Newsletter

Volume 19 No 3 September 2021

Shearn Delamore & Co
7th Floor
Wisma Hamzah Kwong-Hing,
No 1, Leboh Ampang
50100, Kuala Lumpur, Malaysia
T: 603 2027 2727
F: 603 2078 5625
E: info@shearndelamore.com
W: www.shearndelamore.com

FRONT PAGE FOCUS

Dispute Resolution

Disqualification of Solicitors

A case note by Caitlin Tan Hui Yi.

Introduction

When would an advocate and solicitor should not act? Specifically, when one has once acted as solicitor or counsel for a client in a previous engagement, can he or she later act for an adverse party in a case somewhat related to the matters advised or acted for in the previous retainer? This would normally involve balancing the ethical questions of conflict of interests and the right of a litigant to his or her choice of solicitors or counsel.

Court of Appeal case of Dato' Azizan bin Abdul Rahman v Pinerains Sdn Bhd

In the recent Court of Appeal decision of Dato' Azizan bin Abdul Rahman v Pinerains Sdn Bhd, the Court has shed some light on the applicable principles and laws pertaining to the law of disqualification in Malaysia.

In this matter, the Respondent ("Pinerains") sought to disqualify lawyers NN and WWW from acting as counsel for the Appellant ("Azizan"). The grounds of the application are that NN and WWW had previously acted for Ms. Chan, a former director and shareholder of Pinerains in another proceeding ("OS 246"), and that the facts and issues relating to OS 246 are closely related to the subject matter of the present proceedings.

On that premise, it was contended that NN and WWW ought to be barred from acting for Azizan as they are in a position of embarrassment and conflict aside from being in breach of the Legal Profession (Practice and Etiquette) Rules 1978 ("LPR").

Contents

Dispute Resolution 2

Disqualification of Solicitors 2

Tax & Revenue............................... 6

Landmark Decision on Personal Data Protection in Malaysia 6

Intellectual Property....................... 9

PT Tunas Duta Cemerlang v Mohd Hafizuddin Hiew bin Abdullah [2021] MLJU 1547 9

Corporate/M&A 12

Incoming Game Changer in the Merger and Acquisition Space? . 12

Employment & Administrative Law 15

Implementation of New Workplace Policies following the COVID-19 Pandemic................................ 15

Real Estate.................................. 20

Stamp Duty Exemptions on Purchase and Financing of Residential Properties............... 20

The Court of Appeal was invited to consider several cases pertaining to this issue. Pinerains had relied heavily on the Canadian Supreme Court case of **Martin v Gray (MacDonald Estate v Martin)**[1] which took a comparatively stringent approach.

In **Martin**, the guiding principle is once it is shown that there existed a previous relationship sufficiently related to the retainer from which the solicitor or counsel is sought to be removed, it should be inferred that certain confidential information was imparted. Burden is on the solicitor sought to be removed to satisfy that no such confidential information was imparted. It is also imperative to consider if the confidential information would be misused.

On the other hand, Azizan relied on the English House of Lords case of **Prince Jefri Bolkiah v KPMG (A Firm)**[2]. In discussing the different basis for the Court's intervention, the House of Lords differentiated the duty owed by a solicitor to a former client from that owed to an existing client. It was stressed that the fiduciary relationship between a solicitor and client ends with the termination of retainer.

What persists and remains post termination of engagement or solicitor-client relationship is the continuing duty to preserve confidentiality of information imparted during the subsistence of the relationship.

As such, it was held that conflict of interest is a non-issue is this instance. The applicable legal test is there must first exist a former solicitor-client relationship. Then, the party seeking to disqualify must also prove the relevant confidential information alleged to have been conveyed to or possessed by the solicitors. Whether such confidential information was ever imparted is factual.

Simply put, **Martin** was premised on the existence of conflict of interest whilst **Jefri Bolkiah** was premised on the existence of confidential information.

Decision of the Court of Appeal

After assessing both the cases above, the Court of Appeal preferred the principles laid down in **Jeffri Bolkiah**, as adopted in the previous Court of Appeal case of **Mirza Mohamed Tariq Beg Mirza HH Beg v Margaret Low Saw Lui**[3].

The Court of Appeal agreed with the proposition that fiduciary duty ends with termination of engagement. Therefore, a conflict of interest would no longer be an issue; what matters is whether there is a real risk of disclosure of confidential information.

In this regard, the Court of Appeal summarised the position as follows:

> "*[40] To conclude on this note, we reiterate that the legal principles in Jefri Bolkiah (supra) would apply to the issue of disqualification of counsel. These principles are as follows:*
>
> *i. there must first be* ***established a former solicitor-client or some fiduciary relationship*** *between NN, WWW and the Respondent;*
> *ii. the Respondent must prove that NN and WWW are* ***in possession of the confidential information which is relevant to the present appeal.*** *The Respondent must place before the Court full particulars of the relevant confidential information that was allegedly disclosed to NN and WWW; and*
> *iii. a* ***strong case must be made out by the Respondent*** *to disqualify NN and WWW from acting as counsel for the Appellants.*"

On the facts of the case, the Court of Appeal ruled that Pinerains has failed to establish a case to disqualify NN and WWW and dismissed the application. It was held that:

- There was no previous solicitor-client relationship between NN, WWW and Pinerains giving rise to a duty to preserve confidential information;
- The information sought to be protected was not confidential;
- The information would not affect the appeal; and
- There was no breach of the LPR.

Conclusion

This recent decision has reaffirmed the fact that it will not be easy for one to disqualify a former solicitor or advocate from acting for an adverse party in a future matter. Conflict of interest or, by extension, the issue of embarrassment is not a good ground to bar a person who had earlier advised a client from acting for the other party against its former client.

The onus is on the party seeking to disqualify to prove that the solicitor or counsel is in possession of confidential information from its former client relevant to the subject matter of the case coupled with a real risk of disclosure of the confidential information.

CAITLIN TAN HUI YI
DISPUTE RESOLUTION PRACTICE GROUP

Please contact us for further information regarding dispute resolution matters.

Endnotes:

[1] [1990] 3 SCR 1235.
[2] [1999] 2 AC 222.
[3] [2009] 4 CLJ 403.

Tax & Revenue

Landmark Decision on Personal Data Protection in Malaysia

In this article, Abhilaash Subramaniam discusses the first Malaysian case that sets limits on demands of personal data by the Inland Revenue Board ("IRB").

Introduction

In a landmark decision, the High Court of Malaya at Kuala Lumpur declared that the Director General of Inland Revenue ("DGIR") cannot use the provisions of the **Income Tax Act 1967** ("ITA") to override the protections offered under the **Personal Data Protection Act 2010** ("PDPA") to undertake a fishing expedition for the personal data of customers held by a company running a business as a data user.

This matter was handled by Anand Raj, Irene Yong, Foong Pui Chi, Abhilaash Subramaniam and Yeoh Yu Xian of Shearn Delamore & Co's Tax & Revenue Practice Group.

Background to DGIR's demands for personal data

The taxpayer company ("Company") ran (and runs) a loyalty programme for its customers whereby individual customers who wished to join the programme (collectively "Customers") were required to provide their personal data to the Company. The Company became a data user, as defined under the PDPA in respect of such information.

The DGIR wrote to the Company and demanded access to all the personal data held by the Company on the basis that the DGIR was going to store the Customers' personal data in its data warehouse and thereafter use such personal data to broaden the IRB's tax base.

The demands for personal data made by the DGIR were not made pursuant to any audit or investigation undertaken by the DGIR against specific individuals but were blanket demands for the entire customer database of the Company.

Personal Data Protection Principles

The seven Personal Data Protection Principles as enumerated in section 5(1) of the PDPA impose obligations upon data users, such as the Company, regarding

the personal data collected from their customers (data subjects). Any breach of such principles carries penal consequences.

One of the Personal Data Protection Principles is the Disclosure Principle, in section 8 of the PDPA, which prohibits the disclosure of personal data held by a data user for any purpose other than the purpose for which such personal data was collected (the "Disclosure Principle").

There are only very limited exceptions to the Disclosure Principle ("Exceptions") as contained in sections 39 and 45 of the PDPA.

DGIR's purported position that the ITA overrides PDPA

In the instant case, the DGIR sought to argue that its powers under Part V of the ITA and, in particular, its powers to call for information under section 81 of the ITA, were unlimited and overrode all protections offered under the PDPA (including sections 5(1) and 8 of the PDPA) and that the DGIR could make blanket demands for all personal data of the Customers held by the Company.

In doing so, the DGIR relied upon the exceptions to the Disclosure Principle under section 39(b) of the PDPA, namely where the disclosure:

(i) is necessary for the purpose of preventing or detecting a crime, or for the purpose of investigations; or

(ii) was required or authorised by or under any law or by the order of a court.

The DGIR further relied upon the exception under section 45(2)(a)(iii) of the PDPA that exempts the Disclosure Principle in respect of personal data that is processed for "*the assessment or collection of any tax or duty or any other imposition of a similar nature*".

Data Commissioners' decision of agreeing with the DGIR

The Company refused to disclose the personal data of the Customers demanded by the DGIR on the basis that the DGIR's powers to call for information, the DGIR's investigation and collection objectives cannot override the protections offered under the PDPA.

The DGIR then sought confirmation from the Personal Data Protection Commissioner/Deputy Personal Data Protection Commissioner (collectively, "PDP Commissioner") that the DGIR's powers under the ITA could override the protections offered under the PDPA to allow for fishing expeditions for personal

data. The Company also wrote to the PDP Commissioner to oppose to the DGIR's position.

The PDP Commissioner ultimately acceded to the views of the DGIR and issued a decision that the DGIR could use the ITA to override the protections offered under the PDPA to make such blanket demands for personal data from taxpayers (that is, the Customers) without first obtaining their consent ("PDP Commissioner's Decision").

Judicial review proceedings filed by the Company

The Company filed judicial review proceedings in the High Court against the PDP Commissioner and the DGIR to, amongst others, quash the PDP Commissioner's Decision on the basis that it breached the protections offered under the PDPA.

The High Court agreed with the Company and granted the judicial review application, thereby quashing the PDP Commissioner's Decision. In doing so, the High Court further held, amongst others, that the DGIR is bound by the provisions of the PDPA that protect personal data and the DGIR cannot use Part V of the ITA (and section 81 of the ITA) to undertake a fishing expedition to request or demand such personal data. The Court further declared the relevant legal criteria that must be met before the DGIR may request personal data from the Company.

Conclusion

This case is a landmark decision on personal data protection laws in Malaysia and clarifies and confirms that the IRB's powers under the ITA are not without limitations, especially when it comes to matters of personal data.

An appeal to the Court of Appeal has been lodged by the PDP Commissioner.

ABHILAASH SUBRAMANIAM
TAX & REVENUE PRACTICE GROUP

Please contact us for further information regarding tax & revenue matters.

Intellectual Property

PT Tunas Duta Cemerlang v Mohd Hafizuddin Hiew bin Abdullah [2021] MLJU 1547

A case note by Paw Ying Hui.

Introduction

On 27 December 2019, the new **Trademarks Act 2019** ("TMA 2019") came into effect in Malaysia, repealing the Trade Marks Act 1976 ("TMA 1976"). The coming into force of the TMA 2019 has given rise to several procedural issues. The case of **PT Tunas Duta Cemerlang v Mohd Hafizuddin Hiew bin Abdullah**[1] addresses the following procedural issues:

- whether an action under the repealed TMA 1976 must commence by way of an Originating Summons according to Order 87 rule 2 of the Rules of Court 2012 ("ROC");
- whether Order 87 rule 2 applies for an action under TMA 2019; and
- whether the irregularities for non-compliance with Order 87 rule 2 are remediable.

In the above case, the plaintiff's ("PT") applications under TMA 2019 began by way of a Writ. Hafizuddin, as defendant sought to strike out PT's Statement of Claim on the grounds that PT had wrongly chosen to begin their proceeding against Hafizuddin by way of a Writ.

Issue 1: whether an action under the repealed TMA 1976 must be commenced by way of an originating summons according to Order 87 rule 2.

The Court answered in the affirmative.

Order 87 rule 2 provides that an application to the Court under TMA 1976 shall begin by Originating Summons.

The Court affirmed the decisions in **Al Baik Fast Food Distributing Co Sae v El Baik Food Systems Co SA**[2], **Hakubaku Co Ltd v Asiamega Food Manufacturers Sdn Bhd**[3], and **Hundai Motor Company v Sun Yuen Rubber Manufacturing Co**

Sdn Bhd[4] that actions under TMA 1976 shall begin by way of an Originating Summons.

Issue 2: whether Order 87 rule 2 applies for an action under the TMA 2019.

The second issue arose because the ROC has yet not been amended to cater for TMA 2019 despite its having come into effect almost two years ago. Furthermore, TMA 2019 is silent on the mode of application.

PT had argued that as the TMA 2019 is silent on the mode of application, PT cannot be restricted from commencing their action against Hafizuddin only by way of an Originating Summons. PT also argued that Order 87 rule 2 ceased to be in effect with the commencement of TMA 2019 in December 2019.

The Court disagreed with PT's arguments and held that when an action is an application under TMA 2019, Order 87 rule 2 would apply. An application under TMA 2019 shall commence by way of an Originating Summons.

The Court held that until and unless the Rules Committee promulgates new provisions to replace Order 87, the provision in Order 87 as it currently stands shall apply *mutatis mutandis* and, therefore, Order 87 rule 2 is the applicable procedure that governs PT's applications.

PT's mode of beginning their action against Hafizuddin by way of a Writ was therefore irregular as it did not comply with Order 87 rule 2.

Issue 3: whether non-compliance with Order 87 rule 2 can be remedied.

After having determined that Order 87 rule 2 is applicable for actions under TMA 2019, the Court then considered whether the irregularities for non-compliance with Order 87 rule 2 are remediable.

Hafizuddin had attempted to argue that there are no provisions in the ROC for a Writ to be converted into an Originating Summons. Therefore, PT's non-compliance was not a mere irregularity but a nullity and an abuse of the process of the Court. The Court disagreed with Hafizuddin's argument.

The Court weighed the balance between regulating compliance with the ROC and applying justice and fairness in reaching its decision. The Court held that PT's non-compliance with Order 87 rule 2 is curable and remediable.

In addition, the Court held that the irregularity for non-compliance with Order 87 rule 2 does not mean that PT's actions are "*scandalous, frivolous or vexatious*" and, therefore, to be struck out under Order 18 rule 19. The Court ordered that PT's Writ be deemed as an Originating Summons and having complied with Order 87 rule 2.

PAW YING HUI
INTELLECTUAL PROPERTY PRACTICE GROUP

Please contact us for further information regarding intellectual property law matters.

Endnotes:
[1] [2021] MLJU 1547.
[2] [2016] 9 CLJ 310.
[3] [2018] 1 LNS 2077.
[4] [2017] 1 LNS 731.

Corporate/M&A

Incoming Game Changer in the Merger and Acquisition Space?

In this article, Ong Jun Loong examines the proposed amendments to the Competition Act 2010 to introduce merger control provisions.

Introduction

According to a recent news report, the Malaysian Competition Commission (“MyCC”) has initiated the process to amend the **Competition Act 2010** (“CA”) to incorporate merger controls in Malaysia. The introduction of a merger control regime in Malaysia, which is expected to be by the end of 2021, may allow the MyCC to review a proposed merger and acquisition (“M&A”) transaction and determine whether the same will have any significant anti-competitive effects.

What is in place now?

At present, the CA only regulates anti-competitive agreements and the abuse of dominance and has no provision on merger control, unlike the other jurisdictions in Southeast Asia. There are only sector-specific merger control regulations in the aviation industry and the communications and multimedia industry, which are enforced by the Malaysian Aviation Commission (“MAVCOM”) and the Malaysian Communications and Multimedia Commission (“MCMC”) respectively.

Both industries have adopted a voluntary notification regime under the **Malaysian Aviation Commission Act 2015** (“MACA”) and the **Communications and Multimedia Act 1998** (“CMA”), which means that the parties to a proposed M&A transaction in these industries may choose whether they should notify and/or apply to MAVCOM or, as appropriate, MCMC for approval[1].

Even if the relevant thresholds are not met, each of MAVCOM and MCMC have the power to investigate the proposed M&A transaction if there is a reason to suspect that the transaction would result in a substantial lessening of competition in the aviation or, as the case may be, communications market[2].

It is to be noted that the scope of the CA does not extend to any commercial activity carried out by the licensees under the MACA and the CMA respectively, all of which will be governed by MAVCOM and, as the case may be, MCMC. Whilst MyCC does not have the power to regulate M&A yet, it has the authority

under the CA to investigate the conduct of the parties post-merger for anti-competitive behaviour or abuse or market dominance.

An example of this can be seen in the proposed infringement decision issued by the MyCC against GrabCar Sdn Bhd, MyTeksi Sdn Bhd and Grab Holdings Inc (collectively, "Grab") after Grab's acquisition of Uber Technologies Inc's Southeast Asian business in 2018. MyCC had provisionally found that Grab had abused its dominant position in the e-hailing and transit media advertising market by preventing its drivers from promoting and providing advertising services for its competitors.

MyCC was of the view that this move by Grab had distorted competition in the relevant market that is premised on multi-sided platforms by creating barriers to entry and expansion for Grab's existing and future competitors[3].

What may come?

Although nothing has been confirmed yet at the time of writing, MyCC had indicated in the past that it is inclined to implement a mandatory notification regime, which means that as soon as certain jurisdictional thresholds are met, notification on the proposed M&A transaction must be made to the MyCC. If the thresholds are not met, the transacting parties may notify the MyCC on a voluntary basis[4].

It is also uncertain whether MyCC intends to introduce a pre- or post-completion notification regime, but most mandatory notification regimes implemented in other jurisdictions are suspensory. This means that if the parties fail to notify a proposed M&A transaction to the competition authority before completion and decide to engage in "*gun-jumping*" (that is to implement the transaction without approval), and that M&A transaction subsequently comes to attention of the competition authority, there is a risk that the competition authority may impose significant fines on the parties and declare that M&A transaction invalid.

How does this impact a proposed M&A transaction in the future?

If a mandatory notification regime comes into effect in Malaysia, there are a few key factors which the parties should consider especially at the preparatory and due diligence stage of a M&A transaction.

At this stage, the parties should consider what impact the MyCC's merger review period is likely to have on the overall timeline of the intended M&A transaction. If the MyCC's review period is expected to take a long time, there may be a gap between signing and completion of the proposed transaction which may result

in additional costs to the purchaser in maintaining financing for the proposed M&A transaction until completion.

Further, the parties should be mindful that there is a risk that the proposed M&A transaction may not be implemented if MyCC finds, for example, that transaction will have significant anti-competitive effect in the market. However, there is also a possibility that MyCC may approve the M&A transaction subject to the parties agreeing to remedy those anti-competitive effects via, for example, a divestment of certain regional businesses or assets.

If the parties can identify merger control issues at an early stage of a proposed M&A transaction, the parties may want to implement a "*fix-it-first*" remedy promptly to facilitate and expediate the review process by eliminating the risk of long negotiations with MyCC.

Conclusion

When the proposed merger control regime is implemented in Malaysia, it is hoped that MyCC will provide further guidance as to the jurisdictional thresholds (for example, the transaction value of the merger or the revenue/asset value of the company, market share of the transacting parties, etc.) and the types of M&A transactions which are required to be reviewed and approved by the MyCC before they can be implemented or completed.

ONG JUN LOONG
CORPORATE/M&A PRACTICE GROUP

Please contact us for further information regarding corporate/M&A matters.

Endnotes:

[1] Section 55 of the MACA and section 140 of the CMA.
[2] Section 83 of the MACA and section 246 of the CMA.
[3] https://tinyurl.com/37df2uw2.
[4] https://tinyurl.com/k7cunwvy.

Employment & Administrative Law

Implementation of New Workplace Policies following the COVID-19 Pandemic

In this article, Grace Chai discusses the legality of the implementation of new policies that may be required in a post-COVID-19 workplace.

Introduction

As parts of the world are gradually easing their lockdown restrictions and vaccinations are being rolled out, many employers are beginning to prepare for strategies to bring employees back to the office. Whilst many are eager to return to normalcy, it is undeniable that the post-pandemic workplace will never be the same.

Considering that we are still in the early phases of recovery and vaccine efficacies are still being observed, one of the main concerns that employers would have are strategies to create a safe working environment for their employees.

This would lead directly to the burning question of whether employers can unilaterally impose new workplace policies, especially on its existing employees.

New policies

With COVID-19 being a continuous threat, some of the new policies that are being contemplated by employers include policies on vaccination, instructions to return to office, mandatory masking and/or social distancing.

At the time of writing, there is no clear authority in Malaysia to decide on the legality of implementing these policies. Nonetheless, the following issues are likely to be relevant in the consideration of whether any new policies can be implemented.

Lawful and reasonable direction

Firstly, the policies to be implemented ought to be lawful and reasonable and not motivated by any *mala fide* intention (for example, to discriminate against certain groups of employees). There is no hard and fast rule to determine

whether a direction is "*lawful and reasonable*" as the same would turn on the circumstances of each case.

Generally, whether an order is lawful or not depends upon whether the terms of the contract enable the employer to give such an order and, in the absence of any express provisions, upon the character of the employment.

In other words, it boils down to an analysis of whether the employers, having regard to the nature of their business and the duties of their employees, are justified in issuing and enforcing such a direction. In this regard, a careful examination of the nature of the employees' work would be necessary.

Nature of work

Certain work environments undoubtedly contain a higher risk of COVID-19 infection, or where infections occur, are likely to be more serious than others. For example, a high-density workplace, environments where the nature of work involves close physical contact with other persons or workplaces located at remote facilities.

In those circumstances, it may be justifiable for employers to impose more stringent post-pandemic workplace policies, such as subjecting employees to mandatory COVID-19 testing or mandatory COVID-19 vaccination.

Using vaccination as an example, prior to mandating vaccination at the workplace, the question that ought to be considered by employers is whether vaccination is an inherent requirement of the role of the employees. In this regard, the Australian authority of **Maria Corazon Glover v Ozcare**[1] is of assistance.

In that case, the Fair Work Commission ("FWC") held that the dismissal of the home-care assistant who refused to comply with the mandatory flu vaccination policy during the height of the COVID-19 pandemic in Australia to be fair

The FWC found that the ex-employee's job required direct contact with clients who are vulnerable members of society and so it was reasonable for the employer to impose a mandatory flu vaccination policy on its employees.

Arguably, if COVID-19 fundamentally changes the circumstances such that a COVID-related policy becomes an inherent part of particular jobs, refusal of employees to comply with the policy would be considered as the inability to perform their normal duties as envisaged in the employment contract.

The courts have recognised that companies are generally incorporated to conduct business with a view of generating profit; therefore, the employees' inability to work would be a liability rather than asset to the business (**Abdullah Abdul Rahman @ Abdul Halim v Continental Tyres AS Malaysia Sdn Bhd**[2]). In those circumstances, employers may argue frustration of contract in dismissing employees who cannot perform their duties due to their refusal to comply with such COVID-19-related policies.

However, in assessing the risks that would be caused by the absence of such policies, employers should have sufficient evidence or data to justify the implementation of such policies. In the case of **Gan Soh Eng v Guppy Plastic Industries Sdn Bhd**[3], the policy of lowering the retirement age for female workers on the ground that there was a higher risk of accidents happening to female workers of older age was struck down by the Court as being unreasonable, as the company was unable to support its averment of "*higher risk*" by any cogent and convincing evidence.

Business requirements

The next consideration is whether it is a business requirement to implement such post-pandemic policies. For example, if the Government imposes employee vaccination as a pre-condition of operations, it may be difficult for employees to challenge such related policy implemented by employers.

Even in the absence of such government policies or regulations, an employer can make policies to ensure the smooth running of its business in a post-pandemic environment. For example, adding new types of COVID-19-related misconduct to its disciplinary policies. Examples of COVID-19-related safety rules are mandatory masking, and prohibition of physical congregation at the workplace.

In a recent British Columbian decision, **Board of Education of School District No. 39 (Vancouver) v Canadian Union of Public Employees Local 407 (Linde Grievance)**[4]*,* the arbitrator upheld the disciplinary action of suspension taken against an employee who intentionally coughed into the vehicle of a co-worker in April 2020 during the early days of the COVID-19 pandemic. The arbitrator commented that the misconduct was "*a serious matter*" and that "*the grievor [was] lucky that the employer did not terminate him*".

In short, the courts cannot deny the prerogative of employers to determine the best way to run their businesses, which includes putting in place policies to ensure a safe workplace against the backdrop of a pandemic.

Reasons for employees' objection

Before taking any action against an employee's refusal to comply with any of the new policies, it may be worthwhile for employers to first look into the reasons for the objection.

In law, it is trite that employees have the duty of obedience to comply with their employers' order. Any breach of that means the employment relationship is disrupted, and employees can be summarily dismissed on grounds of insubordination.

Nonetheless, if employees have medical or religious reasons in refusing to comply with such policies (for example, vaccination), there may be potential discrimination as the employees would be subjected to less favourable treatment due to their medical condition and/or religious beliefs.

Even though there are no anti-discrimination laws in Malaysia to specifically prohibit such policies, insisting that employees comply with such policies may be deemed as unreasonable.

Alternatives

Employers should be slow in taking disciplinary action against employees who refuse to comply with any COVID-19-related policies, even more so in terminating their employment, unless it is just and reasonable to do so.

Where employees, for good reasons, are unable to comply with the new policies, employers may consider less extreme alternatives such as transferring the employees to different roles or work location with lower risk of infection or making reasonable adjustments such as allowing the employees to continue working from home.

Other considerations

When implementing any policies, employers should ensure that it does not amount to a breach that goes to the root of the employment contract. Otherwise, a new policy could give rise to a circumstance where employees can walk out of their employment by claiming constructive dismissal. Employers

should also remember that the relationship of trust and confidence is a mutual one.

It is therefore arguable that if employers require their employees to undertake any action that may infringe upon the employees' personal agency/space without a strong justification, this could potentially undermine the trust and confidence of the employment relationship.

Conclusion

Given that the situation is unprecedented and still fluid, it is difficult to state at this juncture whether the implementation of any COVID-19-related policies is legal. As mentioned, the determination would depend on the circumstances and nature of each workplace. Ultimately, employers should have justifiable reasons before implementing a new workplace policy that is reasonable.

GRACE CHAI HEUY HANN
EMPLOYMENT AND ADMINISTRATIVE LAW PRACTICE GROUP

Please contact us for further information on employment & administrative law matters.

Endnotes:

[1] [2021] FWC 2989.
[2] [2015] 4 ILR 512 (Award No. 1032 of 2015).
[3] [2008] 3 ILR 414.
[4] [2021] BCCAAA No. 68 (Love).

Real Estate

Stamp Duty Exemptions on Purchase and Financing of Residential Properties

In this article, Tan Yin Lu looks at the Malaysian Government effort to stimulate the local property market through various stamp duty exemptions.

Introduction

In conjunction with the Malaysian Government's effort to address the economic challenges arising from the COVID-19 pandemic, the Malaysian Government has introduced various stamp duty exemptions to encourage more take-up in properties and stimulate the property market.

The following Orders ("Exemption Orders") were gazetted in accordance with the **Stamp Act, 1949**:

(1) Stamp Duty (Exemption) Order 2021 [P.U. (A) 53/2021] ("**Exemption Order 1/21**") and Stamp Duty (Exemption) Order (No. 2) Order 2021 [P.U. (A) 54/2021] ("**Exemption Order 2/21**")

(a) The above Orders are deemed to have come into operation on 1 January 2021.

(b) Under the Exemption Order 1/21, all instrument of transfer executed by an individual for the purchase of only one unit of residential property which value does not exceed RM500,000.00 is exempted from stamp duty. The market value of the residential property will be used in determining the value of the residential property.

(c) Under the Exemption Order 2/21, any loan agreement executed by an individual named in a sale and purchase agreement and any of the following institutions ("Financial Institutions") to finance the purchase of only one unit of residential property which value does not exceed RM500,000.00 is exempted from stamp duty.

(i) a licensed bank under the **Financial Services Act 2013**;

(ii) a licensed Islamic bank under the **Islamic Financial Services Act 2013**;

(iii) a development financial institution prescribed under the **Development Financial Institutions Act 2002**;

(iv) a licensed insurer under the **Financial Services Act 2013**;

(v) a licensed *takaful* operator under the **Islamic Financial Services Act 2013**;

(vi) a co-operative society registered under the **Co-operative Societies Act 1993**;

(vii) any employer who provides an employee housing loan scheme;

(viii) the Borneo Housing Mortgage Finance Berhad (Company Registration Number: 25457-V) incorporated under the **Companies Act 2016**; or

(ix) the Mutiara Mortage and Credit Sdn Bhd (Company Registration Number: 257663-T) incorporated under the **Companies Act 2016**.

(d) The above exemptions are given subject to the following conditions:

(i) the sale and purchase agreement for the purchase of the residential property is executed between 1 January 2021 and 31 December 2025; and

(ii) the individual shall not have owned any residential property including a residential property which is obtained by way of inheritance or gift, which is held either individually or jointly. The said individual shall provide an accompanying statutory declaration confirming this when applying for the exemption.

(e) "*residential property*" under the Exemption Order 1/21 and the Exemption Order 2/21 means a house, a condominium unit, an apartment or a flat purchased or obtained solely to be used as a dwelling house and "*individual*" means a purchaser of a residential property who is a Malaysian citizen or co-purchaser of a residential property who is a Malaysian citizen.

(2) Stamp Duty (Exemption) Order (No. 4) 2021 [P.U. (A) 301/2021] ("**Exemption Order 4/21**") and Stamp Duty (Exemption) Order (No. 5) Order 2021 [P.U. (A) 302/2021] ("**Exemption Order 5/21**")

(a) The above Orders are deemed to have come into operation on 1 June 2021.

(b) (i) Under the Exemption Order 5/21, all instrument of transfer executed by an individual for the purchase of a residential property under the Home Ownership Campaign 2021 which value is more than Ringgit Three hundred thousand (RM300,000.00) but not more than Ringgit Two million and five hundred thousand (RM2,500,000.00) is exempted from stamp duty. The market value of the residential property will similarly be used in determining the value of the residential property.

(ii) This stamp duty exemption shall only be for the stamp duty that should be imposed for the first Ringgit One million (RM1,000,000.00) or less from the value of the residential property and in relation to the balance amount of the value of the residential property which is more than Ringgit One million (RM1,000,000.00), stamp duty of Ringgit Three (RM3.00) shall be imposed for every Ringgit One hundred (RM100.00). Please see the following:

Value of Residential Property	**Stamp Duty**
≤ RM1,000,000.00	Exempted
> RM1,000,0000.00	3% on the amount in excess of RM1,000,000.00

(c) Under the Exemption Order 4/21, any loan agreement executed by an individual named in the sale and purchase agreement and any of the Financial Institutions to finance the purchase of a residential property which value is more than Ringgit Three hundred thousand (RM300,000.00) but not more than Ringgit Two million and five hundred thousand (RM2,500,000.00) is exempted from stamp duty.

(d) The above exemptions are given subject to the following conditions:

(i) the sale and purchase agreement for the purchase of the residential property is executed between an individual and a property developer;

(ii) the sale and purchase agreement is executed on or after 1 June 2021 but not later than 31 December 2021 and is stamped at any branch of the Inland Revenue Board of Malaysia; and

(iii) the purchase price in the sale and purchase agreement is a price after a discount of at least ten per cent (10%) from the original price offered by the property developer except where the residential property is subject to controlled pricing.

Additionally, as "*property developer*" means a property developer registered with the Real Estate and Housing Developers' Association ("REHDA") Malaysia, Sabah Housing and Real Estate Developers' Association ("SHAREDA") or Sarawak Housing and Real Estate Developers' Association ("SHEDA"), an individual buyer shall submit a Home Ownership Campaign 2021 Certification issued by REHDA, SHAREDA or SHEDA to the Inland Revenue Board of Malaysia when applying for the exemptions.

(e) "*individual*" under the Exemption Order 4/21 and the Exemption Order 5/21 has the same meaning as "*individual*" under the Exemption Order 1/21 and the Exemption Order 2/21 but "*residential property*" under the Exemption Order 4/21 and the Exemption Order 5/21 has been further expanded to also include a service apartment and small office home office (SOHO) for which the property developer has obtained an approval for a Developer's License and Advertising and Sales Permit under the **Housing Development (Control and Licensing) Act 1966**, Housing Development (Control and Licensing) Enactment 1978, Sabah or Housing Development (Control and Licensing) Ordinance 2013, Sarawak.

The above Exemption Orders are indeed welcoming to promote economic flow in relation to the property sector but would assist Malaysian citizens who wish to purchase residential properties only. Following the strict wording of the Exemption Orders, permanent residents and companies do not benefit from the Exemption Orders and the Exemption Orders also do not seem to apply where one purchases vacant land even though the vacant land is intended to be developed for residential use.

TAN YIN LU
REAL ESTATE PRACTICE GROUP

Please contact us for further information regarding real estate matters.

Shearn Delamore &Co.

Follow us on:

www.shearndelamore.com

https://www.linkedin.com/company/shearn-delamore-&-co

To subscribe to our legal updates, email us:

km@shearndelamore.com

COPYRIGHT © 2021 SHEARN DELAMORE & CO. ALL RIGHTS RESERVED.

THIS UPDATE IS ISSUED FOR THE INFORMATION OF THE CLIENTS OF THE FIRM AND COVERS LEGAL ISSUES IN A GENERAL WAY. THE CONTENTS ARE NOT INTENDED TO CONSTITUTE ANY ADVICE ON ANY SPECIFIC MATTER AND SHOULD NOT BE RELIED UPON AS A SUBSTITUTE FOR DETAILED LEGAL ADVICE ON SPECIFIC MATTERS OR TRANSACT.