours should be for everything else.

This is a theory that is difficult to put into practice today. With the advancement of technology, it has become increasingly difficult to maintain a clear delineation between the two. Everyone demands instant connectivity, hence the disappearance of boundaries.

In fact, 'work-life balance' is considered a misnomer today. The new norm that is seen to be replacing 'work-life balance' is 'work-life integration', where you attempt to find pockets of time in your work and life schedules to lend to one another, or, if you can, blend them together.

Remember that the scale can never be in ideal balance permanently. It may be momentarily, but the pendulum will always swing bringing you back to an imbalance.

So give work-life integration a chance. You will probably find it more realistic and achievable!

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- *Sebiro Holdings Sdn Bhd v Bhag Singh & Anor* [2015] 4 CLJ 209, Court of Appeal
- *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor* [2015] 4 CLJ 295, Court of Appeal
- *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and Another Case* [2015] 5 CLJ 527, High Court
- *Lynawati Abdullah v Abang Sukori Abang Hj Gobil and Anor* [2015] 7 CLJ 219, Court of Appeal

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Legislation Update:

- *Prevention of Terrorism Act 2015*
- *Capital Markets and Services (Amendment) Act 2015*
- *Securities Commission (Amendment) Act 2015*
- *Industrial Relations (Amendment) Act 2015*
- *Guidelines/Rules/Circulars/Directives and Practice Notes issued between July and September 2015 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia*

- **CHANGES TO BURSA ACE MARKET**

LISTING REQUIREMENTS Amendments made to the ACE Market Listing Requirements by Bursa Malaysia, which came into effect on 13 July 2015, aim to enhance the competitiveness of the listing and investment platforms. As a result of such amendments, moratorium requirements for eligible promoters were also liberalised.

- **DAMAGES AWARDED FOR IVF TREATMENT**

In a landmark ruling by the Court of Appeal, the appellant, who became disabled from an accident, was awarded special damages to undergo *in vitro* fertilisation (IVF) treatment, on the basis that it is a basic fundamental right to have children.

- **DECISION BY NATIVE COURTS MAY BE CHALLENGED**

The indigenous people in the State of Sarawak are now allowed to challenge decisions of the Native Court in the Civil Court, following a unanimous decision by the Court of Appeal. It was ruled that Native Courts, which hear disputes involving indigenous people according to their customary practices, are inferior tribunals under the prerogative of the High Court, and that their decisions are amenable to judicial review.

- **ETHICAL SUKUK IN MALAYSIA**

In its efforts to develop Islamic finance, Malaysia has created a market for ethical Islamic bonds (*sukuk*). In May, Malaysia's sovereign wealth fund, *Khazanah Nasional*, launched the country's first Sustainable and Responsible Investment (SRI) *sukuk*, nearly two years after the format was first announced by the Government of Malaysia.

- **MALAYSIA & THAILAND: SETTLEMENT OF BILATERAL TRADE AND DIRECT INVESTMENT**

Bank Negara Malaysia and Bank of Thailand have signed a Memorandum of Understanding ("MoU"), which intends to set up a framework that promotes the settlement of bilateral trade and direct investment in their respective local currencies. The arrangements under the MoU would reduce the risk of

exposure to the volatility of global settlement currencies and lower transaction costs for businesses.

- **POTA TAKES EFFECT**

The controversial Prevention of Terrorism Act 2015 ("POTA") has come into effect on 1 September 2015. The POTA provides for the prevention of the commission or support of terrorist acts involving listed terrorist organisations in a foreign country, and also for the control of persons engaged in such terrorist acts.

- **SC RULES FOR FUND MANAGEMENT**

INDUSTRY LIBERALISED Rules governing fund management industry have been liberalised by the Securities Commission Malaysia ("SC"), where the establishment of a boutique fund management company with a paid-up capital of MYR500,000 is permitted, in comparison to the previous requirement of MYR2 million for a full-fledged fund management licence. The boutique fund management company is now allowed to manage assets up to the value of MYR750 million, with a clientele of not more than 50 investors.

- **SMOKING BAN**

Smoking in air-conditioned eateries, public parks, and national parks has been banned in Malaysia by the Health Ministry from 1 August 2015. This is followed by the abolition of the rule allowing one-third of the restaurant space to be allocated for smokers.

AROUND THE WORLD... IN BRIEF

- **AUSTRALIA: APPROVAL FOR COAL MINE REVERSED**

The approval given by the Australian Government to the Carmichael Coal Mine has been reversed by the Federal Court of Australia due to environmental concerns, including threats to the survival of two distinctive animal species. The mine is not allowed to operate until fresh approval is obtained.

- **AUSTRALIA: BORDER FORCE ACT** The Border Force Act which came into force on 1 July 2015, contains a controversial provision criminalising the disclosure of wrongdoing, and physical or mental health abuse by individuals working in the Australian immigration detention centres. The incorporation of such provision is said to be caused by revelations in the media over the years by non-governmental organisations and medical groups, about abuse of asylum seekers in the care of the Australian Government.
- **EUROPEAN UNION: TRAVELLING IS PART OF WORKING** The Court of Justice of the European Union ("the CJEU") has ruled that the time spent travelling to and from, to attend the first and last appointments, by workers without fixed office hours, is deemed part of their working time. The ruling intends to protect and uphold the safety and health requirements of workers stipulated in the European Union's working time directive.
- **HUNGARY: NEW IMMIGRATION LAW** With effect from 15 September 2015, a new immigration law takes effect, resulting in refugees facing deportation and imprisonment if they enter Hungary illegally. This is due to the failure of the European Union Ministers to agree on a common strategy in dealing with the recent issues concerning refugees.
- **INDONESIA: DISCLOSURE OF CONCESSIONS PROHIBITED** The Indonesian Government, which ratified the ASEAN Agreement on Transboundary Haze Pollution in 2014, is banned from sharing concession maps, because such disclosure is deemed classified information, and a breach of the law.
- **MYANMAR: MINIMUM WAGES LAW ENFORCED** The Myanmar Government has set the minimum wages for an eight-hour work day at the rate of USD2.80. The law was passed in 2013, and after two years of discussion between employers and labour unions, is now applicable to all sectors and industries, except for businesses employing less than 15 people.
- **PHILIPPINES: LANDMARK COMPETITION LAWS SIGNED** Two landmark laws, aimed at further opening the Philippines to fair trade and competition, have been signed. The Philippine Competition Act and the Foreign Ships Co-Loading Act seek to liberalise the investing environment for local and foreign businesses.
- **SINGAPORE: IVF MIX-UP CASE ON APPEAL** A woman is seeking damages from a fertility center and two embryologists over a mix-up in sperm samples resulting in the birth of a baby girl, currently four years old. She appealed after the High Court, based on policy considerations, denied damages to be awarded for the upkeep of a healthy child.
- **SINGAPORE: LEGAL ONLINE BETTING** Online betting in Singapore could be legalised in June 2016. Lottery operators, Singapore Pools and Singapore Turf Club, have applied for exemption under the Remote Gambling Act 2014, which came into force on 2 February 2015, criminalising related activities.
- **SINGAPORE: TAKEOVER AND MERGERS CODE REVIEWED** The Singapore Code of Takeovers and Mergers ("the Code") is undergoing a review to accommodate changes in the market and international practices. The Securities Industry Council has proposed various amendments to the Code, with key proposals aiming to give greater certainty in the event of a competing offer, and encouraging the Board of takeover targets to be more proactive in protecting shareholders' interests.
- **SWITZERLAND: ALCOHOL LIMIT ON CABLE-CAR OPERATORS** With effect from 1 October 2015, cable car operators in Switzerland will be subject to a blood alcohol level of 0.5 parts per thousand.

- UK: ASSISTED DYING BILL REJECTED** The Assisted Dying Bill ("the Bill") which enables competent terminally-ill adults to choose to be provided with medically supervised assistance to end their own life, has been rejected by the House of Commons. Under the Bill, subject to the approval of two doctors and a High Court judge, an individual with less than six months to live may be prescribed with drugs to end his life.
- UK: SNOOPING LAW REWRITE?** The High Court ruled that section 1 of the Data Retention and Investigatory Powers Act 2014 ("the Act") is inconsistent with the European Union Law, as the former fails to set out clear and precise rules for accessing data which are retained and restricted for the purposes of preventing, detecting or conducting criminal prosecutions relating to serious offences. Furthermore, the access to such data is not subject to a prior review by a court or an independent administrative body, which generally decides the limit and use of the data. The Act will remain in force until the end of March 2016.
- US: SAMSUNG'S APPEAL DENIED** Both *Samsung* and *Apple* have been in legal battle over patent infringements for years. An appeals court in the United States ("US") has ruled that it will not reconsider the decision which found that *Samsung* had violated *Apple's* patents.
- VIETNAM: LAW FIRMS IN ALLIANCE** Five law firms, namely Bross & Partners, LuatViet, Phuoc & Partners, Rajah & Tann LCT Lawyers, and VLT Lawyers have come together to form the country's first alliance of law firms, named the LawTeam Alliance (LTA).

CRIME & NATIONAL SECURITY

THE PREVENTION OF TERRORISM ACT 2015

The Prevention of Terrorism Act 2015 came into force on 1 September 2015. The law, which aims to prevent the conduct or support for acts of violence involving terrorist organisations, has been criticised following claims that it is merely a reincarnation of the Internal Security Act 1960 ("ISA").

In this article, we examine the elements of the Prevention of Terrorism Act 2015, including the procedures and its relevant provisions.

INTRODUCTION The Prevention of Terrorism Act 2015 ("the Act") is a statute enacted as a result of a White Paper entitled *Towards Handling The Threats of the Islamic State Militant Group*, tabled in November 2014, by Prime Minister Datuk Seri Najib Tun Razak.

The Act provides for the prevention of the commission or support of terrorist acts¹ involving listed terrorist organisations in a foreign country or any part of a foreign country and for the control of persons engaged in such acts and for related matters.

With the implementation of the Prevention of Terrorism Act, police can now act against those who are recruiting people, regardless of what form they are using, for terrorism and militant movement such as the Islamic State (IS). This Act will also enable police to take actions against those who are going to Syria and Iraq to join IS. – Nancy Shukri (Minister in Prime Minister's Department).

DETENTION AND OTHER CONDITIONS The Act provides for the powers of a police officer, to arrest, without warrant, if he has reason to believe that such arrest is justified.² The suspect

¹ Terrorist acts is defined under section 130B (2), (3) and (4) of the Malaysian Penal Code.

² Section 3 of the Act.

has to be produced before a Magistrate within 24 hours, and may initially be held in remand for 21 days, with an extension of a further 38 days.³ After such period of remand, the suspect may be taken before a Sessions Court Judge, and if found that there are no grounds to lawfully detain the suspect, the Sessions Court Judge may direct his release⁴ or order his release subject to certain restrictions⁵, including the attachment of an electronic monitoring device⁶. If the suspect is not released, an Inquiry Officer will continue investigations.⁷

THE INQUIRY OFFICER The Inquiry Officer's role is to conduct investigations and report his findings to the Prevention of Terrorism Board ("the Board").

The role and function of the Inquiry Officer is intriguing as his identity is vague. According to the Act, the appointment of the Inquiry Officer will be made by the Home Minister. Although it is stated that a police officer will not be appointed as the Inquiry Officer, the issue revolves around the independence of such officer.

THE PREVENTION OF TERRORISM BOARD

The Board will comprise between five and eight people, appointed by the *Yang di-Pertuan Agong*. They will comprise a chairman, a deputy chairman and not less than three, not more than six, other members. The Board may make restriction as well as detention orders. Detention may be ordered for a period of two years,⁸ with further powers to extend such order indefinitely.

ACCESS TO LAWYERS The rights of the person arrested appears to be limited as it is stated in the Act that neither the person subject to inquiry nor witness at an inquiry shall be represented by a lawyer at the inquiry except when his own evidence is taken and recorded by the Inquiry Officer.¹⁰

JUDICIAL POWER There appears to be slight contradiction in the Act between two sections on the issue of judicial review of the Board's decision. In section 19, it is stated that there shall be no judicial review in any court except on the grounds of procedure.¹¹ However, in section 13, it is clearly stated that the direction of the Board shall be subject to review by the High Court. The issue that remains is which section will prevail.

Section 13 (10)

The direction of the Board under subsection (1) shall be subject to review by the High Court.

Section 19 (1)

There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act, except in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.

OTHER RECOURSE Despite the ambiguity in whether a person arrested may have recourse to courts over the decision of the Board, section 13(9) of the Act enables the person arrested to make representations to the Advisory Board, under Article 151 of the Federal Constitution.¹²

CONCLUSION It is understood that prevention of terrorism is indeed important considering the rise in terrorist acts across the world. However, such measures of prevention must be consistent with international human rights law. Thus, it is hoped that the newly enforced Act would stay true to its aim and not be a reprise of the much criticised ISA.¹³

³ Section 4 of the Act.

⁴ Section 6(1)(a) of the Act.

⁵ Section 6(1)(b) of the Act.

⁶ Section 6(2) of the Act.

⁷ Section 10 of the Act.

⁸ Section 9(1) of the Act.

⁹ Section 13(1) of the Act.

¹⁰ Sections 10 and 11 of the Act.

¹¹ In section 8(6) it is stated that the Board shall determine its own procedure.

¹² Section 13(9) of the Act.

¹³ The Internal Security Act 1960 was abolished in 2012.

CORPORATE REAL ESTATE

A NEW STRATA REGIME The Strata Management Act 2013 which came into force on 1 June 2015, seeks to provide for matters relating to the proper maintenance and management of buildings and common property. The Act is applicable in Peninsular Malaysia and the Federal Territories.

In this article, we discuss the changes in the strata regime in light of the recent legislative changes.

INTRODUCTION The Strata Management Act 2013 ("the SMA") repeals the Building and Common Property (Maintenance and Management) Act 2007. The implementation of the SMA is complemented by two by-laws, namely, the Strata Management (Maintenance and Management) Regulations 2015 and the Strata Management (Strata Management Tribunal) Regulations 2015. Further change includes the amendment to the Strata Titles Act 1985, whereby provisions for management of subdivided buildings as well as the Strata Title Board have been moved to the purview of the SMA.

THE COMMISSIONER The SMA provides for the appointment of the Commissioner of Buildings ("the Commissioner"), Deputy Commissioner of Buildings and other officers. The duties, powers and functions of the Commissioner are stated in the SMA.

SCHEDULE OF PARCELS The SMA imposes an obligation on the developers to file a schedule of parcels, which show the proposed share units of each parcel and the total share units of all parcels, with the Commissioner, before proceeding with the sales of parcel.

DEVELOPERS' DUTIES AND OBLIGATIONS The developers' duties are clarified. These include their responsibilities to maintain and

manage the buildings and the common property from the date of delivery of vacant possession to a purchaser to a month after the establishment of the Joint Management Body ("JMB") and Management Corporation ("MC"). The SMA also imposes statutory obligations on the developers to establish and manage the maintenance account and sinking fund account before the establishment of the JMB and MC. The time frame for the developers to hand over the administration office and assets of the development area, as well as monies in the maintenance account and the sinking fund account to the JMB is before the expiry of the developer's management period.

THE DEFECTS ACCOUNT Section 92 of the SMA requires the developers to deposit a sum of money with the Commissioner for the purpose of rectifying defects in the common property of the development area after completion of the same. The amount of deposit to rectify defects is set at the rate of not less than 0.5% of the estimated cost of construction or MYR50,000, whichever is higher.

INTER-FLOOR LEAKAGE AND DAMAGE TO PARTY WALL New provisions covering inter-floor leakage and damage to party wall¹⁴ are also introduced via the Strata Management (Management and Maintenance) Regulations 2015.

STRATA MANAGEMENT TRIBUNAL The Strata Management Tribunal ("the Tribunal") is established under the SMA to hear and determine claims specified in Part 1 of the Fourth Schedule. The total amount that may be awarded by the Tribunal is limited to MYR250,000. An award made by the Tribunal in a settlement and after a proceeding is final, which binds on all parties and is deemed to be a court order which is enforceable. However, the award can be challenged on the ground of serious irregularity.

SUBDIVISION OF BUILDING OR LAND The Strata Titles Act 1985 is now amended, requiring developers to obtain a certificate of proposed strata plan ("CPSP") before applying to subdivide

¹⁴ 'Party wall' is defined as a wall that is located between separate parcels.

a building or land. The timeline to apply for the CPSP is summarised below:

- (a) Where the sale of the parcel has taken place and the document certifying the super structure stage is issued after 1 June 2015, the timeline to apply for the CPSP is three months from the date of the document certifying the super structure stage;
- (b) Where the building is completed after 1 June 2015 and the sale of the parcel has taken place before 1 June 2015, the developers are required to apply for the CPSP three months from the date of issuance of the certificate of completion and compliance (CCC);
- (c) Where the building is completed, and the sale of the parcel has taken place after 1 June 2015, the CPSP's application is three months from the date of issuance of the CCC, or the date of the first sale, whichever is later;
- (d) Where the building is completed before 1 June 2015, but the first sale has taken place after 1 June 2015, the period for the CPSP application is three months from the date of the first sale of the parcel;
- (e) Where the building is completed, and the sale of the parcel has taken place before 1 June 2015, the period to apply for the CPSP is three months from 1 June 2015.

After obtaining the CPSP, the developers shall apply for subdivision within a month from the date of issuance of the CPSP, accompanied with the schedule of parcels and other documents.

In the event that the timeline stated above is not complied with, the developer concerned is guilty of an offence and shall be liable to a fine between MYR10,000 and MYR100,000, or imprisonment for a term of not more than 3 years or both. The Strata Titles Act also provides for the applications for subdivision involving the issuance of provisional strata title for a provisional block and subdivision of low-cost buildings. There are additional documents required for subdivision which involves a provisional block.

TRANSFER OF STRATA TITLES TO THE PURCHASER

The developers are required to transfer the strata title to the purchaser within 30 days of the date of issuance of the strata title by the Land Administrator, while the purchaser is required to execute the complete documents of transfer of the strata title within 30 days of the date of notice of transfer of the strata title being served to the purchaser or 30 days of the date of purchase of the parcel, whichever is later. Non-compliance of the provisions mentioned above is an offence and shall attract a fine of between MYR1,000 and MYR10,000 per parcel.

The SMA is a victory to the National House Buyers Association (HBA) and those who fought for the well-being of stratified property owners in addressing the cumulative problems related to the proper maintenance and management of buildings and common properties. It also ensures uniformity of laws and policies when it concerns the local governments. This SMA legislation includes all stratified properties, residential and commercial. – Chang Kim Loong (Honorary secretary-general of the National House Buyers Association).

LIMITED COMMON PROPERTY AND SUBSIDIARY MANAGEMENT CORPORATION

The Management Corporation may create a subsidiary management corporation to manage and maintain the limited common property. The role of the subsidiary management corporation is to represent the interest of a group of parcel owners who are entitled to the exclusive benefits of the limited common property. The subsidiary management corporation shall maintain a maintenance account and a sinking fund account.

CONCLUSION The changes led by the new strata regime are very welcoming as they address the inadequacies and shortcomings faced by the old strata laws, and provide adequate protection to the owner of a stratified property. 🏡

COMMUNICATIONS & MULTIMEDIA

SECTION 114A... GUILTY UNTIL PROVED INNOCENT?

In this day and age of technology, where information is easily available and communication is just an email away, internet-related crimes have also been increasingly rampant.

Section 114A of the Evidence Act 1950, was introduced in the hope of enabling law enforcement officers to successfully identify the online perpetrators. In the recent months, cases on the interpretation of section 114A have reached the courts.

INTRODUCTION Section 114A, referred to as the *Presumption of Fact in Publication*, was introduced via the Evidence (Amendment) (No 2) Act 2012 ("the Amendment Act"). The amendment came into force on 31 July 2012.

The amendment aims to facilitate the identification and proving of the identity of an anonymous person involved in the publication through the Internet.

Section 114A – Presumption of fact in publication

- (1) A person whose name, photograph or pseudonym appears on any publication depicting himself as the owner, host, administrator, editor or sub-editor, or who in any manner, facilitates to publish or re-publish the publication is presumed to have published or re-published the contents of the publication unless the contrary is proved.
- (2) A person who is registered with a network service provider as a subscriber of a network service on which any publication originates from is presumed to be the person who published or re-published the publication unless the contrary is proved.
- (3) Any person who has in his custody or control any computer on which any publication originates from is presumed to have published or re-published the content of the publication unless the contrary is proved.

THE IMPLICATIONS According to subsection (1) of section 114A, if your name, photograph or pseudonym appears on any publication on the Internet, representing yourself as the

publisher, you are presumed to have published the contents of such publication. For example, if someone creates a blogsite in your name, you are presumed to have published the contents on that site, unless you prove otherwise. If someone posts a comment on your blog, you are also presumed to have published it.

A scrutiny of subsection (2) also appears to have serious consequences. If a posting originates from your account with a network service provider, you are deemed to be the publisher unless the contrary is proved.

A further presumption in subsection (3) is for the contents that originate from a computer. You are deemed to be the publisher so long as your computer was the device used to post that content.

REVERSING THE BURDEN OF PROOF The section has caused some uneasiness in criminal cases, as it appears to impose the burden on the person to prove his innocence, as opposed to the prosecution to prove his guilt. Furthermore, since computers may be easily manipulated and hacked into, the issue is whether it is too risky to reverse the burden onto Internet users, network services subscribers and computer owners, to prove their innocence.

Recent cases¹⁵ have suggested that the presumption in section 114A will automatically apply when the act complained involved cyber-crime, and that the presumption has retrospective effect.¹⁶

REBUTTABLE Although the presumption is rebuttable, the argument, however, is that it may not only be difficult for the lay person to navigate his way through the maze of technology, there may also be other legal hindrances. Furthermore, the standard to achieve in rebutting the presumption is on a balance of probabilities. A mere denial is, therefore, insufficient.

CONCLUSION Although the section is intended to balance the rights of aggrieved persons, especially of those maligned through social media, it begs the question of whether this presumption, if applied especially in criminal cases, is one of guilt, and therefore goes against the very grain of the criminal justice system. ☹️

¹⁵ *YB Dato' HJ Husam HJ Musa v Mohd Faisal Rohban Ahmad* [2015] 1 CLJ 787

¹⁶ *Tong Seak Kan & Anor v Loke Ah Kin & Anor* [2014] 6 CLJ 904

LEGAL HISTORY

CELEBRATING THE MAGNA CARTA The *Magna Carta Libertatum*, which literally means the 'Great Charter of Liberties', signed in June 1215 between the Barons of Medieval England and King John, was a document that recorded a series of written promises that His Majesty would govern England and deal with its subjects according to the customs of feudal law.

The year 2015 marked the 800th anniversary of the inception of the *Magna Carta*.

In this article, the historical importance and significance of the *Magna Carta* which dates back to 1215, is discussed.

THE HISTORY Historically, the English pursued imperialism. In order to ensure that the colonies were well governed, the King demanded taxes and men from the Barons in return for large portions of land. This mutual relationship played well between the King and the Barons until the day when the barons became rebellious, resulting in wars.

In 1215, the Barons and the King reached a settlement, leading to the creation of the *Magna Carta*.

THE DOCUMENT Originally, the *Magna Carta* contained 63 clauses written in Latin on parchment. These clauses set out the rules that governed the behaviour of the King. Most of these clauses could only be understood in the context of a feudal society.

Several original clauses are preserved and coded in the application of English law today, namely clauses 1, 13, 39 and 40.

In clause 1, the freedom and rights of the English Churches are established. The Churches were to be governed by the Monarch, where it will be run independently without any political interference and interruption.

Clause 13 provides that the liberties and customs of London and other towns will be preserved and that these cities will be autonomous.

Clauses 39 and 40 provide that every individual is entitled to the right to a fair trial, and that no one is above the law, including the King. This provision remains applicable today.

Clause 39

No free man shall seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

Clause 40

To no one will we sell, to no one deny or delay right or justice.

SIGNIFICANCE Although the *Magna Carta* was first signed as a peace treaty, over the centuries, it has become the basis for freedom, justice and democracy enjoyed by people across the world in the present day.

Today, this document forms the cornerstone of fundamental liberties in most Commonwealth jurisdictions. It represents a milestone in the achievement of liberty for citizens and it is regarded as one of the most important documents of Medieval England.

Clause 39 is currently reflected in article 9 (*No one shall be subjected to arbitrary arrest, detention or exile*) of the Universal Declaration of Human Rights ("UDHR") and article 5 (*Right to Liberty and Security*) of the European Convention of Human Rights ("ECHR").

CONCLUSION Although there are very limited clauses of the *Magna Carta* remaining, it does not dismiss the fact that it is a cornerstone for the fundamental rights and liberties of individuals since 800 years ago. Ultimately, this marrow of democracy should be in remembrance. ✨

EMPLOYMENT & INDUSTRIAL RELATIONS

UNFAIR DISMISSAL... COMPENSATION, REINSTATEMENT, OR NEITHER?

The Malaysian Federal Court in the case of *Unilever (M) Holdings Sdn Bhd v So Lai & Anor*¹⁷ has issued a landmark ruling whereby it was held that an employee who had been wrongfully dismissed could not be awarded compensation *in lieu* of reinstatement, as he had already reached the retirement age by the time the case had been decided.

In this article, we examine the facts, issues, as well as the legal effects.

THE FACTS The first respondent, So Lai @ Soo Boon Lai (the employee), had been in the employment of the appellant company, Unilever (M) Holdings Sdn Bhd (the employer), for 17 years. Just 14 months short of his mandatory retirement age of 55, he was dismissed. The employee challenged his dismissal by filing a complaint at the Industrial Court. The Industrial Court decided in his favour, and he was awarded compensation, *in lieu* of reinstatement, and 24 months' backwages.

The employer, being dissatisfied with the decision, filed for judicial review of the decision of the Industrial Court, and for the award to be quashed. Although the employer's application was dismissed, the High Court upheld the compensation *in lieu* of reinstatement awarded by the Industrial Court, but the award for backwages was reduced to 14 months instead, bearing in mind that the employee's retirement age was 55. On appeal, the Court of Appeal dismissed the appellant's appeal and reaffirmed the High Court's decision. The appellant appealed to the Federal Court.

THE ISSUES The issues before the Federal Court were as follows, namely (i) whether compensation *in lieu* of reinstatement should be awarded to a person who could not be reinstated; and (ii) whether the issue of


reinstatement even arose in this case, since the employee had already past his retirement age of 55, at the time of the filing of the claim.

THE DECISION In allowing the appeal, the Federal Court held that the words 'compensation *in lieu* of reinstatement' in plain English mean that such compensation was meant to be a replacement or a substitute or an alternative to reinstatement. The element of compensation, therefore, will arise only when the employee is in a position or situation to be reinstated.

If an employee could not be reinstated because his age was past mandatory retirement, the issue of compensation does not arise. Furthermore, since reinstatement is a form of specific performance, it could only be ordered in a situation where there was a legal basis for such performance.

"If a workman cannot be reinstated because his age has exceeded his retirement age, the issue of compensation cannot arise. Corollary to that logic, it cannot be *in lieu* of his reinstatement. After all, reinstatement is a statutorily recognised form of specific performance.

On that premise, such specific performance can only be ordered in a situation where the legal basis for such performance does exist. One cannot substitute when the one to be substituted does not or cannot exist. This can be seen in the legal maxim: '*lex non cogit ad impossibilia*', ie, the law does not compel to do that which is impossible."

CONCLUSION This ruling raises various issues on whether such position is deemed fair and just, as there is a great risk of it being misused, considering that the circumstance in which the employee found himself in when the case was heard, was completely beyond his control. Furthermore, it may provide errant employers with the *carte blanche* to misuse this precedent to terminate employees close to retirement age, bearing in mind that there is no possibility of compensation *in lieu* of reinstatement. 

¹⁷ [2015] 3 CLJ 900, Federal Court

ARBITRATION – Appointment of arbitrator –
Objection to appointment of arbitrator by KLRCA
– Whether consent of parties required for such
appointment – Whether KLRCA breached their
duty

**SEBIRO HOLDINGS SDN BHD V BHAG
SINGH & ANOR** [2015] 4 CLJ 209,
Court of Appeal

FACTS The appellant and second respondent had a disagreement over the appointment of an arbitrator by the Director of the Kuala Lumpur Regional Centre for Arbitration (“KLRCA”) to hear and decide their dispute. The appellant had indicated its preference over Tan Seri Datuk Amar Steve as the arbitrator, due to his knowledge regarding the locality of the place where the contract is performed. This was however objected by KLRCA and KLRCA had instead appointed the first respondent. This appointment was disputed by the appellant, claiming that the first respondent was unqualified since, not being a Sarawakian, lacked geographical knowledge of Sarawak. KLRCA claimed it was *functus officio* upon appointing the arbitrator for the arbitration. Dissatisfied, the appellant filed for the termination of the appointment of the first respondent. This was dismissed by the High Court. The appellant appealed.

ISSUE The issue before the Court of Appeal was whether the KLRCA breached their duty to act fairly and to consult the appellant as to whether the alternative proposed arbitrator with local knowledge would be acceptable by the appellant.

HELD In dismissing the appeal, it was held that there was no breach of duty by KLRCA as the parties had agreed that in the event there is a disagreement on the appointment of an arbitrator, the arbitrator shall be appointed by the Director of the KLRCA. The section does not stipulate the requirement of consent of the parties before the arbitrator is appointed.

It was also held that it is not impossible to acquire knowledge, and as such, the appointment of the arbitrator is not dependent on the inherent capability of the appellant's arbitrator of choice.

TORT – Defamation – Libel – Whether accusation of sexual harassment amounted to defamation
– Whether conduct of sexual harassment amounted to nervous shock

**MOHD RIDZWAN ABDUL RAZAK V ASMAH
HJ MOHD NOR** [2015] 4 CLJ 295, Court of
Appeal

FACTS As a result of an allegation of sexual harassment by the defendant (respondent) against the plaintiff (appellant), an inquiry committee was set up to look into the complaint. However due to insufficient evidence, the plaintiff was subject only to a strong administrative reprimand, and the defendant was transferred. The plaintiff then lodged a complaint seeking disciplinary action against the defendant for lodging complaint without proof and defamation, but to no avail. The plaintiff subsequently filed his claim for defamation against the defendant in the High Court. The defendant, on the other hand, counterclaimed that the sexual harassment by the plaintiff had caused her to suffer emotional and mental stress and that she became ill. The High Court found that the plaintiff failed to prove his defamation claim against the defendant and allowed the defendant's counterclaim. The plaintiff appealed.

ISSUE The plaintiff appealed on the ground that the High Court judge had erred in dismissing his claim and that there was no basis in law in allowing the defendant's counterclaim.

HELD It was held by the Court of Appeal that although complaints by the defendant were defamatory of the plaintiff, such statements amounted to a formal complaint, made in accordance with proper mechanism. Furthermore, there was evidence to show that the sexually-oriented remarks were in fact made by the plaintiff and directed at the defendant. It was held that where acts of sexual harassment are serious to cause adverse psychological effect on the victim, those acts would fall within the tort of intentionally causing nervous shock. In this case, it was found that the plaintiff's actions did amount to sexual harassment, and the plaintiff did have knowledge of the defendant's vulnerability, including how she was adversely affected by the plaintiff's sexually-oriented remarks. The plaintiff's actions, therefore, fell within the tort of intentionally causing nervous shock.

ARBITRATION – Dispute on construction contract – Non-payment – Dispute arising prior to Construction Industry Payment and Adjudication (CIPA) Act 2012 coming into force – Application of CIPA Act – Whether application retrospective

**UDA HOLDINGS BHD V BISRAYA
CONSTRUCTION SDN BHD & ANOR AND
ANOTHER CASE** [2015] 5 CLJ 527, High Court

FACTS This matter involved two disputes. The first was non-payment of claims between UDA Holdings Bhd (“UDA”) and an unincorporated consortium (“the Consortium”). An adjudication proceeding was initiated against UDA under section 9 of the Construction Industry Payment and Adjudication Act 2012 (“CIPA Act”) by the Consortium and an adjudicator was appointed by the Kuala Lumpur Regional Centre for Arbitration (“KLRC”). UDA challenged the validity of such adjudication and objected on the grounds that the CIPA Act was not in force when the claims arose. The second dispute was between Capitol Avenue Development Sdn Bhd (“Capitol”) and Bauer (Malaysia) Sdn Bhd (“Bauer”) where an adjudicator was appointed for the adjudication proceeding initiated by Bauer against Capitol. Capitol objected on the basis that the appointed adjudicator had no jurisdiction, as the relevant issues arose before the CIPA Act came into force. Both disputes were heard together as similar issues of law were involved.

ISSUE The main issue before the High Court was whether the CIPA Act applied to payment disputes and their underlying contracts which arose before the Act came into force on 15 April 2014.

HELD In dismissing the matter, the High Court held that the CIPA Act is applicable retrospectively to written construction contracts which are executed wholly or partly within the territory of Malaysia, regardless of when they were entered into. However, the Act is not applicable to the proceedings relating to payment dispute under a construction contract which commenced before 15 April 2014.

ADMINISTRATIVE LAW – Defamation – Libel – Whether accusation of sexual harassment amounted to defamation – Whether conduct of sexual harassment amounted to nervous shock

**LYNAWATI ABDULLAH V ABANG SUKORI
ABANG HJ GOBIL AND ANOR** [2015] 7 CLJ
219, Court of Appeal

FACTS The dispute between the appellant and the respondent concerned the rightful ownership of six parcels of native customary rights land. The dispute was first heard in the Chief’s Court, which decided in the appellant’s favour. The respondent then appealed to the District Native Court, which ruled that the appellant was not a native of Sarawak when she acquired the disputed land, and thus had no locus in any action before a Native Court. The appellant appealed to the Native Court of Appeal but it was dismissed. The appellant then applied to the High Court for leave to file a judicial review application, with a view of obtaining an order of *certiorari* to quash the decision of the Native Court of Appeal. This, however, was not successful. The High Court ruled that a decision made by the Native Court of Appeal is not amenable to judicial review. The appellant appealed.

ISSUE The main question before the Court of Appeal was whether a decision made by the Native Court of Appeal of Sarawak is amenable to judicial review by the High Court.

HELD In allowing the appeal, the Court of Appeal held that the Native Court of Sarawak, which is established by the State laws of Sarawak, is an inferior tribunal. Thus, the High Court may exercise control over the Native Courts through prerogative orders. The decision by the Native Court of Appeal of Sarawak, therefore, is amenable to judicial review by the High Court.

ACTS

PREVENTION OF TERRORISM ACT 2015

No
769

Date of coming into operation
1 September 2015

Notes
This is an Act to provide for the prevention of the commission or support of terrorist acts involving listed terrorist organisations in a foreign country and for the control of persons engaged in such acts, and for related matters.

TECHNOLOGISTS AND TECHNICIANS ACT 2015

No
768

Date of coming into operation
1 August 2015

Notes
This is an Act to provide for the establishment of the Malaysia Board of Technologists and for the registration and recognition of Professional Technologists and Certified Technicians in providing technology services and technical services and for related matters.

PUBLIC SECTOR HOME FINANCING BOARD ACT 2015

No
767

Date of coming into operation
1 July 2015

Notes

This is an Act to establish and incorporate the Public Sector Home Financing Board, to provide for its functions and powers, and for matters connected therewith.

AMENDMENT ACTS

CAPITAL MARKETS AND SERVICES (AMENDMENT) ACT 2015

No
A1499

Date of coming into operation
15 September 2015


Notes
The highlights of the amending Act include the enforceability of netting provisions under a qualified capital market agreement, and additional powers of the Securities Commission Malaysia.

SECURITIES COMMISSION (AMENDMENT) ACT 2015

No
A1489

Date of coming into operation
15 September 2015

Notes
The Securities Commission is now known as the Securities Commission Malaysia. Other highlights of the amending Act include functions of the Chairman and Deputy Chief Executive; as well as the introduction of provisions for the Management of Systemic Risk in the Capital Market and Shariah Advisory Council. New sections 148A and 148B provides for permitted

disclosure in civil enforcement proceedings and confidentiality of supervisory information, respectively. New section 160A on the other hand provides the Securities Commission Malaysia with the power to issue directions to discharge the international obligations of the Malaysian Government under the United Nations Security Council Resolutions. 

INDUSTRIAL RELATIONS (AMENDMENT) ACT 2015

No
A1488


Date of coming into operation
1 July 2015

Notes
The highlight of the amendments is the substitution of section 23A on the qualification of the President and Chairman of Industrial Court. 

REGISTRATION OF ENGINEERS (AMENDMENT) ACT 2015

No
A1479


Date of coming into operation
31 July 2015

Notes
The highlights of the amending Act include the registration of Engineering Technologists, Professional Engineers with Practising Certificate, and Inspectors of Works. A provision for the establishment of a Disciplinary Committee has been introduced. 

PREVENTION OF CRIME (AMENDMENT) ACT 2015

No
A1484


Date of coming into operation
1 September 2015

Notes
The highlights of the amending Act include the introduction of provisions for the prosecution of persons detained; the establishment of a Prevention of Crime Board; and power of the Board to order removal of any detained person from one place of detention to another, and power to order production of detained person. 

PRISON (AMENDMENT) (NO.2) ACT 2015

No
A1486

Date of coming into operation
1 September 2015

Notes
The highlight of the amending Act is insertion of the words "and the Prevention of Terrorism Act 2015 [Act 769]" after the words "Prevention of Crime Act 1959 [Act 297]" in subsection 7(1A) of the Prison Act 1995. 

**GUIDELINES/RULES/CIRCULARS/
DIRECTIVES AND PRACTICE NOTES ISSUED
BETWEEN JULY AND SEPTEMBER 2015
BY BANK NEGARA MALAYSIA,
BURSA MALAYSIA AND
SECURITIES COMMISSION MALAYSIA**

BANK NEGARA MALAYSIA (BNM)

- Concept Paper on Internal Capital Adequacy Assessment Process for Takaful Operators – *Date issued: 28 August 2015*
- Concept Paper on *Wakalah* – *Date issued: 28 July 2015*
- Concept Paper on Capital Adequacy Framework (Capital Components) – *Date issued: 15 July 2015*
- Concept Paper on Capital Adequacy Framework for Islamic Banks (Capital Components) – *Date issued: 15 July 2015*
- Guidelines on Management of Participating Life Business – *Date issued: 15 July 2015*
- Amendment to the Enhancement of Policy and Guidelines of the Small Debt Resolution Scheme – *Date issued: 15 July 2015*

BURSA MALAYSIA

- Consolidated Main Market Listing Requirements – *Date updated: 13 July 2015*
- Consolidated Ace Market Listing Requirements – *Date updated: 13 July 2015*

SECURITIES COMMISSION

- Guidelines on Prospectus – *Date revised: 31 July 2015*
- Guidelines on Licensing Handbook – *Date issued: 8 July 2015*
- Guidelines for Registered Person (Registered Representative) – *Date issued: 8 July 2015*

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knowledge@zulrafique.com.my

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The contributors for this **Brief** are:

- *Mariette Peters*
- *Amylia Soraya*
- *Foo Yuen Wah*
- *Teo Yan Jie*

Publisher:
ZUL RAFIQUE & partners Consultancy Sdn Bhd
D3-3-8, Solaris Dutamas, No.1, Jalan Dutamas 1
50480 Kuala Lumpur, Malaysia

Printer:
NC Print Sdn Bhd (197139-T)
AS 101, Jalan Hang Tuah 4, Salak South Garden
57100 Kuala Lumpur, Malaysia