

Shearn Delamore & CO.

Dear valued clients and business partners,

We are pleased to highlight the following legal updates for the month of May 2018.

COMPETITION LAW & ANTITRUST

Two guidelines were published by the [Malaysian Aviation Commission](#) ("MAVCOM") last month:

- i. Guidelines on Substantive Assessment of Mergers;
- ii. Guidelines on Notification and Application Procedure for an Anticipated Merger or a Merger.

Early this year the MAVCOM published three guidelines which are:

- i. Guidelines on Aviation Service Market Definition;
 - ii. Guidelines on Anti-Competitive Agreements;
 - iii. Guidelines on Abuse of Dominant Position.
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For further information regarding competition law and antitrust matters, please contact our [Competition Law & Antitrust Practice Group](#).

INTELLECTUAL PROPERTY

Aktif Perunding Sdn Bhd v ZNVA & Associates Sdn Bhd [2018] 7 MLJ 692

University Teknologi Malaysia appointed Ahmad Zaki Sdn Bhd ("Main Contractor") as the main contractor for the construction of a student accommodation in Kuala Lumpur ("Project"). The Main Contractor then appointed the plaintiff ("Aktif Perunding Sdn Bhd"), by way of a letter of intent dated 27 September 2013, to be the mechanical and electrical engineering consultant for the Project. Aktif Perunding Sdn Bhd produced certain mechanical and electrical engineering drawings ("Drawings") and in the "*Title Block*" of the Drawings, it is stated that Aktif Perunding Sdn Bhd was the mechanical and electrical engineer for the project. Aktif Perunding Sdn Bhd was later terminated by the Main Contractor and the defendant ("ZNVA & Associates Sdn Bhd") was appointed as the new consultant for the Project.

The High Court Judge considered the following main issues in the present suit:

- a. whether the Main Contractor owned copyright in the Drawings under section 26(2)(a) of the **Copyright Act 1987** ("Act") because the Main Contractor commissioned Aktif Perunding Sdn Bhd to prepare the Drawings;
- b. whether the statement in the title block was evidence that Aktif Perunding Sdn Bhd was the author of the Drawings and therefore the owner of the copyright in the Drawings;
- c. if Aktif Perunding Sdn Bhd has no copyright in the Drawings, whether Aktif Perunding Sdn Bhd had moral rights in the Drawings under section 25(2)(a), (b)(i) and (ii) of the Act on the grounds that Aktif Perunding Sdn Bhd was the author of the Drawings; and
- d. whether ZNVA & Associates Sdn Bhd committed fraud by replacing Aktif Perunding Sdn Bhd's name in the title block with ZNVA & Associates Sdn Bhd's name and subsequently using the Drawings without Aktif Perunding Sdn Bhd's knowledge and consent.

In the present suit, the High Court Judge invited the Board of Engineers' learned counsel as an *amicus curiae* in this case in light of the nature and importance of the title block.

The High Court Judge considered the novel question of whether a company has "*moral rights*" in a work under section 25(2) of the Act.

Who was the author of the Drawings?

The High Court Judge was satisfied that Aktif Perunding Sdn Bhd was the author of the Drawings on the grounds that Aktif Perunding Sdn Bhd had given evidence that its engineering team was the “*artist*” of the Drawings within the meaning of “*author*” under section 3(c) of the Act and that the title block initially stated Aktif Perunding Sdn Bhd’s name. Accordingly, the title block provided information on the ownership and authorship of the Drawings in question.

However, the High Court Judge found that copyright in the Drawings subsisted in the Main Contractor by reason of operation of law under section 26(2)(a) of the Act and the contents of the title block cannot therefore deprive the Main Contractor of such right.

Can Aktif Perunding Sdn Bhd have moral rights in the Drawings?

The High Court Judge held that the Act only confers moral rights on the author of a work who is a natural person, in which it would not apply in the present suit where Aktif Perunding Sdn Bhd is a company. This is based on the following reasons:

- a. Section 25(2), (4), (5) and (6) of the Act have expressly provided for the scenario when an author of a work has died and the author’s personal representative may then act for the author’s estate. This evinces the Parliament’s intention to confine moral rights to an individual author only.
- b. Section 25(2)(b)(ii) of the Act expressly provided for “*distortion, mutilation or modification*” of a work which “*might reasonably*” be regarded as adversely affecting the author’s honour. The term “*honour*” can only refer to an author who is a natural person.
- c. The entire provision of section 25 of the Act does not refer at all to the winding up or dissolution of a corporate author.

Whether ZNVA & Associates Sdn Bhd had defrauded Aktif Perunding Sdn Bhd

Aktif Perunding Sdn Bhd had failed to discharge the legal burden under section 101(1) and 102 of the **Evidence Act 1950** to prove the allegations of fraud on a balance of probabilities. Even if there is fraud, Aktif Perunding Sdn Bhd had failed to discharge the legal onus to prove any loss or damage due to the fraud.

Conclusion

The novel issue of whether a non-natural person such as a company could have moral rights in a work has been clarified by the High Court Judge in this case. It is held that only a natural person can be conferred moral rights in a work.

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INTELLECTUAL PROPERTY LAW PRACTICE GROUP

For further information regarding intellectual property law matters, please contact our [Intellectual Property Law Practice Group](#).

TAX & REVENUE

Income tax

The Inland Revenue Board of Malaysia has issued a new public ruling on **Tax Incentive for Returning Expert Programme (Public Ruling No 2/2018)** on 2 May 2018.

Goods and Services Tax ("GST")

The following Orders have been gazetted on 16 May 2018 and will come into operation on 1 June 2018:

- i. **Goods and Services Tax (Rate of Tax) (Amendment) Order 2018**
- ii. **Goods and Services Tax (Zero-Rated Supply) (Revocation) Order 2018**
- iii. **Goods and Services Tax (Relief) (Revocation) Order 2018**
- iv. **Goods and Services Tax (Imposition of Tax for Supplies in respect of Free Zones) (Revocation) Order 2018**
- v. **Goods and Services Tax (Application to Government) (Revocation) Order 2018**

vi. **Goods and Services Tax (Imposition of Tax for Supplies in respect of Designated Areas) (Revocation) Order 2018.**

For further information regarding tax and revenue matters, please contact our [Tax and Revenue Practice Group](#).



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This Alert 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

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