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THE BRIEF *Case*

Ermira Faridah Md Said (centre) of **ZUL RAFIQUE** *& partners* with the delegates of the ***Law Firm Network*** at its ***Asia-Pacific Regional Meeting 2016*** hosted by the firm.

ZUL RAFIQUE *& partners*

A BRIEF NOTE...

by Dato' Zulkifly Rafique

Building stronger ties...

ZUL RAFIQUE *& partners* was the proud host for this year's Law Firm Network Asia-Pacific Regional Meeting 2016 which was held from 20 to 22 October 2016. Member delegates worldwide congregated in Kuala Lumpur for a knowledge-sharing session on their respective legal practice areas, as well as the development of the legal profession.

The Law Firm Network ("LFN"), founded over 25 years ago in 1989, is an association of independent law firms from all around the world. The LFN has members in more than 50 countries, with **ZUL RAFIQUE** *& partners* being a member in 2014.

The legal world is constantly evolving and has been undergoing a paradigm shift, what more with the evolution of technology and globalisation. Thus, we understand the importance of continuous professional development *via* such meeting of minds to keep ourselves abreast with the latest legal issues and updates within and outside of Malaysia, in order to provide the best value and quality of service to our clients.

After all, as said by Mark Twain, "Continuous improvement is better than delayed perfection".

With that said, **ZUL RAFIQUE** *& partners* would like to thank all clients and friends for their support over the years and to wish all of you a very Happy New Year.

CONTENTS

IN-BRIEF

- **ADVOCATES ORDINANCE (SABAH) (AMENDMENT) BILL 2016 PASSED** The Advocates Ordinance (Sabah) (Amendment) Bill 2016 ("the Bill") has been passed by the *Dewan Rakyat*. The purpose of the Bill is to streamline the amendments made to the Legal Profession Act 1976, the governing law of the legal profession in Peninsula Malaysia, *via* the Legal Profession (Amendment) Act 2012. The liberalisation of the legal services sector in Sabah involves the entry of foreign legal service, subject to the provisions of the Sabah Advocates Ordinance.

- **AIIB BILL 2016 PASSED** The Asian Infrastructure Investment Bank (AIIB) Bill 2016 ("the Bill"), which enables Malaysia to become an AIIB member has been passed by Parliament on 15 December 2016. The Bill also allows Malaysia to purchase AIIB shares. The Government, however, has vowed that the creation of the AIIB will not jeopardise the nation's sovereignty.

- **BANKRUPTCY (AMENDMENT) BILL 2016 TABLED** The Bankruptcy (Amendment) Bill 2016 was tabled in *Dewan Rakyat* on 21 November 2016 for the First Reading. The highlights of the amendments include the introduction of a new rescue mechanism known as the voluntary arrangement, the prohibition of bankruptcy action against a social guarantor, new provisions on automatic discharge from bankruptcy, and the establishment of an Insolvency Assistance Fund. The Bankruptcy Act 1967 will also be renamed as the Insolvency Act 1967.

- **E-COMMERCE ACT TOUGHENED UP** The Electronic Commerce Act 2006 will be tightened to prevent the occurrence of online fraud involving online sales and purchases. The Ministry of Domestic Trade, Cooperatives and Consumerism is currently studying and fine-tuning the law to protect consumers and traders who conduct online businesses.

- **FAOM TO BE ESTABLISHED** The Malaysian financial technology (fintech) firms are setting up an association known as the Fintech Association of Malaysia (FAOM) ("the Association"), which serves as a new platform for the fintech companies to expand their businesses and work with the industry regulators. The Association would also help its members to venture into the other markets *via* collaboration between the Association and the other fintech associations. The Association is currently under the evaluation of the Registrar of Societies and is expected to be set up by early 2017.

- **FINTECH REGULATORY SANDBOX FRAMEWORK ISSUED** A detailed Financial Technology Regulatory Sandbox Framework ("the Framework") has been issued by *Bank Negara Malaysia*. The Framework renders the experimentation of fintech solutions in a live environment, subject to safeguards and regulations. The finalisation of the Framework forms a conducive environment for the implementation of technology to foster innovations, which lead to the growth and development of the financial sectors in Malaysia.

- **HEDGING RULES EASED** *Bank Negara Malaysia* in its efforts to fend off the speculative attacks on the Malaysian Ringgit currency, has introduced three measures to ease the local companies' access to the hedging facilities with locally incorporated financial institutions. These measures are (i) to allow the local companies to undertake hedging transaction for US Dollar and Chinese Yuan against Malaysian Ringgit without the need for sighting of the underlying documents; (ii) to introduce a US Dollar and Yuan-Ringgit futures onshore exchange; and (iii) to establish a common understanding and consistent interpretation on the requirements under the Foreign Exchange Administration (FEA) rules.

- **MYR40,000 AWARDED TO WOMAN OVER TERMINATION DUE TO PREGNANCY** The Court of Appeal ("the Court") in *Noorfadilla Ahmad Saikin v Chayed Basirun & Ors* has partly allowed the appellant's appeal over the quantum of damages awarded to her by the High Court. In addition to the sum of MYR30,000 awarded by the High Court for the breach of constitutional protection, the Court has awarded the appellant another MYR10,000 for pain and suffering. The Court also ordered the respondent to compensate the appellant for the loss of earnings, loss of Employment Provident Fund contributions and dividends.

- **OVERNIGHT POLICY RATE UNCHANGED** *Bank Negara Malaysia* ("the Bank") has maintained the Overnight Policy Rate (OPR) at the existing rate of 3 per cent. This is to allow the degree of monetary accommodativeness to be consistent with the policy stance of the Bank which ensures that the domestic economy in Malaysia continues on a steady growth path amid stable inflation and is supported by continued healthy financial intermediation in the economy.

IN-BRIEF

AROUND THE WORLD… IN-BRIEF

- **AUSTRALIA: FIRST CRIMINAL ROBO-LAWYER** *Robot Lawyers* ("the Robot"), a virtual assistant to help unrepresented individuals in criminal defence, was launched in November 2016. The Robot produces a document, which the users may present in court, after asking the users a few questions concerning their personal circumstances. These questions are based on the type of personal information judges will be interested in when considering the penalties. The Robot will also email the users a free character reference guidelines document for any character reference statements. However, the Robot's assistance is limited and will be inapplicable if users contest or plead not guilty or dispute the facts in the criminal case.

- **CHINA: CYBER SECURITY LAW PASSED** The Standing Committee of the National People's Congress, China passed the controversial Cyber Security Law ("the Law") on 7 November 2016. The Law, which will take effect in June 2017, requires the Internet operators to cooperate with the investigations involving crime and national security, and imposes the mandatory testing and certification of computer equipment. The Law also allows the government investigators to have full access to the data of companies if any wrongdoing is suspected.

- **EUROPE: AI PREDICTS OUTCOME OF CASES** An artificial intelligence (AI) system has correctly predicted the outcomes of cases decided by the European Court of Human Rights. Although the accuracy of the predicted verdicts is 79 per cent, the researchers observed that AI may not be able to replace the role of lawyers and judges even though it may be useful in identifying patterns in cases that lead to certain outcome.

- **ITALY: CHILD ALLOWED TO BE GIVEN MOTHER'S NAME** The Italian Constitutional Court has declared that the law providing for the automatic attribution of the paternal surname to the legitimate children of a couple, even if it is against the parents' wishes, to be unlawful. In 2014, the European Court of Human Rights (ECHR) ruled in favour of an Italian-Brazilian couple who wanted to give their son both their surnames. The ECHR also condemned the law and ordered Italy to change it.

- **SINGAPORE: BANKRUPT IN MALAYSIA DECLARED BANKRUPT IN SINGAPORE** A Singaporean High Court has ruled that a Malaysian made bankrupt in Malaysia can also be made bankrupt in Singapore for the debts owed there, as the Singaporean Bankruptcy Act does not preclude the making of concurrent bankruptcy orders in Malaysia and Singapore. This ruling follows a case in which a Malaysian was declared bankrupt in Singapore for owing MYR58 million to the Armed Forces Fund Board of Malaysia.

- **SINGAPORE: CIVIL SUIT PAPERS TO BE SERVED *VIA WHATSAPP*** A Singaporean court has recognised and allowed the application of a complainant to use the *WhatsApp* messaging system on a smartphone to notify the defendant of a civil suit, after several attempts to serve the court papers on him failed. The Singapore Rules of Court require court documents to be served on the defendant personally, unless exempted or if alternative means are allowed by the court.

- **UK: HISTORIC RULING ON CRYOPRESERVATION** A High Court in the United Kingdom ("UK") has ruled in favour of the mother and granted the final wish of a terminally ill teen by allowing her body to be cryogenically frozen and transported to the United States for storage at a specialist facility. The presiding judge, Mr Justice Peter Jackson, has warned that a firmer legal, regulatory and ethical framework will need to be developed if the practice of cryogenic freezing becomes more popular in the UK.

- **UK: ONLINE COURTS GUIDANCE IN 'PLAIN ENGLISH'** Following the United Kingdom ("UK") Ministry of Justice and Judiciary's GBP1 billion vision paper, which proposes a system to resolve selected cases online, there have been suggestions for such online criminal court system to be accompanied by guidance that is written in 'plain English'. This is to ensure that the defendants have a clear understanding of the consequences of their pleas.

FINANCE

BUDGET 2017... A SNAPSHOT The Budget 2017 was unveiled on 21 October 2016 by the Malaysian Prime Minister and Minister of Finance, *YAB Dato' Sri Mohd Najib Tun Haji Abdul Razak*. The Budget 2017 was subsequently passed on 14 December 2016.

In this article, we examine some of the highlights of Budget 2017.

CORPORATE TAX The Malaysian Government ("the Government") will reduce the corporate tax for the year of assessment 2017 and 2018. The tax rate will be reduced in stages, based on a percentage increase in income compared to the previous year of assessment.

SUBSIDIES AND HANDOUTS The Government has made changes to the 1Malaysia People's Aid, also known as the *Bantuan Rakyat 1Malaysia* (BR1M) scheme, a programme providing cash assistance for low income households.

"In this regard, BR1M's assistance for next year will be increased as follows: First: For households in the e-Kasih database with a monthly income below than MYR3,000, BR1M will be increased to MYR1,200 from MYR1,050 and MYR1,000; Second: For households earning between MYR3,000 and MYR4,000, BR1M will be increased from MYR800 to MYR900; and Third: For single individuals earning below MYR2,000, BR1M will be increased from MYR400 to MYR450." – Dato' Sri Mohd Najib Tun Haji Abdul Razak, Prime Minister and Minister of Finance.

PROPERTY Government-owned vacant lands at strategic locations will be provided to Government-linked companies and *Perumahan Rakyat 1Malaysia* (PR1MA) to build more than 30,000 houses with a selling price of between MYR150,000 and MYR300,000, lower than the market price. The Government will also build around 10,000 houses in urban areas for rental to eligible youths with permanent jobs. Rental is up to a maximum of five years, and at a lower market rate.

The stamp duty exemption is also increased to 100 per cent on instruments of transfer and housing loan instruments, compared to the current 50 per cent. However, this is only limited to houses with the value of up to MYR300,000 for first time buyers for the period between 1 January 2017 and 31 December 2018.

PRIVATE RETIREMENT SCHEME With effect from 2017, the Government will introduce a one-off increase of the existing MYR500 incentive to the Private Retirement Scheme contributors with a minimum accumulated investment sum of MYR1,000 during the period of two years.

SMES AND START-UPS The Government, in its effort to promote the development of the Small and Medium-Sized Enterprises ("SMEs"), will provide SMEs with the loan financing of MYR200 million and insurance credit facilities with coverage valued up to MYR1 billion through *EXIM Bank*. A sum of MYR75 million is also allocated to implement the programs under the SME Master-Plan.

TAXI DRIVERS Taxi drivers will be given a grant of MYR5,000 to purchase new vehicles and individual taxi permits. The Social Security Organisation (SOCSO) Scheme will also be extended to cover individual taxi drivers with a monthly income of up to MYR3,000 with a launching grant of MYR60 million.

ISLAMIC BANKING In order to maintain Malaysia as an international Islamic financial centre, the period of income tax exemption to entities carrying out Islamic banking and *Takaful* business through the International Currency Business Unit (ICBU) in foreign currencies, as well as the stamp duty exemption on instruments of such activities, will be extended to the year of assessment 2020.

"Another important message is that the Government will take positive measure to amend the Bankruptcy Act 1967 from early next year, concerning those declared bankrupt especially 'social guarantors' for example scholarship guarantor and among others those certified with chronic disease as well as elderly. The details are being worked out and to be announced soon." – Dato' Sri Mohd Najib Tun Haji Abdul Razak, Prime Minister and Minister of Finance

INSOLVENCY ACT 1967 The Bankruptcy (Amendment) Bill 2016 was tabled in Parliament for its First Reading on 21 November 2016. The Bankruptcy Act 1967 will be renamed as the Insolvency Act 1967 and will introduce significant changes to the bankruptcy laws in Malaysia.

CORPORATE

MALAYSIAN CODE ON TAKE-OVERS AND MERGERS... KEY CHANGES On 15 August 2016, the Malaysian Code on Take-overs and Mergers 2010 ("the 2010 Code") was revoked and replaced by the Malaysian Code on Take-overs and Mergers 2016 ("the 2016 Code"), which should be read together with the Rules on Take-overs, Mergers and Compulsory Acquisitions ("the 2016 Rules") issued by the Securities Commission Malaysia ("SC") on the same date.

In this article, we highlight the key changes under the 2016 Code and the 2016 Rules applicable to any take-over or merger transaction (collectively referred to as "take-over") in Malaysia.

INTRODUCTION The 2016 Code sets out 12 general principles to be observed and complied with by all persons engaged in any take-over. The detailed procedures and requirements relating to take-over, which were previously set out in the 2010 Code, are now set out in the 2016 Rules.

SCOPE OF APPLICATION OF THE 2016 RULES

The requirements in the 2010 Code were applicable where the target company, which was the subject of a take-over, was: (i) a body corporate formed within or outside of Malaysia but listed in Malaysia[1]; (ii) a public company (whether listed or unlisted); (iii) a foreign company listed in Malaysia; or (iv) a real estate investment trust ("REIT") listed in Malaysia.

With the coming into force of the 2016 Code and the 2016 Rules, the take-over regime now extends to business trusts listed in Malaysia although unlisted public companies that are now subject to the 2016 Code and 2016 Rules are only those with more than 50 shareholders and net assets of MYR15 million or more.

TARGET COMPANY WITH DUAL LISTING

Previously, the take-over of a company listed in Malaysia would fall within the purview of the SC, even though the company concerned is listed on a stock exchange outside of Malaysia, and is subject to the jurisdiction of a foreign take-over regulator.

Under the new regime, the 2016 Rules states that a target company with primary listing both in Malaysia and on a stock exchange outside of Malaysia may be subject to the dual jurisdiction of the SC and a foreign take-over regulator. In such cases, early consultation with the SC is required so that guidance can be given on how conflicts between the relevant rules may be resolved.

In the case of a target company with a primary listing on a stock exchange outside of Malaysia and a secondary listing in Malaysia, the SC may consider disapplying the 2016 Rules so long as the target company is able to demonstrate that the relevant take-over regulation in the foreign jurisdiction accords an equivalent level of protection to the shareholders of the target company as provided under the 2016 Rules.

OFFER PRICE IN A MANDATORY TAKE-OVER OFFER

The 2010 Code provided that the offer price for any voting shares or voting rights in a mandatory offer must not be less than the highest price (excluding stamp duty and commission) paid or agreed to be paid by the offeror or any person acting in concert with the offeror ("Minimum Offer Price"), within six months prior to the beginning of the offer period.

Under the 2016 Rules, when a mandatory offer arises from an arrangement, agreement or understanding to control, the offer price must be the higher of: (i) the Minimum Offer Price; or (ii) the volume weighted average traded price of the target company for the last 20 market days prior to the triggering of the mandatory offer obligation.

In the event there is no transaction for the voting shares or voting rights of the target company in the last six months prior to a take-over offer under (ii), the 2016 Rules mandates the offeror to provide a basis for the offer price. Prior consultation with the SC is also required.

PERSONS ACTING IN CONCERT FOR REIT AND BUSINESS TRUST

The 2016 Rules specifies who are presumed to be persons acting in concert ("PACs") in relation to the take-over of a REIT or a business trust.

[1] Excluding: (a) a company declared by the Minister of Domestic Trade, Co-operatives and Consumerism to be a public authority, instrumentality or agency of the Government of Malaysia or of any State or to be a body corporate which is not incorporated for commercial purpose; (b) any corporation sole; (c) a registered society; or (d) a registered trade union.

In the event the offeror is a REIT, the following persons are presumed to be PACs: (i) the management company of the REIT; (ii) a director of the management company (together with his spouse, close relatives and related trusts); (iii) any person who owns or controls 20 per cent of the voting shares or voting rights of the management company; (iv) any person who is related to or an associate of its management company; and (v) the trustee of the REIT.

Where the offeror is a business trust, the following are presumed to be PACs: (i) the trustee-manager of the business trust including the agent; (ii) a director of the trustee-manager (together with his spouse, close relatives and related trusts); (iii) any person who owns or controls 20 per cent of the voting shares or voting rights of the trustee-manager; and (iv) any person who is related to or an associate of the trustee-manager.

The SC shall be consulted if a manager or a trustee, in its capacity as trustee of a REIT, acts at the same time for more than one of the following: (i) offeror or possible offeror; (ii) competing offeror or possible competing offeror; and (iii) offeree REIT.

"In line with the SC's efforts to move towards a proportionate regulatory regime, the enhancements seek to ensure that the take-over framework will be facilitative to commercial realities while providing protection to shareholders where required. These include specifying that sizeable unlisted public companies are subject to the Code, removing the limitation that take-over schemes can only be initiated by parties holding over 50% equity interest and providing clear guidance on required conduct during a take-over offer." – Securities Commission Malaysia

OPTIONS AND DERIVATIVES TREATED AS AN ACQUISITION OF SECURITIES Under the 2010 Code, the acquisition of convertible securities does not give rise to a mandatory offer obligation. Such obligation will only be triggered when such convertible securities are converted into voting shares or voting rights.

Under the 2016 Rules, a person who has acquired or written any option or derivative, which causes such person to have a long economic exposure, whether absolute or conditional, to changes in the price of securities, will be treated as having acquired those securities. Any person who would acquire control or trigger the creeping threshold as a result of acquiring such options or derivatives must consult the SC to determine whether an offer is required, and if so, the terms of the offer to be made.

OFFEROR TO FIRST APPROACH TARGET COMPANY'S BOARD OF DIRECTORS Under the 2010 Code, a potential offeror has to make an announcement as to whether there is a take-over or possible take-over offer, when there is an untoward movement or increase in the volume of share turnover of a target company. The announcement shall be made by the offeror before serving a take-over notice on the board of directors of the target company. The board of directors shall thereafter make an announcement that they have received the take-over notice and dispatch such announcement to the offeree shareholders.

Under the 2016 Rules, however, the offeror is required to put forward the take-over offer to the board of directors of the target company prior to making an announcement on the take-over offer.

SC'S DISCRETION IN ACQUISITION OF SHARES FROM A SHAREHOLDER Under the 2010 Code, when an acquirer acquires between 20 per cent and 33 per cent from a controlling vendor, he may have obtained control of the company.

Pursuant to the 2016 Rules, this percentage range has been removed and the SC has the discretion in deciding on each individual case, and whether the mandatory offer obligation is triggered.

CONCLUSION According to the SC, the amendments are "to ensure that the take-over framework will be facilitative to commercial realities while providing protection to shareholders where required".

FINANCE

OF MONEY, TECHNOLOGY AND SANDBOXES Fintech, a contraction of "Financial Technology", refers to the use of technology in the delivery of financial services. Advancement of fintech has led to the booming of new business start-ups offering various solutions to improve the efficiencies and competitiveness of financial institutions. Bitcoin, crowdfunding, and peer-to-peer (P2P) lending are some of the examples of fintech. Mobile payments such as, *Apple Pay* and *Google Wallet* are also becoming common in this day and age.

These innovations render transactions to be carried out online easily, within a few seconds by merely a few clicks. But, what are the risks that the consumers are exposed to? Is it safe to make the payments through such channels?

In this article, we attempt to provide an overview of the regulating framework of fintech in Malaysia.

INTRODUCTION In October 2016, the Central Bank of Malaysia, *Bank Negara Malaysia* ("the Bank"), issued the Financial Technology Regulatory Sandbox Framework ("the Framework") to enable the testing of fintech innovations in a live environment. The Framework, which took effect from 18 October 2016, applies to three categories of entities, namely, a (i) financial institution[2], (ii) fintech company[3] which collaborates with a financial institution, and (iii) fintech company intending to carry on businesses provided under the Financial Services Act 2013 (FSA), Islamic Financial Services Act 2013 (IFSA), and the Money Services Business Act 2011 (MBSA).

PARTICIPATION CRITERIA An applicant, who seeks the Bank's approval to participate in a sandbox[4], has to fulfil the criteria provided under the Framework. In order to qualify for testing in the sandbox, the product, services or solutions ("the Product"), must be genuinely innovative in improving the quality of financial services, enhancing the risk management of financial institutions in Malaysia, addressing the gaps in, or creating opportunities for investments in the Malaysian economy.

The Framework also requires the applicant to assess the usefulness and functionality of the Product as well as to be equipped with the necessary resources to support the testing of the Product in the sandbox. Further, the applicant has to prepare a business plan to commercialise the Product after exiting from the sandbox.

In addition, the applicant must identify the potential risks that may arise from the testing of the Product and propose the appropriate safeguards to address the identified risks. A set of guidelines has been stipulated under the Framework to guide the Bank in assessing the risks posed by the Product and to evaluate the safeguards proposed by the applicant.

APPLICATION REQUIREMENTS The applicant must include the intended key outcomes of the test and the relevant indicators to measure such outcomes. When the application is approved by the Bank, the applicant will be engaged by the Bank to determine the following matters: (i) the testing parameters, (ii) the specific measures to determine the success or failure of the test at the end of the testing period, (iii) the exit strategy in the event the test failed or is discontinued, and (iv) a transition plan for the deployment of the Product on a commercial scale upon successful testing and exit from the sandbox. The Bank may require the participant to submit information concerning the progress of the test during the testing period of the Product.

THE TESTING APPROVAL The initial testing period is limited to 12 months. However, the applicant may apply to the Bank, before the expiry of the testing period, to extend the testing period, by stating the additional time required and the reasons for such extension. When the testing period granted by the Bank expires, the approval to participate in the sandbox and other incidental permission will be terminated automatically.

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2 A financial institution is defined as the following: (i) an authorised or registered person under the Financial Services Act 2013; (ii) an authorised person under the Islamic Financial Services Act 2013; (iii) a licensee under the Money Services Business Act 2011; and (iv) a prescribed institution under the Development Financial Institution Act 2002.

3 A fintech company is a company that utilises or intends to utilise fintech, but excludes a financial institution.

4 A 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question. See further **Word of the BriefCase** on page 11.

REVOCATION OF APPROVAL The approval to participate in the sandbox may be revoked by the Bank at any time before the expiry of the testing period if one of the circumstances provided under the Framework materialises. These include circumstances where the participant is undergoing or has gone into liquidation, fails to carry out the proposed safeguards, or when the applicant breaches data security and confidential requirements. The Bank may revoke the approval immediately if it is in the opinion that any delay in revoking the approval would be detrimental to the interests of the participant, their customers, the financial system or the general public.

COMPLETION OF TESTING Upon the completion of the testing for the Product, the Bank will decide if the Product is to be introduced in the market on a wider scale. If the introduction of such Product is allowed, the participating fintech companies intending to carry out the regulated business will be assessed based on the criteria stated under the FSA, IFSA, and MSBA.

The Bank may also refuse the introduction of the Product if such Product has failed to comply with the agreed test measures, or if the Product results in unintended negative consequences for the public or financial stability.

"Fintech is challenging the status quo of the financial industry. New business models will emerge. Delivery channels will challenge existing norms. Transaction costs will be reduced. Rather than looking at the fintech revolution as unwelcoming, financial institutions ought to embrace it as an opportunity." – Datuk Muhammad bin Ibrahim, Governor of the Central Bank of Malaysia.

CONCLUSION The formulation and introduction of the Framework by the Bank is an encouraging measure. Since the financial industry is undergoing a rapid change, financial institutions in Malaysia are expected to embrace the new technology innovations to improve the quality of service and tap into the new markets and opportunities created by the fintech revolution.

TORT – Negligence – Land searches – Failure to maintain true and accurate record – Duty of care – Statutory duty – Whether duty breached – National Land Code 1965, sections 22, 384, 385 and 386

PENDAFTAR HAKMILIK, PEJABAT PENDAFTARAN WILAYAH PERSEKUTUAN KUALA LUMPUR & ANOR V POH YANG HONG [2016] 9 CLJ 297, Federal Court

FACTS The respondent, Poh Yang Hong, entered into a sale and purchase agreement with a vendor, Ng Lai Yin ("the Vendor"), to purchase a property ("the Property") following a private search at the first appellant's office, which confirmed the Vendor to be the registered proprietor of the Property. However, whilst the registration was pending, the respondent found the Property to be registered under one *Mohamad Nor bin Mohamad*. Another search was conducted and the Property was found to be registered under two names with two different titles. The respondent alleged that the first appellant had breached their duty of care by misrepresenting the true and actual particulars of the Property, and by failing to maintain true and accurate records. The respondent sued for damages in negligence. The appellants denied the claim and maintained that there was no duty of care and that the information was accurate at the time it was provided. The High Court held in favour of the respondent, which was subsequently upheld by the Court of Appeal. The appellant appealed.

ISSUE The issue was whether the first appellant owed a duty of care towards the respondent.

HELD In dismissing the appeal, the court held that the appellants were liable for negligence as they owed a duty of care to the respondent to maintain the register and register all lands caused to be registered. The appellants were also to ensure that the information contained in the Register is correct, true and accurate and that it reflects the true and actual description of the title to the land as well as the true identity of the registered proprietor itself.

LEGAL PROFESSION – Admission – Petition for admission – Objection to admission – Fit and proper person – Whether petition should be allowed – Decision of judge of concurrent jurisdiction – Status of – Legal Profession Act 1976, sections 11 and 16

BAR COUNCIL MALAYSIA & Anor v JUDY BLACIOUS S/O A F PEREIRA [2016] MLJU 1000, Court of Appeal

FACTS The respondent, Judy Blacious, filed a petition ("the Petition") to be admitted as an Advocate & Solicitor of the High Court of Malaya ("the first High Court"). The appellant ("the Bar Council of Malaysia") objected and entered a caveat against the admission on the ground that he was not a fit and proper person ("the Notice"). The respondent's application to strike out the Notice and caveat was dismissed and the Petition was struck out. The respondent then appealed to the Court of Appeal. The appeal was allowed and the Petition was fixed for hearing at the second High Court. The appellant filed a second Notice of Objection. Justice Lee Swee Seng at the second High Court allowed the Petition on the condition that the respondent complete eight hours of any human rights seminar, forum, activity or program organised by the Bar Council Human Rights Committee or the Perak State Bar ("the Order"). The Petition was then fixed before the third High Court. The appellant contended that the respondent had not complied with the Order. However, the third High Court held that there was substantial compliance with the Order and allowed the respondent's Petition on the respondent's personal undertaking that he would fulfil the conditions set out in the Order. Dissatisfied, the appellants appealed.

ISSUE The issue was whether the respondent's petition should be allowed.

HELD In allowing the appeal, the court held that the learned judge in the third High Court fell into error of law and fact when she failed to give sacrosanct value to the terms of the Order made by Justice Lee Swee Seng of the second High Court. An order of a judge of concurrent jurisdiction in the same matter must be respected and given effect to unless the learned judge was hearing an application for variation of the order.

CONTRACT – Joint venture agreement – Non-delivery of vacant possession – Non-performance of contractual obligations – Claim which causes taxpayers to be short-changed – Whether liability established

SETIAUSAHA KERAJAAN NEGERI SELANGOR (PERBADANAN) v PERBADANAN RIADAH SDN BHD AND ANOTHER APPEAL [2016] 4 MLJ 723, Court of Appeal

FACTS The appellant/plaintiff, a developer, entered into a joint venture agreement ("the Agreement") with the state's agency, namely the first and second defendants/respondents to develop a housing and industrial project on a land ("the Land"). The first defendant, who was to give vacant possession within six months, did not do so, but neither did the plaintiff demand vacant possession. It was also within the knowledge of the plaintiff that the said land was leased by the state and its agencies for sand dredging activities by third parties. The plaintiff wrote to the defendants on numerous occasions to complain of the sand mining activities and the delivery of vacant possession of the Land. The plaintiff also informed the defendants about its intention to change the nature of the development project due to the non-profitability of the initial project. However, the defendants did not respond. The defendants then sued the plaintiff for the failure to perform the development project after the Agreement expired. The plaintiff, on the other hand, claimed against the defendants for compensation as the latter had failed to deliver the vacant possession of the Land. The High Court decided that the first defendant was liable to the plaintiff but dismissed the plaintiff's claim against the second defendant. Aggrieved, the first defendant and the plaintiff appealed.

HELD In allowing the first defendant's appeal and dismissing the plaintiff's appeal, it was held that when the State's funds are bound to be short-changed by the plaintiff's claim based purely on a technical default, the court ought to balance the contractual rights of the parties. In the present case, the non-delivery of vacant possession was a technical default that could not constitute a cause of action to seek damages, especially when there was clear evidence by the plaintiff to suggest that they could not have proceeded with the Agreement profitably.

DEBRIEF

ARBITRATION – Arbitration agreement – Interpretation of agreement – Venue of arbitration – Seat of arbitration – Difference between "venue" and "seat" – Arbitration agreement referred to "venue" of arbitration – Whether "venue" meant "seat" of arbitration

GOVERNMENT OF INDIA V PETROCON INDIA LTD [2016] 3 MLJ 435, Federal Court

FACTS The appellant (the Government of India) and the respondent (a company), signed an agreement ("the Agreement") to develop petroleum resources in India. The Agreement contained a clause ("the Clause") referring to Kuala Lumpur ("KL") as the venue of the arbitration proceedings, unless the parties agree otherwise. A dispute subsequently arose. The arbitral tribunal had initially fixed preliminary meetings in KL, but due to the SARS outbreak, they were shifted to Amsterdam. Subsequently proceedings were held in London. The arbitrators, pursuant to a consent order made in London, recorded that the seat of arbitration had been moved to London. The arbitration proceeded and a partial award ("the Award") was made. The appellant applied to set aside part of the Award at the KL High Court. The High Court held, however, that it had no jurisdiction as KL had ceased to be the seat of arbitration. Dissatisfied, the appellant appealed to the Court of Appeal. The Court of Appeal affirmed the decision of the High Court but on different grounds. The appellant now appeals to the Federal Court.

ISSUE The main issue was whether the word "venue" used in the Clause referred to the "seat" of arbitration.

HELD In dismissing the appeal, the Federal Court ruled that the "seat" of arbitration must be distinguished from "venue" of arbitration as the former refers to the law governing the proceedings whilst the latter points to the geographical place of arbitration. However, in this case, based on the language of the agreement and conduct of the parties, the word "venue" is construed to mean the "seat". The words in the clause gave the parties the flexibility to change the "venue" of the arbitration to a place other than KL, and by the consent order, the change of "venue" meant that the "seat" had also been moved to London.

BRIEFLY

GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN OCTOBER AND DECEMBER 2016 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

BANK NEGARA MALAYSIA (BNM)

- BNM Concept Paper on Stress Testing – *Effective date: 1 June 2017 except for paragraph 15, which comes into effect on 1 June 2018*
- BNM Concept Paper on Direct Distribution Channels for Pure Protection Products – *Effective date: 1 January 2017*
- BNM Policy Document on External Auditor – *Effective date: 1 January 2017*
- BNM Exposure Draft on Code of Conduct for Malaysia Wholesale Financial Markets – *Issued on: 31 October 2016*
- BNM Financial Technology Regulatory Sandbox Framework – *Effective date: 18 October 2016*

BURSA MALAYSIA

- Amendments to Directive 5.05-001 in relation to the Participating Organisations' IT Security Standards and Disaster Recovery Site Standards – *Effective date: 3 January 2017*
- Directive on the Trading Participants' IT Security Standards – *Effective date: 3 January 2017*
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to the exchange rate of USD/MYR used for conversion of LBMA Gold Price AM to Ringgit Malaysia – *Effective date: 30 November 2016*
- Consolidated Rules of Bursa Malaysia Derivatives Bhd – *As at: 30 November 2016*
- Consolidated Rules of Bursa Malaysia Securities Bhd – *As at: 28 November 2016*

BRIEFLY

- Consolidated Rules of Bursa Malaysia Securities Clearing Sdn Bhd – *As at: 28 November 2016*
- Consolidated Rules of Bursa Malaysia Depository Sdn Bhd – *As at: 28 November 2016*
- Consolidated Rules of Bursa Malaysia Derivatives Clearing Bhd – *As at: 28 November 2016*
- Amendments to Directive 5-001 (Directives on Conduct of Business) in relation to the notification of insurance policy – *Effective date: 15 November 2016*
- Amendments to the Rules of Bursa Malaysia Derivatives Berhad in relation to the introduction of the Tin Futures Contract – *Effective date: 31 October 2016*

SECURITIES COMMISSION

- SC Guidelines on Prevention of Money Laundering and Terrorism Financing for Capital Market Intermediaries – *Date revised: 7 December 2016*
- SC Guidelines on Management of Cyber Risk – *Effective date: 31 October 2016*

WORD OF THE BRIEFCASE...

Regulatory sandbox:

"Regulatory sandbox" means a 'safe space' in which businesses can test innovative products, services, business models and delivery mechanisms without immediately incurring all the normal regulatory consequences of engaging in the activity in question.

The term 'sandbox' originates from the small space filled with sand where children play, and using their imagination, build sand castles, tunnels *etc*. The software term sandbox comes from this, because in a sandbox environment, a programmer has the liberty to build things from scratch.

THE BRIEFCASE

The BriefCase 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:

look@zulrafique.com.my

The contributors for this **BriefCase** are:
- *Mariette Peters*
- *Joanne Ching*
- *Amylia Soraya*
- *Ding Mei Sin*
- *Foo Yuen Wah*

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ZUL RAFIQUE *&* *partners* Consultancy Sdn Bhd
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