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INTELLECTUAL PROPERTY

IN THIS ISSUE

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Handling of Personal Data and the Consent Required

IN THIS ARTICLE, CHEW CHUI YIANG DISCUSSES THE ISSUE OF CONSENT REQUIREMENT IN THE PERSONAL DATA PROTECTION ACT 2010.

The Personal Data Protection Act 2010

The introduction of the Personal Data Protection Act 2010 ("PDP 2010")[1] which has been 10 years in the making will bring widespread ramifications to all aspects of commercial transactions. Most companies and industries to differing extents would be affected by the manner in which the handling of personal data in the course of business is regulated once the PDP 2010 comes into force.

Personal Data

"Personal data" is defined under the PDP 2010 as any information processed or recorded which relates directly or indirectly to an individual, and where such individual is identified or identifiable from that information, either alone or in conjunction with other information in the possession of a data user. A "data subject" under the PDP 2010 is an individual to whom personal data relates to.

The name of an individual is the most basic example of information that relates directly to an individual and identifies the individual, and therefore potentially falling under the category of personal data. The mere mention of the name of an individual in a document does not however without more amount to personal data within the meaning of the PDP 2010. If however, the mention of the name of an individual is coupled with details found in the document, for instance, of the individual's financial standing or even spending habits, then all this information would collectively be personal data within the meaning of the PDP 2010. The different information relating to a data subject does not necessarily have to be contained within a single document, or even in the same medium, for such information to amount to personal data. In examinations, for instance, candidates may be referred to by a mere number, but the identity of the candidates could still be ascertained by referring to a database held by the examiner containing the candidates' names corresponding with the candidates' numbers. The PDP 2010 however does specifically include a category of sensitive personal data that includes information as to an individual's physical or mental health or condition, political opinions, religious beliefs, commission or alleged commission of an offence, as well as opinions expressed by others in respect of the individual. These broad provisions under the PDP 2010 would render most information handled by commercial enterprises, including human resource records and customer lists, personal data within the meaning of PDP 2010.

PDP 2010 applies to any person who processes, and any person who has control over or authorises the processing of, any personal data used in commercial transactions. A company incorporated in Malaysia, a partnership or

association formed in Malaysia, an individual who resides in Malaysia, and any of the aforementioned maintaining an office, branch, agency or regular practice in Malaysia, and who in the course of business either alone or jointly with another processes any personal data or has control over or authorises such processing is a data user as defined under the PDP 2010.

Processing, in relation to personal data, is widely defined under the PDP 2010, and covers the collecting, recording, holding or storing of any such information, as well as the carrying on of operations concerned with the handling of such information.

Consent

The core standards governing the handling of personal data are set out in the Personal Data Protection Principles in the PDP 2010. Compliance with the Personal Data Protection Principles is mandatory, with the only exemptions being in cases where the processing of personal data are for the purposes of taxation, crime control, and other specific public interest actions. A contravention of any of the Personal Data Protection Principles amounts to an offence under the PDP 2010 unless exempted thereunder.

Pursuant to the General Principle in section 6 of the PDP 2010, data users are prohibited from processing personal data relating to an individual without the consent of the individual. In the case of sensitive personal data, no data user shall process personal data relating to an individual except in accordance with the provisions of section 40 of the PDP 2010, which among others provide that the explicit consent of the individual is required before the individual's personal data could be processed. Consent once granted could however still be withdrawn by the individual to whom the personal data relates. The processing of personal data and sensitive personal data relating to an individual, notwithstanding that no consent is obtained from the individual, is allowed in circumstances where such processing is deemed necessary[2].

Consent is not defined under the PDP 2010. It would appear that consent would refer to any freely given, specific and informed indication of a data subject's wishes by which the data subject signifies agreement to the processing of the personal data relating to the data subject[3]. Consent involves some affirmative acceptance. A data subject cannot give consent to something of which the data subject has no knowledge of, nor can consent be inferred from silence.

Consent must be freely given

Consent obtained by coercion, duress, undue influence, fraud, misrepresentation or mistake would not be deemed to be free consent.

Consent must be specific

It would appear that the consent to the processing of personal data relating to a data subject must be consent to the processing of the personal data for a specific purpose. For instance, if an individual consents to the collection, recording and subsequent use of the individual's personal data by a company for the purpose of receiving marketing materials from the company in respect of a particular product or service, the company would be prohibited from forwarding such personal data to a related company for the marketing of a different range of products or services.

Informed consent

The data subject should be aware or made aware of the fundamental nature of the processing of the personal data (namely, how, why and what the personal data is used for), and the effect of the handling of such personal data on the data subject.

Indication of agreement

It remains to be seen how current standard industry practices would withstand the requirement of affirmative agreement. For instance, it is common for businesses to indicate in forms where personal data are given that data subjects are deemed to have given their consent for the use of the personal data for future marketing purposes, unless the data subjects check a box provided in the form to "opt-out" of such arrangements. It would appear that the preferable approach now would be for these businesses to seek affirmative consent by having data subjects check a box provided in the form to "opt-in" of such arrangements. In the former scenario, a data subject would be deemed to have consented to the use of the data subject's personal data in the manner indicated unless the data subject indicates otherwise. In the latter scenario, a data subject would have to positively agree to the use of the data subject's personal data in the manner indicated.

Sensitive personal data

There is an added burden on a data user to obtain the explicit consent of a data subject for the use of the data subject's sensitive personal data due to the nature of such information. Again, "explicit consent" is not defined under the PDP 2010. "Explicit consent" however suggests that the consent must be absolutely clear and unequivocal, and should specifically refer to the nature of the data to be processed, the purpose of the processing and any specific impact of the processing on the data subject.

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[1] The PDP 2010 was gazetted on 10 June 2010, and as at the date of writing the PDP 2010 has yet to enter into force.

[2] There is a closed category of instances where the processing of personal data is deemed necessary, and consent of the data subject is dispensed with. The exceptions in respect of the processing of personal data are found in s.6(2), and the exceptions in respect of the processing of sensitive personal data are found in s.40(1)(b) and (c).

[3] This definition is provided under the Directive of the European Parliament and the Council on the processing of personal data.

Budget 2011 Highlights

IN THIS ARTICLE, CYNTHIA LIAN HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2011 BUDGET.

Introduced in Parliament on October 15 2010, Budget 2011, themed as "A Budget by the Rakyat" is focused on setting the pace for the transformation of Malaysia into a developed and high-income nation.

One significant proposal in Budget 2011 is the increase in service tax from 5% to 6% which may have a correlation to the announcement by the Ministry of Finance a few days before Budget 2011 was introduced that the implementation of the much talked-about goods and services tax ("GST") would be deferred.

Some of the Budget 2011 highlights are discussed below. Unless otherwise stated, the budgetary proposals discussed below when passed by Parliament, will take effect from the year of assessment ("Y/A") 2011.

Direct Taxes

Tax Treatment on Bonds

Expenses in respect of discounts or premium incurred by non-financial institutions from the issuance of bonds will be tax-deductible against any gross business income where the discounts or premium expenses could not be deducted in full against discounts or premium income.

In order to qualify for tax deductions, the proceeds from the issuance of the bonds must be used wholly for the production of gross income from the source consisting of a business and the bonds issued do not form part of the stock in trade of a business of the company.

Withholding Tax

The Director General of Inland Revenue ("DGIR") would be empowered to impose a penalty under section 113(2) of the Income Tax Act 1967 ("ITA") on a person who fails to pay the withholding tax in respect of certain payments made to non-residents such as interest or royalties under section 109 of the ITA or special classes of income under section 109B of the ITA but claims a tax deduction in respect of the payments. The proposed penalty is over and above the late payment penalty of 10% imposed on the portion of the unpaid withholding tax.

Dividend payments under section 108 of the ITA

Dividends paid in excess of "section 108 balance" which are debts due to the Government shall be recoverable as if it were tax due and payable under the ITA. The proposed amendment is to take effect retrospectively from Y/A 2008 onwards.

Distributions by Unit Trust

The definition of "dividend" in the sections relating to investment holding companies (section 60F of the ITA), closed-end fund companies (section 60H of the ITA) and unit trusts (section 63B of the ITA) will be extended to include income distributed by a unit trust.

Tax Incentives

- *Sukuk*

To encourage transactions in *Bursa Suq al-Sila*, which is the world's first Syariah-complaint commodity trading platform launched by the Malaysian Government, it was proposed that expenses incurred in the issuance of Islamic securities under the principles of *Murabahah* and *Bai' Bithaman Ajil* based on *tawarruq* would be tax deductible for Y/As 2011 to 2015. The issuance of the securities must be approved

by the Securities Commission or the Labuan Financial Services Authority.

- Export Credit Insurance Premium for *Takaful*

It was proposed that double tax deduction be given on payments of insurance premium for export credit insurance based on *takaful* concept. The export credit insurance must be purchased from *takaful* operators approved by the Minister of Finance.

- Generation of Energy from Renewable Sources ("RS") and Greenhouse Gas (GHG) Emission

Pursuant to the Government's initiative in advancing green technology, an extension of the application period for tax incentives was proposed to be given to companies generating energy from RS as follows:

(i) tax incentives in the forms of pioneer status, investment tax allowance, import duty and sales tax exemption on certain equipment currently enjoyed by companies generating energy from RS or providing energy conservation services be extended for applications received until 31 December 2015.

(ii) tax incentives in the forms of import duty and sales tax exemption on certain equipment imported or purchased by companies to generate energy from RS for consumption of third parties be extended for applications received until 31 December 2012.

(iii) The tax exemption period on income received from the sale of Certified Emission Reductions from Clean Development Mechanism projects approved by the Ministry of Natural Resources and Environment be extended for another two years for Y/As 2011 and 2012.

- Food Production

In line with the Government's initiatives to ensure the continuous development of agro-food and agro-based industries, tax incentives currently granted to a company that invests in a subsidiary company engaged in food production activities as well as a subsidiary company that undertakes food production activities will be extended for another five years and will be effective for applications received from 1 January 2011 until 31 December 2015.

- Last Mile Network Facilities Provider for Broadband

In order to encourage investments in broadband services infrastructures, the application period for tax incentives in the form of income tax exemption, import duty and sales tax exemption to companies that invest in last mile infrastructure will be extended for another two years to 31 December 2012.

Indirect Taxes

Service Tax

The service tax rate will be increased on all taxable services to 6% from the current rate of 5%. It was further proposed that service tax of 6% will be imposed on telecommunication services adopting satellite applications such as paid television broadcasting services in order to widen the tax base from the existing service tax imposed on telecommunication services such as telephone, facsimile, leased line and bandwidth.

Stamp duty

To encourage ownership of the first residential property, stamp duty exemption of 50% will be given on instruments of transfer and loan agreements executed for the purchase of the first residential property by a Malaysian citizen priced not exceeding RM350,000. The proposal is effective for instruments executed from 1 January 2011 to 31 December 2012.

Excise duty and Import Duty

Full exemption of import duty and excise duty will be given on new completely-built-up ("CBU") hybrid cars, electric cars as well as hybrid and electric motorcycles. The proposal is effective for applications received by the MOF from 1 January 2011 until 31 December 2011.

Tax administration

Excess Tax

Excess tax paid under the ITA may be utilised by the DGIR for the payment of any amount of tax which is due and payable under the ITA, Real Property Gains Tax Act 1976 ("RPGTA") and Petroleum (Income Tax) Act 1967 ("PITA"). Similar amendments have been proposed in respect of PITA and RPGTA.

Tax Instalments

Under the proposed amendment on tax instalment, the DGIR may direct a company, trust body or co-operative society to make payments by instalments at any time during the basis period and the amount directed shall be deemed to be the revised estimate for the purpose of ascertaining penalty under-estimated under section 107C(10) of the ITA. The proposed amendment, if passed by Parliament, takes effect from Y/A 2012.

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Employment (Part-Time Employees) Regulations 2010

IN THIS ARTICLE, SUGANTHI SINGAM PROVIDES AN OVERVIEW OF THE RECENTLY PASSED EMPLOYMENT (PART TIME EMPLOYEES) REGULATIONS 2010.

Whilst many employers and organisations engage part time workers on a regular basis there has never been any statutory regulations governing the employment. The terms and conditions of employment were left very much to the discretion of the employers until recently. Benefits for permanent full time employees such as the provision of medical benefits, annual leave, sick leave, overtime pay and Employees Provident Fund contributions which are common features in an employment contract often did not feature as part of the terms and conditions of engagement of part time employees. The recent Employment (Part Time Employees) Regulations 2010 ("the 2010 Regulations") which came into operation on 1 October 2010 have made it compulsory for employers to adhere to certain minimum terms and conditions of employment in the engagement of such personnel which includes the requirement to make the necessary contributions to the Employees Provident Fund and Social Security Organisation by employers.

The Employment Act 1955 ("the Act") defines a part time employee as a person included in the First Schedule whose average hours of work as agreed between him and his employer do not exceed 70% of the normal hours of work of a full-time employee employed in a similar capacity in the same enterprise whether the normal hours of work are calculated with reference to a day, a week, or any other period as may be specified by the regulations made thereunder which includes the 2010 Regulations. The 2010 Regulations exclude casual employees whose working hours in a week do not exceed 30% of the normal hours of work of a full time employee and those who work in the employee's residence. For example domestic maids, telesales personnel or teleworkers would be excluded from the purview of the 2010 Regulations.

In essence the 2010 Regulations are applicable to part time workers who put in between 30% and 70% of the hours that apply to full-time workers at the same workplaces. As an illustration if a full time employee worked for 8 hours daily, the part time employee in turn would have to work between 2.4 to 5.6 hours daily to be within the purview of the Act.

Under the 2010 Regulations employers must now make provision for annual leave, holidays, overtime payment and payment for work done on public holidays, sick leave and rest day when engaging part time employees. The following sets out the minimum requirements to be adhered to in the engagement of such employees where a breach of any of the following provisions constitutes an offence under the Act and on conviction would expose an employer to a fine not exceeding RM10,000.

Regulation 6 Public Holidays

An employer must provide a minimum of seven paid gazetted public holidays in comparison to a minimum of 10 paid gazetted public holidays for full time employees, four of which must be the National Day, the Birthday of the Yang Di Pertuan Agong, Labour Day and The Birthday of the Ruler or the Yang Dipertua Negeri or Federal Territory Day depending on where the employee works. In addition there is provision for further paid holidays on any day declared as a public holiday under section 8 of the Holidays Act 1951.

The employer and employee are free to agree on the remaining three days or for any other day or days to be substituted for the gazetted public holidays.

As with full time employees, in the event the employer requires a part time employee to work on a public holiday during normal hours of work he will be entitled to a minimum of two days' wages in addition to the holiday pay that he is entitled to for that particular day.

Regulation 7 Annual Leave

Presently the annual leave entitlement for full time employees ranges from 8 to 16 days depending on the length of service of the employee. For part time employees it is within the range of 6 to 11 days as set out below:

- for those employed for a period of under 2 years, a minimum of 6 days for each year of service;
- for those employed between 2 to under 5 years, a minimum of 8 days for each year of service; and
- for those employed for 5 years and above, a minimum of 11 days for every year of service.

Additionally in the event the employer terminates the services of a part time employee, the employer is statutorily obliged to pay the employee for his unutilised annual leave unless the employee's services were terminated on the grounds of misconduct.

Regulation 8 Sick Leave

Whilst full time employees are given 60 days' hospitalization leave and 14 to 22 days sick leave where no hospitalization is required, part time employees are only entitled to paid sick leave the duration of which is dependent on their length of service with the particular employer:

- for those employed under 2 years, a minimum of 10 days for each year of service;
- for those employed between 2 to under 5 years, a minimum of 13 days for each year of service; and
- for those employed for 5 years and above, a minimum of 15 days for each year of service.

Regulation 9 Rest Day

It is compulsory to provide a weekly rest day if the employee works five days or more at a minimum of a 20-hour work week.

Whilst the employer can request that the employee work on a rest day, the employee must be paid a minimum of two days' wages for work done on the rest day. For work performed on a rest day which is beyond the normal hours of work, similarly he would be entitled to a minimum of 1.5 times his hourly rate of pay for each hour or part thereof which does not exceed the normal hours of work of a full time employee and a minimum of twice his hourly rate of pay for each hour or part thereof which exceeds the normal hours of work of a full time employee.

Conclusion

The 2010 Regulations have attempted to mirror the benefits accorded to full time employees albeit with a reduction in the benefits to part time employees which corresponds with their reduced hours of work. As the benefits are only minimum provisions that are required to be adhered to, employers can always provide enhanced benefits to the part time employees as incentives to motivate productivity. Bearing in mind the consequences of breaching the 2010 Regulations employers would be well advised to take heed of the provisions.

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FINANCIAL SERVICES

High Court: *Al-Bai Bithaman Ajil* rebates "must be granted"

IN THIS ARTICLE, JENNY HONG CONSIDERS THE IMPACT OF THE HIGH COURT'S DECISION IN THE CASE OF BANK ISLAM MALAYSIA BHD V AZHAR OSMAN & OTHER CASES[1] ON THE ISSUE OF IBRA' (REBATE) GRANTED BY ISLAMIC FINANCIAL INSTITUTIONS.

Concept of *ibra'* (rebate)

The concept of *ibra'* has long been recognized by the Shariah Advisory Council on Islamic Finance of Bank Negara Malaysia ("SAC")[2]. According to the SAC, *ibra'* means surrendering one's right to a claim on debt either partially or fully[3].

In a conventional banking system, a customer is under an obligation to pay the outstanding principal amount and such interest accrued up to the date on which settlement is made or default occurs. Where a conventional loan facility is terminated or settled early, the unearned future interest (the interest which would have accrued during the remaining tenure of the loan facility had early termination or settlement not

occurred) is not chargeable and hence, not payable to the financier.

The position is different, however, in the context of an Islamic banking facility that an Islamic banking facility is in fact a sale transaction and by virtue of the nature of such transaction, the selling price of the asset, which includes a profit element, must be satisfied in full notwithstanding that the defendant has not had the full benefit of the Islamic financing facility. Against this background, the issue of *ibra*' arose, and the question whether it should be granted in the event of an early termination of the facility, has always been left to the discretion of Islamic financial institutions. This issue has given rise to much contention; more so when the contract between a customer and the financier is silent on the issue of *ibra*' or its quantum.

Earlier court decisions involving Islamic home financing facilities under the *Al-Bai Bithaman Ajil* principle ("BBA contract")[4] recognized the discretionary nature of the grant of *ibra*', but failed to address the implications arising from the absence of an express term in the financing agreement between the customer and the financier regulating the same. The courts in the earlier cases held that the fact that Islamic financial institutions have a discretion whether or not to grant *ibra*' was irrelevant to the issue whether or not Islamic financial institutions were entitled to claim the unearned profit for the unexpired tenure, in the event of an early termination of the facility)[5]. However, in **Affin Bank Bhd v Zulkifli Abdullah**[6] and **Malayan Banking Bhd v Marilyn Ho Siok Lin**[7], the courts held that it would be inequitable to allow the financier to claim the profit for the unexpired tenor, since this would, in particular, be inconsistent with the right of the customer to enjoy the benefit of the full tenor, had the contract not been terminated prematurely.

Decision in Bank Islam Malaysia Bhd v Azhar Osman & Other Cases ("Azhar Osman")

The uncertainty surrounding the issue of *ibra*' was examined in **Azhar Osman**. The court, in this case, was asked to determine the quantum of the claim by Bank Islam Malaysia Bhd ("the Bank") which arose as a result of the Court of Appeal's decisions that a BBA contract is valid and enforceable.

The counsel for the Bank contended that the Bank had a legal right to claim the full sale price as stipulated in the Property Sale Agreement ("PSA"). He argued that, firstly, a BBA contract is a sale transaction (as opposed to a loan transaction) and hence, the selling price must be satisfied in full. The court should then honour and enforce the clear written terms within the four corners of the PSA and should not interfere with the intention of the parties by imputing any other term. According to the Bank's counsel, the Bank would in most instances, as a matter of practice, grant a rebate in the exercise of its discretion. Secondly, he cited the decision of the Court of Appeal in **Bank Islam Malaysia Bhd v Lim Kok Hoe & Anor and Other Appeals**[8] where the Court of Appeal upheld and acknowledged the obligation of the purchaser to pay the full sale price under the PSA.

Written terms of PSA

In delivering judgment, Rohana Yusuf J held that the Bank should not be allowed to enrich itself with an amount which was not due whilst at the same time taking cognizance of the customer's right to redeem his property. It would also be inequitable if the court were to allow the Bank to contend that contractual terms of the sale transaction must be adhered to strictly only on the part of the customer. The court then went on to examine the nature of the BBA contract and held that a BBA contract cannot be seen as a simple sale transaction.

Therefore, the court held that when an Islamic bank adopts a practice of granting rebate on a premature termination (although the BBA contract is silent on the issue of rebate or its quantum), it creates an implied term and a legitimate expectation on the part of the customer that he will be granted a rebate on the sale price in the event of a premature termination of the Islamic facility. Accordingly, as justice demands equitable interference, it was only proper that such expectation and practice be read into the contract and thus, an Islamic bank must grant a rebate and such rebate should be such amount of unearned profit as practised by the Islamic bank.

Doctrine of *Stare Decisis*

In addition, Rohana Yusuf J recognized that the court is bound by **Lim Kok Hoe** only in respect of the issue of the validity and enforceability of a BBA contract. According to the court, there was no suggestion in **Lim Kok Hoe** that the issue of quantum had been raised or discussed before the Court of Appeal. Therefore, there was no binding precedent in that respect from the superior court supporting an Islamic bank's right to payment of the full sale price as argued by the Bank's counsel.

Conclusion

The decision in **Azhar Osman** brings greater certainty and comfort to customers in respect of their Islamic financing facilities, who would otherwise be placed at the mercy of their financiers in relation to the latter's discretion whether or not to grant a rebate and, as to its quantum. As a positive step forward and one which has lent certainty and clarity to the issue of *ibra*', the SAC has recently resolved[9] that Islamic financial institutions are now obliged to grant *ibra*' to customers for early settlement of financing based on buy and sell contracts (such as BBA or *murabahah*). Therefore, the granting of *ibra*' must now be addressed and included as a clause in the legal documentation for Islamic financing. The formula for the determination of

the quantum of *ibra'* to be granted will therefore be standardized by Bank Negara Malaysia.

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[1] [2010] 5 CLJ 54
[2] The SAC is established under section 51 of the Central Bank of Malaysia Act 2009 as the authority for the ascertainment of Islamic law for the purposes of Islamic financial business.
[3] Resolutions of Shariah Advisory Council of Bank Negara Malaysia (Islamic Banking and Takaful Department) BNM/RH/GL/012-2
[4] A deferred-payment sale contract pursuant to which the bank will firstly, purchase the asset from the customer based on the asset purchase agreement. Thereafter, the bank will sell the asset to the customer based on the selling price in the asset sale agreement. The bank's selling price will be payable by the customer over a period of years and it will not be the same amount as the purchase price as the former includes profit margin calculated based on the tenure of the facility.
[5] **Affin Bank Bhd v Zulkifli Abdullah** [2006] 1 CLJ 438 HC, **Arab-Malaysian Finance Bhd v Taman Ihsan Jaya Sdn Bhd & Ors** [2009] 1 CLJ 419 HC
[6] [2006] 1 CLJ 438 HC
[7] [2006] 3 CLJ 796
[8] [2009] 6 CLJ 22
[9] Resolution of Shariah Advisory Council of Bank Negara Malaysia published on 29 June 2010.

CASE NOTE

Terengganu Forest Products v Cosco Container Lines Co. Ltd & Anor

IN THIS ARTICLE, DATIN JEYANTHINI KANNAPERAN ANALYSES THE RECENT FEDERAL COURT DECISION IN TERENGGANU FOREST PRODUCTS V COSCO CONTAINER LINES CO. LTD & ANOR IN RELATION TO THE TEST FOR LEAVE TO APPEAL TO THE FEDERAL COURT IN A CIVIL MATTER.

In a judgment delivered on 12 November 2010, a special sitting of the Federal Court[1] considered the inconsistencies in prior decisions of the apex court in **Datuk Syed Kechik Bin Syed Mohamad & Anor v The Board of Trustees of the Sabah Foundation and Ors and Anor application**[2] and **Joceline Tan Poh Choo & Ors vs Muthusamy**[3] on the applicable test for leave to appeal in a civil matter to the Federal Court.

The written judgment of the Chief Justice traces the history and development in the structure of the appellate courts and the emergence of the Federal Court and section 96 of the Courts of Judicature Act 1964 ("section 96")[4]. Relying on the speech of the Minister of Law when moving the Courts of Judicature Bill ("the Bill") and the explanatory statement to the Bill, the Chief Justice highlights that whilst section 96 was amended so as to include the principle of public importance applicable in England in deciding whether leave to appeal to the Federal Court should be given, section 96(a) is "more specifically" worded[5] such that the English authorities cannot necessarily be adopted nor applied as binding precedent.

Apart from the position in England, the Federal Court also took into account the laws applicable in New Zealand, South Africa, India and the United States of America on the grant of leave to appeal to the respective apex courts, concluding that despite the differently worded provisions there is a common thread in the various jurisdictions in that the requirement for leave to appeal acts as a filter thereby allowing the apex court time and opportunity to develop laws for public benefit and advantage.

The Federal Court also summarised the tests as culled from the two inconsistent decisions, highlighting that whilst both decisions accept that the decision of the Court of Appeal in respect of which leave to appeal to the Federal Court is sought must either involve a question of general principle not previously decided or involve a question of importance upon which further argument and decision of the Federal Court would be to public advantage, the decisions differ[6] in the interpretation of the first limb of section 96(a) and **Joceline Tan** imposes further conditions for leave not propounded in the **Syed Kechik** decision.

Having set out the above backdrop, the Chief Justice held that to obtain leave it must be shown that the matter falls under either of the two limbs of section 96(a) (and that the matter can also fall under both limbs) and also rejected in clear terms the argument that leave should be granted more liberally so as to enable the law to develop, concluding that the latter would defeat the limitation set by the two limbs of section 96(a). He accepted as correct the proposition that the purpose of section 96 is not to allow for correction of ordinary errors committed by the lower Courts (as would be in the case where appeal was as of right) and held that under the first limb, if the decision by the Court of Appeal involves a question of law which had been previously decided by the Federal Court, then such decision of the Federal Court would be binding precedent and there is no need for leave to be given on that question. The Chief Justice also highlighted that whilst novelty was of paramount consideration under limb (a), the same

was irrelevant under the second limb, which instead required the applicant to show that on the question of law, a decision of the Federal Court would be to "public advantage"[7].

In the final analysis the Chief Justice held that the guidelines set by **Joceline Tan** were too strict and defeated the objective of section 96(a) and accepted instead the principles set out in the **Syed Kechik** case. The Chief Justice also accepted the guidelines appearing below, suggested and drafted by Tan Sri Richard Malanjum, the Chief Judge of Sabah and Sarawak as applicable under section 96 and which an intending applicant must consider:-

"1) *Basic prerequisites*

i) *that leave to appeal must be against the decision of the Court of Appeal;*

ii) *tthat the cause or matter must have been decided by the High Court exercising its original jurisdiction;*

iii) *that the question must involve a question of law which is of general principle not previously decided by the Federal Court [first limb of section 96(a)]; and*

iv) *that the issue to be appealed against has been decided by the Court of Appeal.*

2) *As a rule leave will normally not be granted in interlocutory appeals.*

3) *Whether there has been a consistent judicial opinion which may be uniformly wrong for example, Adorna Properties Sdn Bhd vs Boonsom Boonyanit @Sun Yok Eng.*

4) *Whether there is a dissenting judgment in the Court of Appeal.*

5) *Leave to appeal against interpretation of statutes will not be given unless it is shown that such interpretation is of public importance.*

6) *That leave will not normally be given:-*

i) *where it merely involves interpretation of an agreement unless the Federal Court is satisfied that it is for the benefit of the trade or industry concerned;*

ii) *the answer to the question is not abstract, academic or hypothetical;*

iii) *either or both parties are not interested in the result of the appeal.*

7) *That on first impression the appeal may or may not be successful; if it will inevitably fail leave will not be granted".*

For completeness it must be stated that the Federal Court did also consider the spate of cases where, after leave had been granted, the apex court when considering the appeal proper has held that it was not prevented from reconsidering the issue of leave and/or not answering the questions framed when such leave was granted[8]. On this issue the Chief Justice held that once leave is granted, the appellate panel should not again consider whether leave should or should not have been given and should instead proceed to hear the matter, even if the appeal is groundless. The only circumstances where the issue of leave may be said to be revisited, was where leave was erroneously granted in circumstances such that any established law or statute was not brought to the attention of the panel or overlooked.

The court also held that grounds of judgment of the Court of Appeal are not necessary in every case where the Federal Court considers an application for leave to appeal, especially where an Order of the High Court is unanimously upheld by the Court of Appeal and in interlocutory matters where questions of facts and law are obvious.

Whilst the Federal Court has set out the approach to be adopted when interpreting section 96(a) of the Courts of Judicature Act, it leaves to be seen how the test as clarified will henceforth be applied.

SD

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[1]Comprising the Chief Justice of Malaysia - Tan Sri Zaki Tun Azmi, the President of the Court of Appeal - Tan Sri Alaudddin Mohd Sheriff, the Chief Judge Malaya - Tan Sri Arifin Zakaria, the Chief Judge Sabah & Sarawak - Tan Sri Richard Malajum and Federal Court Judge -Tan Sri Zulkefli Ahmad Makinudin

[2]1991 [1] MLJ 257

[3]2008 [6] MLJ 62

[4]The Courts of Judicature [Amendment] Bill 1998

[5]Section 96(a) of the Courts of Judicature Act

"Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court-

(a) from any judgment or order of the Court of Appeal in respect of any civil cause or matter decided by the High Court in the exercise of its original jurisdiction involving question of general principle decided for the first time or a question of importance upon which further argu-

ment and decision of the Federal Court would be to public advantage"

[6] The Court in **Syed Kechik** holding that for limb (a) the matter ought not to have been previously decided by the Federal Court whilst the Court in **Joceline Tan** holding that the matter must be one not previously decided by the Court of Appeal.

[7] On what may amount to a question of law, the Chief Justice was quick to point out what whilst an experienced counsel can formulate any dispute to appear as a question of law, a real question of law is necessary and interpretation of a term or clause peculiar to the parties or interpretation of a statutory provision that is not to the public's advantage or which involve facts applicable to the parties does not suffice.

[8] Eg. **Sri Kelang Kota – Rakan Engineering JV Sdn Bhd & Anor vs Arab Malaysia Prima Realty Sdn Bhd & Ors** 2003 [3] MLJ 259 and **Meida Ya Co Ltd**, **Japan & Anor vs Meidi (M) Sdn Bhd** 2009 [2] MLJ 14.

The Partners of Shearn Delamore & Co.

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as Partners with effect from **1 January 2011**.

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would like to announce the retirement of

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Partner
Financial Services Practice Group

with effect from **1 January 2011**.