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NEWSLETTER

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CASE NOTE

Can Different Punishment Be Meted Out For The Same Misconduct?

IN THIS ARTICLE, WONG KIAN JUN LOOKS AT THE CASE OF **HARIANTO EFFENDY BIN ZAKARIA & 8 OTHERS V INDUSTRIAL COURT OF MALAYSIA AND ANOTHER** ON THE RIGHT EMPLOYERS HAVE TO IMPOSE DIFFERING PUNISHMENT ON EMPLOYEES WHO HAVE COMMITTED THE SAME MISCONDUCT.

Differing punishment despite committing the same nature of misconduct

The Federal Court had in this case upheld the dismissal of the employees (the "Employees") by Bumiputera Commerce Bank Berhad (the "Bank") despite the Bank imposing differing punishment on other employees of the Bank who committed the same misconduct.

Facts of the case

All the Employees who were active members of the National Union of Bank Employees ("NUBE") took part in a series of pickets in the month of October 2003. On 21 October 2003, the picketers, including the Employees, commenced the picket at approximately 12.30 p.m. outside the Bank's branch on Jalan Tun Perak. Thereafter at approximately 1.25 p.m., the picketers moved to the side entrance of the Bank holding placards and balloons and barged through the side entrance despite attempts by the security personnel of the Bank preventing them from entering. The picketers proceeded to the lobby and entered the banking hall, disrupting the operations of the Bank.

The incident was captured on the CCTV cameras of the Bank. Although approximately 40 employees took part in the picket only 15 employees were issued letters of suspension by the Bank. Show cause letters were issued and a domestic inquiry was conducted in respect of the picket carried out in the Bank's premises. The Bank then dismissed the Employees. The Bank did not, however, dismiss other employees involved in the picket from their employment. The question that arose ultimately for the Federal Court was whether the Industrial Court was required to consider whether the punishment of dismissal was warranted and proportionate to the findings of misconduct by the employer.

In what circumstances would differing punishment for the same misconduct be warranted?

One of the Employees' main contention was that the Employees were dismissed by the Bank whereas five other employees were not, despite all of them entering the Bank as part of the picket. The Employees contended that the differing punishment meted out to the Employees as opposed to the other employees amounted to unequal treatment and double standards by the Bank. The Employees argued that the courts below failed to take into account this disparity in punishment and, if it did, it would have arrived at a different conclusion.

The Bank took the position that the punishment that was meted out was warranted in the circumstances and the conduct of the Employees from the time the show cause letters were issued must be scrutinised in determining the punishment to be meted out.

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PUBLISHER
Shearn Delamore Corporate Services Sdn. Bhd. (557186 x)
Suite 10.05, 10th Floor
Wisma Hamzah-Kwong Hing
No. 1 Leboh Ampang
50100 Kuala Lumpur
Tel 603 2027 2727
Fax 603 2078 5625

The Federal Court held that the Bank had acted reasonably in imposing differing punishment for the following reasons:

(a) Three employees were found not guilty by the domestic inquiry held by the Bank

(b) The Bank had taken into account the plea of mitigation of one employee and imposed a two-year increment freeze as punishment for that employee

(c) The Bank had taken into account the written explanation of another employee and issued a caution letter in that case

(d) Two employees apologised for their actions and this was taken into consideration

(e) The Employees did not apologise for their conduct despite being given the opportunity to do so, and

(f) The Employees showed no remorse for their actions.

The Federal Court held the above factors were correctly taken into consideration by the lower courts and that the Bank was justified in imposing differing punishment for different employees by reason of such factors.

This suggests that an employee's conduct post discovery of the misconduct will be considered in determining the punishment to be meted out in each case. A dismissal by the Bank of all employees involved in the picket, whether or not they had shown remorse or expressed regret for their actions, may have been too harsh a punishment and would have resulted in a failure to take into account the conduct of the employees after the offence was established.

Such post offence conduct are important factors that an employer must consider before any punishment is handed out. The Federal Court affirmed by its decision that, where employees have been charged with the same misconduct, this did not require the employer to impose the same punishment on all the employees so charged.

The fact that the employees were long standing employees of the Bank with no record of previous misconduct or past disciplinary records did not mean that the punishment of dismissal was not available. The Federal Court held that there is no fixed rule of law to suggest that it was unreasonable to dismiss an employee with an unblemished record for a single instance of insolence.

The Federal Court held that the punishment to be meted out would depend on the nature of the misconduct itself. In this case, the actions of the Employees in carrying placards and balloons, noisily distracting customers and colleagues and releasing the balloons in the banking hall amounted to a grave misconduct, involving the core of the Bank's business, which was service rendered to members of the public. The Federal Court, in holding that the dismissal by the Bank was proportionate to the misconduct, agreed with the Court of Appeal's observations that in view of the gravity of the charges against the Employees, they must have been aware that dismissal would have been the inevitable punishment.

SD

WONG KIAN JUN
EMPLOYMENT AND ADMINISTRATIVE LAW PRACTICE GROUP

For further information regarding Employment Law, please contact

N Sivabalah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

DISPUTE RESOLUTION

Assessing the Changes to the Winding Up Process in the Companies Bill 2013[1] ("CB 2013")

IN THIS ARTICLE, KOO YIN SOON ANALYSES THE EXPECTED CHANGES TO THE WINDING UP PROCESS IN THE COMPANIES BILL 2013.

The Companies Bill 2013 is expected to be tabled in Parliament in the first quarter of 2015. The Bill introduces various changes and reform to, *inter alia*, the winding up process. This article focuses on the process governing cessation of companies[2] and is the first in a series of articles on the new Bill. Judicial Management and Creditors Voluntary Arrangements will be considered in the next article in this series.

Reducing timelines for the winding up process

Presently, there is no timeframe prescribed within which the petition to wind up a company has to be filed after the issuance of the statutory notice (Section

218 notice). The CB 2013 requires a petition to be filed in Court within six months of the statutory notice (Section 447 Notice which substitutes the present Section 218 Notice)[3]. This limits the lifespan of a Section 218 Notice and is envisaged as having been introduced to curb abuse and to set useful timelines for potential settlement processes.

Presently Section 218 permits the Court to order a winding up if, *inter alia*, a company is being used for unlawful purposes or any purpose prejudicial to national security or public interest or incompatible with peace, welfare, public order, security, good order or morality in Malaysia. The CB 2013 provides that, for winding up actions commenced by the Registrar of Companies ("Registrar"), a finding by the Registrar that a company is being used for such purposes shall be received as prima facie evidence until proven otherwise. This is provided for in the proposed Subsection 446(2) of CB 2013. This serves to reverse the burden of proof. It places the onus on the company to disprove the existence of the state of affairs said to exist by the Registrar in commencing the winding up action pursuant to Section 218(1)(m) and (n) of the present Act.

Another provision which has been amended is Section 308 of the Companies Act which regulates the striking off a company from the register by the registrar. Under the proposed Section 556, read together with Section 557 of CB 2013, a director, shareholder or member or liquidator of a company may apply to the Registrar of Companies to strike off a company on various grounds, which include a situation where the company is no longer carrying on business or is not in operation. This is intended to provide an efficacious and cost effective mode of removing defunct companies.

Defining the parameters of exempt dispositions

Express provision has been made under CB 2013 for exempt dispositions to fall outside the ambit of dispositions made after the commencement of the winding up by the Court (Section 453(1), CB 2013). Under the present Section 223, Companies Act 1965 ("CA 1965"), all such dispositions are void unless the Court otherwise orders. The trigger for such dispositions to be caught is the commencement of the winding up. Under the CB 2013, the trigger for dispositions to be caught is similar, but worded "*after the presentation of the winding up petition*" as the commencement of the winding up under the CB 2013 references the period after the winding order has been pronounced. The important difference under the CB 2013 is this: exempt dispositions are not caught and a validation order need not be sought from Court in respect of such exempt dispositions.

"Exempt dispositions" are defined under the CB 2013 as dispositions made by a liquidator, or by an interim liquidator[4], pursuant to a power conferred on them by the Act or rules of the Court that appointed them or by an order of the Court (Section 453(2), CB 2013). This is intended to facilitate the liquidators/interim liquidators in their efforts to carry out their functions of liquidating the assets of the company as part of the winding up process without having to seek validation orders each time a disposition is made.

Refining the concept of undue preference transactions and preserving the assets of the company

Section 535 incorporates the wording of Section 53 of the Bankruptcy Act into the CB 2013 and expressly provides that all transactions shall be deemed to be unduly preferential should a company be wound up on a petition presented within six months of the date of such transaction. The provision provides that all such transactions[5] "*shall be deemed fraudulent and void*". Responsibility is also ascribed to the persons who are knowingly a party to the carrying on of such fraudulent trading pursuant to Section 546[6], CB 2013. The liability exposure for fraudulent trading includes personal liability, without any limitation for payment of the whole/part of the debt and/or imprisonment not exceeding 10 years and/or a fine not exceeding one million ringgit.

The liquidator's right to "*claw back*" is dealt with in Section 537, CB 2013. An anomaly has arisen by reason of the change in the definition of the "*commencement of winding up*" under CB 2013. Because the commencement of winding up under CB 2013 references that point after the winding up order has been issued, there is now a difference between the liquidator's right to claw back acquisitions and disposals by the company. Where there is an acquisition by the company within two years before the presentation of the winding up petition, the right to claw back is triggered. However, in a disposal by the company, the right to claw back triggers where the disposal is made within a period of two years before the commencement of the winding up (which is a date after the winding up order has been issued). The reason for this difference in the treatment of the right to claw back acquisitions and disposals is unclear, particularly when disposals should be of greater concern.

Increasing the threshold for statutory amount of debts to prevent abuse by creditors

The minimum statutory amount prescribed for which a company may be presumed to be unable to pay its debts has been increased from RM500.00 to RM5,000.00[7]. While this sum is relatively low as compared to the RM30,000.00 limit in Bankruptcy Proceedings and S$10,000.00 prescribed by the Companies Act of Singapore, it does represent a step in the right direction.

Empowering the Court to terminate winding up proceedings to ascertain the status of a company

The CB 2013, in Section 476 and 477, contains new provisions giving the Court power to stay or terminate the winding up process. Whether or not Sections 476 and 477 do in fact widen the Court's power is debatable. However these new provisions do undoubtedly add clarity to the cessation of a winding up[8] as

the power to stay in Section 476 and the power to terminate in Section 477 are clearly segregated. Section 478 maintains the provision empowering the Court on an application under Section 476 and 477 to require the liquidator to furnish a report with respect to any facts or matters which are in his opinion relevant.

Section 477 sets out the factors to be taken into consideration before an order to terminate a winding up order may be issued. The current judicial approach evidenced in the case law on granting a permanent stay[9] has not been adopted in totality. Instead a wider approach is prescribed, which permits the Court to take into consideration the satisfaction of debts, agreement by both parties or other factors that the Court considers appropriate. It remains to be seen how the catch all provision "*other factors that the Court considers appropriate*" will be applied in fact.

Enhancing the roles of liquidators to facilitate the smooth process of liquidation

Schedule 11, CB 2013[10] sets out both the powers of a liquidator requiring the authority of the Court or a committee of inspection ("COI")[11] and powers which may be exercised independently of the same[12]. Notable changes include the power to carry on the business of the company for 180 days (with further extension subject to the approval of the Court/COI), to compromise debts not exceeding RM10,000[13] due to the company without approval of the Court/COI (this limit may be increased to RM50,000 upon approval of the Court/COI[14]), and to appoint an advocate to assist in his duties[15].

Given these enhanced roles, the CB 2013 has also tightened the qualifications of liquidators appointed by a winding up court[16]. The provisions now expressly disqualify persons linked or indebted to the company or corporations linked to the company.

Enhancing the rights of creditors

Section 530, CB 2013 expressly allows for the proving of unliquidated damages, albeit only for demands arising by reason of a contract, promise or breach of trust.

The power of a liquidator to make an estimate of the value of any debt or liability provable (including for unliquidated damages) is still subject to appeal[17].

Reaffirming the rules relating to preferential debts

There is provision in the CB 2013 for formal incorporation of Schedule C on the rights and duties of secured creditors as well as Section 41, Bankruptcy Act (on mutual credit and set-off) as Section 533, CB 2013. This is a welcome move and no longer requires the previous cross referencing of the Companies Act with the Bankruptcy Act.

Providing adequate protection to employees as unsecured creditors

The upper limit for the payment of wages or salary in the distribution of a company's property is increased from RM5,000 to RM15,000 (Section 534(1)(b), CB 2013).

In addition, employees have an added protection by reason of the change in the definition of the "*commencement of winding up*" which is discussed above. Under the CB 2013, as the commencement of winding up references the period after the winding up order has been issued, the salary, workers compensation, remuneration in case of leave, and employers contributions, in instances where a company is wound up by the Court, will be payable for services rendered within a period of four months before the winding order is issued. This will be a welcome safeguard for employees who, under the present regime, are entitled to wages and salary payments in a winding up, for services rendered within a period of four months before the presentation of the winding up petition. SD

KOO YIN SOON
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding Dispute Resolution, please contact

Robert Lazar
rlazar@sheardelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

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1. This article is based on the Exposure Draft as at 2 July 2013.
2. Part X: Winding Up, Sections 211–318, CA 1965 applicable to uncontested petitions from date of presentation of the petition until granting of the winding up order.
3. A parallel of the requirement in Section 5 of the Bankruptcy Act requires a Creditors Petition must be presented within six months of an act of bankruptcy.
4. Section 453(2), CB 2013.
5. This is in effect the same as the current Section 293 which uses the words from "*the date of the presentation of the petition*" read together with Section 53(1) of the Bankruptcy Act 1967.
6. Currently Section 304, CA 1965.
7. Section 447, CB 2013.
8. Currently termination of a winding up order is by way of a "permanent stay" (the words are judicially defined and not found in Section 432, CA 1965) of the winding up order under Section 243, CA 1965 resulting in "*whole effect of the winding up ceases and the company can thereafter resumes the conduct of*

its business and affairs as if no winding up order existed". The same section is also used to seek a stay of winding up proceedings pending an appeal and this has continued to cause confusion among practitioners and clients alike.

[9] The Federal Court in **Vijayalakshmi Devi Nadchatiram v Dr Mahadevan Nadchatiram & Ors [1995] 2 MLJ 709** set out the following principles in relation to the granting of a stay under Section 243, CA 1965:
  (a) the onus is on the party seeking a stay to make out a positive or sufficient case
  (b) The attitude of the creditors, contributories and the liquidator is a relevant consideration
  (c) Whether it is conducive or detrimental to commercial morality and to the interests of the public at large
  (d) A stay will be refused if there is evidence of misfeasance or of irregularities demanding investigation.

[10] Currently in Section 236, CA 1965.

[11] Part I Schedule 11, CB 2013.

[12] Part II, Schedule 11, CB 2013.

[13] Currently RM1,500 in Section 236(2)(b), CB 2013.

[14] Section 2, Part 1, Schedule 11, CB 2013.

[15] This is no doubt an enhancement although the author may be biased in his views.

[16] Section 457 and 495, CB 2013 set out qualifications required for a person to be appointed as a liquidator.

[17] Section 530 (4)–(7), CB 2013.

FINANCIAL SERVICES

Trade Reporting for Over-The-Counter Derivatives

IN THIS ARTICLE, ISABELLA NG EXAMINES THE CURRENT REGULATORY FRAMEWORK FOR THE REPORTING OF OVER-THE-COUNTER ("OTC") DERIVATIVES IN MALAYSIA.

Applicable legal provisions

Subdivision 4 of Division 3 of Part III ("OTC derivatives") of the Capital Markets and Services Act 2007 ("CMSA") provides for the setting up of a trade repository and the reporting requirements for OTC derivatives as introduced by the Capital Markets and Services (Amendment) Act 2011 ("2011 Amendment"). The 2011 Amendment came into force on 3 October 2011[1] and provided that Subdivision 4 of Division 3 of Part III shall come into operation at the expiration of two years or a further period not exceeding one year as the Minister may determine from the date of the coming into operation of the 2011 Amendment[2]. Therefore, the provisions of the CMSA relating to the setting up of a trade repository and the reporting obligations for OTC derivatives only came into force on 3 October 2014[3].

Trade repository

Section 107B of the CMSA provides that the Securities Commission of Malaysia ("SC") may in writing approve any body corporate to be a trade repository[4] provided it is satisfied with the following conditions:

(a) the body corporate will be able to carry out the functions as may be specified

(b) the body corporate has sufficient financial, human or other resources to carry out the functions as may be specified, and

(c) the body corporate has in place rules and procedures to enable it to perform its functions[5].

The SC has yet to announce its approval of a trade repository or to specify the functions of such repository.

Reporting obligations

Subsection 107J(1) of the CMSA provides that a holder of a Capital Markets Services Licence ("CMSL"), registered person[6] or any other person dealing in derivatives shall report information as may be specified by the SC, including any amendment, modification, variation or changes to the information, to a trade repository.

Although the general definition of "derivatives"[7] in the CMSA excludes derivatives involving exchange rates, for the purpose of reporting obligations under the CMSA, "derivatives" mean OTC derivatives[8] and shall include derivatives whose market price, value and delivery or payment obligations are derived from, referenced to or based on exchange rates[9].

The SC has yet to specify the form and manner in which the information shall be reported to the trade repository.

Exempted transactions

Subsection 107J(2) of the CMSA provides that the reporting obligations shall not apply to dealing in derivatives where Bank Negara Malaysia ("BNM") or the Government of Malaysia is a party. Therefore, transactions where BNM and the Government of Malaysia is a party will be exempted from the reporting obligations.

Consultation paper

In line with the objectives and efforts to develop a robust framework for the reporting of OTC derivatives to a trade repository, the SC, BNM and the Malaysia Deposit Insurance Corporation (Perbadanan Insurans Deposit Malaysia, "PIDM", collectively referred to as "Regulatory Agencies") issued a *Joint Public Consultation Paper on Trade Repository Reporting Requirement for Over-The-Counter Derivatives* (the "Consultation Paper") on 20 November 2013[10].

The Consultation Paper refers to, among others:

- reportable OTC derivatives transactions
- entities required to report to the trade repository
- the reporting approach, process and frequency of reporting
- data requirements for various derivatives contracts, and
- transitional arrangements and implementation timeline.

Below are some aspects contained in the Consultation Paper.

Reporting entities

Paragraph 3.1 of the Consultation Paper contemplates the reporting entities that would be subject to the mandatory reporting obligations to be as follows:

- investment banks licensed by the SC under the CMSA and by BNM under the Financial Services Act 2013 ("FSA")
- holders of a CMSL under the CMSA. These would include derivatives brokers, stockbroking companies and fund management companies
- institutions licensed by BNM under the FSA and the Islamic Financial Services Act 2013 ("IFSA"). These would include conventional and Islamic commercial banks, international Islamic banks, insurance and reinsurance companies, as well as takaful operators, international takaful operators and re-takaful operators, and
- any other person dealing in OTC derivatives, as may be prescribed by the SC.

Principal party to an OTC derivatives transaction

Based on the Consultation Paper, each reporting entity specified in paragraph 3.1 of the Consultation Paper who is a principal party to an OTC derivatives transaction will have an obligation to report the required information directly to the trade repository. Therefore, for example, in a bilateral interest rate swap transaction between a commercial bank and an investment bank, each party has its own obligation to report the swap transaction to the trade repository[11].

Treatment of branches

A reporting entity must also ensure that their reporting covers all transactions to which the reporting entity is a principal party, including transactions which are originated from, negotiated, arranged or booked by its domestic or foreign branches. For example, an overseas branch of a licensed entity may book a derivative transaction which it arranges between a client in a foreign jurisdiction with the licensed entity. The overseas branch is not required to comply with the mandatory reporting obligation. However, the parent licensed entity being a principal party to the derivatives contract with the client in that foreign jurisdiction is required to report the transaction to the trade repository[12].

Treatment of subsidiaries of CMSL holders and entities licensed by BNM

The reporting obligations would also extend to a subsidiary company of a CMSL holder or an entity licensed under the FSA 2013 and IFSA 2013 only if the subsidiary company is a reporting entity as specified in paragraph 3.1 of the Consultation Paper. Therefore, if a subsidiary company of a licensed financial institution under the FSA 2013 is a CMSL holder, that subsidiary company will be obligated to report its transactions to the trade repository separately from that of the parent company[13]. However, the reporting obligations will not extend to a subsidiary which is incorporated in foreign jurisdiction[14].

Using a reporting agent

Based on the Consultation Paper, a reporting agent may be appointed to report transactions on behalf of a reporting entity in the following circumstances:

(a) where OTC derivatives transactions are electronically confirmed, matched or executed on a third-party facility[15], the reporting entity who transacts through such facilities may appoint the facility provider as the reporting agent

(b) where OTC derivatives transactions are cleared through a central clearing counterparty ("CCP"), whether through a direct or indirect clearing arrangement, the CCP may be appointed as the reporting agent, and

(c) where OTC derivatives transactions with a foreign counterparty are reported by the foreign counterparty to another trade repository, such trade repository receiving the transaction information may be appointed as the reporting agent[16].

Despite the flexibility of using a reporting agent to report on its behalf, the reporting entity remains accountable to fully comply with reporting requirements[17]. Paragraph 4.7 of the Consultation Paper requires the reporting entity to evaluate and ensure that the reporting agent is able to report all the required data fields for all asset classes and meet the reporting frequency.

In addition, paragraph 4.8 of the Consultation Paper provides that, where a reporting agent is appointed, the reporting entity must notify the trade repository of such reporting arrangement. Similarly, the trade repository must be notified when a reporting agent ceases to be a reporting agent for the reporting entity.

The reporting entity will also be obligated to maintain proper internal records on:

(a) transactions which are reported by a reporting agent and those which are reported by the reporting entity itself

(b) a list of reporting agent(s) that have been appointed, and

(c) terms and conditions of the appointment[18].

Conclusion

As it stands today, although there are legal provisions for the reporting of OTC derivatives in Malaysia, the practical details have yet to be finalised and there is no indicated timing of when reporting will commence. However, it is expected that there will be a transitional period for reporting entities to start reporting and updating transaction data to the trade repository before full compliance with all reporting requirements would be enforced.

SD

ISABELLA NG
FINANCIAL SERVICES DEPARTMENT

For further information regarding financial services matters, please contact

Christina S C Kow
christina@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

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[1] P.U.(B) 518/2011.

[2] Subsection 1(3) of the 2011 Amendment.

[3] P.U.(B) 395/2013.

[4] Subsection 107B(1) of the CMSA.

[5] Subsection 107B(2) of the CMSA.

[6] Section 2 of the CMSA: "registered person" means a person registered under Section 76.
Section 76:
(1) A person is a registered person for the purposes of subsection 58(1) where such person is–
(a) specified to be a registered person in Schedule 4;
(b) registered under subsection (2);
(c) registered with a recognized self-regulatory organization under section 323; or
(d) registered with a body that is approved by the Commission.
(2) The Commission may on the application made by any person referred to in paragraph (1)(b) register such person for one or more regulated activities.

[7] "Derivatives" as defined in subsection 2(1) of the CMSA means "*any contract, either for the purposes of creating an obligation or a right or any combination of both, of which its market value, delivery or payment obligations are derived from, referenced to or based on, but not limited to, underlying securities or commodities, assets, rates, indices or any of its combination, whether or not a standardized derivative or an over-the-counter derivative, but does not include-*
(a) securities;
(b) any derivative to which BNM or the Government of Malaysia is a party;
(c) any over-the-counter derivatives whose market price, value, delivery or payment obligations are solely derived from, referenced to or based on, exchange rates; or
(d) any agreement, when entered into, is in a class of agreements prescribed not to be derivatives".

[8] Section 107A of the CMSA.

[9] Subsection 107J(4) of the CMSA.

[10] Available at http://www.sc.com.my/wp-content/uploads/eng/html/consultation/131120_PublicConsultation_1.pdf.

[11] Paragraph 4.1 of the Consultation Paper.

[12] Paragraph 4.2 of the Consultation Paper.

[13] Paragraph 4.3 of the Consultation Paper.

[14] Paragraph 4.4 of the Consultation Paper.

[15] These electronic trading facilities refers to facilities that provide firm and executable rates and those which provide electronic confirmation or matching services where the trade may be concluded outside the confirmation system

using other means. Facilities which provide trade negotiation services are not considered as an electronic confirmation, matching or execution facilities.

[16] Paragraph 4.5 of the Consultation Paper.

[17] Paragraph 4.6 of the Consultation Paper.

[18] Paragraph 4.7 of the Consultation Paper.

INTELLECTUAL PROPERTY

Wearing two hats: Dual practices as Advocate and Solicitor and Registered Agent for Intellectual Property

IN THIS ARTICLE, SHARON CHIEN SEE YIM DISCUSSES THE RISKS AN INDIVIDUAL BEARS WHEN PRACTISING BOTH AS AN ADVOCATE AND SOLICITOR AND REGISTERED PATENT, TRADE MARK AND/OR INDUSTRIAL DESIGN AGENT.

Introduction

It is common for an Advocate and Solicitor practising in the Intellectual Property ("IP") profession to perform a role as a registered patent, trade mark and/or industrial design agent ("IP Agent") within his full-time practice in a law firm. Following this common practice, IP Agents who are also lawyers are often entrusted by clients to represent them in contentious disputes relating to patent, trade mark or industrial designs.

Accepting the brief may be flattering and profitable — but what are the risks? How might such risks be mitigated or eliminated?

The governing principle

Bar Council Ruling 12.03 permits an Advocate and Solicitor to act jointly as a patent, trade mark and/or industrial design agent and an Advocate and Solicitor. The Ruling states that:

> "***12.03 Advocate and Solicitor acting as registered patent, trade mark and/or industrial design agent***
>
> *(1) An Advocate and Solicitor shall notify the Bar Council within 1 month of his/her first becoming a registered patent, trade mark, industrial design and/or geographical indication agent, or if he/she is already a registered patent, trade mark, industrial design and/or geographical indication agent, within 1 month of the coming into effect of this Ruling.*
>
> *(2) He/she shall perform his/her role as a registered patent, trade mark, industrial design and/or geographical indication agent within his/her full-time practice in a law firm.*
>
> *(3) He/she shall comply with the Etiquette Rules and all other applicable laws and Rulings while acting as a registered patent, trade mark, industrial design and/or geographical indication agent.*
>
> *(4) In his/her conduct as a registered patent, trade mark, industrial design and/or geographical indication agent, he/she shall be subject to all disciplinary rules governing an Advocate and Solicitor.*
>
> *(5) Any law firm providing services of a registered patent, trade mark, industrial design and/or geographical indication agent may describe itself as providing such services on its letterhead.*
>
> *(6) No Advocate and Solicitor is permitted to merely supervise a registered patent, trade mark, industrial design and/or geographical indication agent unless his/her law firm handles the work and fees for such work are paid directly to the law firm.*"

Conflicts

One of the most common concerns for lawyers engaging in dual practices as described above is a conflict of interest. One scenario in which a conflict of interest is apparent is where the lawyer who represents a litigant in a dispute pertaining to a patent, trade mark or industrial design registered under the name of the opposite party is the opposite party's IP Agent for the IP.

This article, however, seeks to address conflict issues which may arise in the following scenarios:

(i) where the lawyer who represents the plaintiff in an IP infringement suit is also the plaintiff's IP Agent for the plaintiff's IP that is the subject matter of the infringement suit. In such cases, the validity of the registration of the IP is often challenged by the defendant in its defence and/or counterclaim.

(ii) where the lawyer who represents the defendant in an IP invalidation suit is also the defendant's IP Agent for the defendant's IP that is the subject matter of the invalidation suit.

The IP Agent for the registered IP would have knowledge of the history of the

registration of the IP. Thus, would a lawyer who conducts the infringement suit on behalf of the plaintiff, or conducts the defence on behalf of the defendant in an IP invalidation suit, be deemed embarrassed or in conflict if he is also the IP agent for the IP that is the subject matter of the suit?

Whether a litigation lawyer acting as a patent/trade mark/industrial design agent presents a conflict so as to warrant a disqualification

It is trite that a litigant has the right to be represented by a lawyer of his choice. The paramount question to be asked is whether there is a real possibility of injustice if the current lawyer who is also the litigant's registered agent for the litigant's IP that is the subject of the dispute is allowed to conduct the case on behalf of the litigant?

Rule 3 of the Legal Profession (Practice and Etiquette) Rules 1978 (the "Rules") provides that an advocate and solicitor should not accept a brief if he or she is, or would be, embarrassed by reason of him possessing confidential information as a result of having previously advised another person on the same matter, or if there is some personal relationship between him and a party or a witness in the proceedings.

Rule 4 of the Rules provides that an advocate and solicitor should not accept a brief if he knows or has reason to believe that his professional conduct is likely to be impugned.

Rule 5 of the Rules provides, *inter alia*, that an Advocate and Solicitor should not accept a brief if such acceptance would render it difficult for him to maintain his professional independence or is incompatible with the best interest of the administration of justice.

In addressing the issue of whether a lawyer, who is also the IP agent for a litigant's IP that is the subject matter of the suit, would be in breach of the ethics of the legal profession and in breach of the law if he were also to act for the litigant in the suit, the case of **Low Yien Kwee & Ors v Ever Noble Sdn Bhd** can be considered. The subject matter of the dispute in this case is not IP but this was a case in which the defendant sought to disqualify the plaintiffs' lawyers from further acting for the plaintiffs in the suit on the ground that the lawyers will be made witnesses for the defendant in the suit.

Balia Yusof J in this case held that:

> "*It has to be shown how the professional conduct of the firm is likely to be impugned by taking up briefs in the instant case. The affidavits filed in support of this application do not provide the relevant evidence for this court to adjudicate on. The statement of claim against the firm … does contain general averments and allegation of conspiracy and sabotage against the firm, but that is all. This in my view is insufficient to prove that r 4 … of the Rules has been breached.*"

Further in the case of **Quah Poh Keat & Ors v Ranjit Sigh a/l Taram Singh**[1] Suriyadi JCA delivering the judgment of the Court held that:

> "*It was our view that to disqualify the firm from representing the appellants, a strong case has to be established first by the respondent, with the evidence to be gauged from the supporting affidavits. What is strong will depend on the evidence and requirements of the law...*
>
> *Even though the main action is still pending, and this proceeding is not the forum to go into the merits of the case, by the very nature of the application, a need arises for us to sieve and consider some of the evidence. Prior to any conclusion, we had to pose the question whether a reasonable man armed with all the facts, might reasonably anticipate the probability of the two solicitors being called as witnesses.*"

Rule 28 of the Rules provides, *inter alia*, that an advocate and solicitor should not appear in a case where he has reason to believe that he will be a witness in respect of a material and disputed question of fact.

On the question of disqualification of a solicitor/firm by way of Rule 28 of the Rules, Balia Yusof J in the case of **Low Yien Kwee** (above) held that:

> "*...in order for an advocate and solicitor to be disqualified under r 28 of the Rules, it must be demonstrated that his appearance as a witness is in respect of a material and disputed question of facts. This has to be proved and the burden lies on the party seeking for the disqualification … A party making an application for disqualification under the said rule is not at liberty to make general assertions that the advocate and solicitor will be a witness in the case. There must be sufficient material for the court to consider whether in the particular circumstance of the case, the prohibition in r 28 applies.*"

The decision of Balia Yusof J in **Low Yien Kwee** (above) was in conformity with the principle laid down in the case of **Wee Choo Keong v Pendakwa Raya**[2]
where Wan Yahya J said of Rule 28 as follows:

> "*This section to my mind does not envisage that an advocate and solicitor is ipso facto excluded from appearing as such in court, the moment he believes that he will be a witness. That ethical restriction will only arise if he is likely to be a witness of any material or disputed fact. Rule 28 is a rule of ethics and the magistrate should not have applied it totally with the stringency of the force of law.*
>
> *In a case like this, the rule of common sense and fair play in keeping*

<u>with our tradition of maintaining a fair and impartial adversarial system should be observed</u>."

In the case of **Manville Canada Inc v Ladner Downs**[3], the British Columbia Supreme Court noted that:

> "*...if the rules for disqualification invite applications of this kind wherever the ingenuity of the legal mind can conjure up a possibility of an appearance of impropriety, the result will be to damage the profession's reputation and the integrity of the system by adding to the already intolerable length and cost of litigation ... many [disqualification applications] are brought simply because an application to disqualify has become a weapon which can be used to discomfit the opposite party by adding to the length, cost and agony of litigation. If that becomes a regular feature of our litigation, it would not likely do much to improve the profession's standards in an area in which there seem to have been few serious problems. But it could do much to further reduce the court's ability to get to judgment in a timely way.*"

The above cases conclude that strong proof is required to deny the right of an Advocate and Solicitor from representing his clients. This view has subsequently been affirmed in the case of **Sheng Lien @ Sheng Len Yee v Tan Teng Heng**[4]
where it was stated that "*in order to disqualify a firm from representing a party, a strong case has to be established first by the respondent with the evidence to be gauged from the supporting affidavits*".

Turning back to Bar Council Ruling 12.03(4), Advocates and Solicitors who are also registered patent, trade mark and/or industrial design agents are bound by all disciplinary rules governing an Advocate and Solicitor. This ruling is said to provide a nexus for Advocates and Solicitors acting jointly as patent/ trademark/industrial design agents and Advocates and Solicitors to treat the professional communications with their client in their capacity as agents as privileged.

Section 126 of the Evidence Act 1950 provides that:

> *"(1) No advocate shall at any time be permitted, unless with his client's express consent, to disclose any communication made to him in the course and for the purpose of his employment as such advocate by or on behalf of his client, or to state the contents or condition of any document with which he has become acquainted in the course and for the purpose of his professional employment, or to disclose any advice given by him to his client in the course and for the purpose of such employment:*
>
> *Provided that nothing in this section shall protect from disclosure-*
>
> *(a) any such communication made in furtherance of any illegal purpose;*
>
> *(b) any fact observed by any advocate in the course of his employment as such showing that any crime or fraud has been committed since the commencement of his employment.*

In the case of **Dormeul Trade Mark**[5]

Nourse J reluctantly held that it was not open to him to fly in the face of the established rule and the legislature that legal professional privilege was afforded only to communications between a client and his legally qualified advisers and not to trade mark agents. He however expressed the view that:

> "*It does seem to me to be a little odd and possibly perverse, that if a trade mark agent is entitled to advise a client in relation to certain legal matters and to conduct certain legal proceedings on his behalf, the same privilege should not apply as would certainly apply in a case where the advice was being given and the proceedings were being conducted by a solicitor. Nevertheless I do not think it is open to me in this court to fly in the face of established rule...*"

Notwithstanding the above, Gibson J in the case of **Camille DeCap and DeCap Trailer MFG Ld v Midland Manufacturing Limited**[6] held that:

> "*I conclude that the relationship between a patent agent and a solicitor in closely associated firms and in relation to patent litigation is much more akin to the relationship between two solicitors in the same firm than it is to the relationship between a solicitor and a secretary employed by his or her firm.*"

Following the principles laid down in the above cases, the question to be examined is whether the agent-client communication enjoys the same level of legal privilege as solicitor-client communication under Section 126 of the Evidence Act 1950.

If the judgment in **Dormeul Trade Mark** was to be followed, that would require lawyers who are also IP Agents acting in a non-litigious matter to recuse themselves upon said matter becoming litigious. Such a practice would be unfair and prejudicial to the interests of the IP owner.

It would seem from most of the above cases and from the Rules and the Evidence Act that strong proof is required to convince the courts that IP Agents are vital witnesses to a litigant's case. IP Agents who are also lawyers are merely agents and solicitors acting for the litigants and even if the IP Agents who are also the lawyers acting for a litigant in an IP suit are to be called as witnesses for the opposite party, their evidence will not be in respect of any disputed question of fact or on any advice they have given to the litigant as they are bound by the rule on privileged communication from disclosing what they have communicated with their clients.

Conclusion

Carrying on dual practices can be challenging and complicated. IP Agents wearing two hats should always ensure the code of ethics of being both an Advocate and Solicitor and registered patent/trade mark/industrial design agent is strictly followed, to identify and resolve conflicts, to maintain professional independence of their practices and, on his volition, not to take up a case if he will be in breach of the disciplinary rules in Bar Council Ruling 12.03 pertaining to alternate practice.

SHARON CHIEN SEE YIM
INTELLECTUAL PROPERTY AND TECHNOLOGY PRACTICE GROUP

For further information regarding Intellectual Property matters, please contact

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

[1] **[2009] 4 MLJ 293** at page 302.
[2] **[1990] 2 MLJ 239**.
[3] **CarswellBC 6, 63 BCLR (2d) 102, [1992] 2 WWR 323, 88 DLR (4th) 208**.
[4] **[2012] MLJU 135**.
[5] **[1983] RPC 131**.
[6] **[1994] CarswellNat 13, 31 CPC (3d) 363, 55 CPR (3d) 421, 80 FTR 154**.

TAX LAW

Budget 2015 Highlights

IN THIS ARTICLE, CHRISTOPHER TAY HANMIN HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2015 BUDGET.

The Budget 2015 tabled by the Prime Minister in his capacity as Finance Minister on 10 October 2014 is entitled *Budget 2015: The People's Economy*. The Prime Minister has labelled the budget as being "pro-rakyat" as it seeks to alleviate concerns about the rising cost of living.

Quite significantly, Budget 2015 completes the 10th Malaysian Plan[1] which is a five-year plan. The 11th Malaysian Plan will be launched in May 2015.

With the impending introduction of the Goods and Services Tax ("GST") in Budget 2014, Malaysians from all walks of life have been waiting with bated breath for Budget 2015 to see how far-reaching the GST will be when it is implemented on 1 April 2015.

Some of the Budget 2015 highlights are discussed below. Unless otherwise stated, the budgetary proposals below when passed by Parliament will take effect from Year of Assessment ("Y/A") 2015.

GST

In Budget 2014, it was proposed that certain food items and services will not be subject to GST. This time around, the Government is proposing to extend the list of items not subject to GST to include the following:

- all types of fruits, whether local or imported
- white bread and wholemeal bread
- coffee powder, tea dust and cocoa powder
- yellow mee, kuey teow, laksa and meehoon
- pharmaceutical products listed under the National Essential Medicine covering almost 2,900 medicine brands, including medicines used to treat 30 types of diseases such as heart failure, diabetes, cancer, etc
- certain types of reading materials, and
- newspapers.

The Government has also proposed to increase the amount of electricity consumption in domestic households which will not be subject to GST from the first 200 units to the first 300 units per month.

In addition, it was proposed that retail sale of RON95 petrol, diesel and liquefied petroleum gas will be given GST relief.

In line with the above, the Government, on 13 October 2014, gazetted three orders[2] pursuant to Section 56 of the Goods and Services Tax Act 2014, namely:

- Goods and Services Tax (Exempt Supply) Order 2014
- Goods and Services Tax (Zero-Rated Supply) Order 2014
- Goods and Services Tax (Relief) Order 2014.

In tandem with the implementation of GST on 1 April 2015, the Government proposed the following:

- *Individuals*
  Individual income tax rates would be reduced by 1% to 3% and the

individual income tax will be restructured whereby the chargeable income subject to the maximum rate of 25% will be increased to that exceeding RM400,000 from RM100,000 previously.

- *Companies*
  Corporate tax rate will be reduced from 25% to 24% while companies with paid up share capital of up to RM2.5 million are taxed at a reduced rate of 19% of chargeable income up to RM500,000 and the remaining chargeable income would be taxed at a reduced rate of 24%. These tax reductions would be effective only from Y/A 2016.

- *Cooperatives*
  Cooperatives income tax rate will be reduced by 1% to 2% so the maximum income tax rate will be reduced from 25% to 24%.

- *Additional/Other packages, deductions and incentives*
  - Training grant of RM100 million provided to businesses for their employees to attend GST courses
  - Financial assistance amounting to RM150 million provided to small and medium enterprises for the purchase of accounting software
  - Accelerated Capital Allowance on purchase of ICT equipment and software, and
  - Additional tax deductions for expenses incurred for training in accounting and ICT relating to GST.

Tax deductions and incentives

- *Investment Account Platform ("IAP")*
  The IAP's objective is to attract participation from individual and institutional investors to boost development of small and medium enterprises ("SMEs") as well as entrepreneurs through an efficient, simple and transparent funding system.

  It was proposed that profit earned by individual investors from investments made through IAP will be accorded income tax exemption subject to the following conditions:

  - Tax exemption shall only be accorded for three consecutive years starting from the first year profit is earned
  - Investment is made for a period of three years starting from the operation date of IAP
  - Tax incentive shall only be accorded for investment activities in Malaysia, in venture companies owned by Malaysian or locally incorporated companies
  - Tax exemption shall only be accorded for investments made in SMEs and venture companies in any sector, and
  - SME is defined as per the latest definition issued by SME Corporation Malaysia.

The operational date of the IAP is scheduled to be from 1 September 2015 to 31 August 2018.

- *Sukuk issuance*
  To expand the sukuk market at the international level, it was proposed that deductions on expenses incurred for the issuance of sukuk under the principles of *Ijarah* and *Wakalah* be extended for another three years from Y/As 2016 to 2018.

- *Medical tourism*
  As Malaysia has the potential to be a hub for medical tourism in the region, it was proposed that new and existing companies engaged in expansion, modernisation and refurbishment that provide private healthcare facilities to at least 5% healthcare travellers from their total patients be given exemption on income equivalent to Investment Tax Allowance of 100% of qualifying capital expenditure for a period of five years. This will be effective for applications received by the Malaysian Investment Development Authority ("MIDA") from 1 January 2014 to 31 December 2017.

- *Scholarships*
  To encourage companies to provide scholarships in the vocational and technical field, it was proposed that double deductions be given to scholarships awarded by a company to eligible Malaysian students pursuing vocational and technical courses in Government recognised institutions. This will be effective from Y/As 2015 to 2016.

- *Structured Internship Programme ("SIP")*
  To encourage companies to extend the SIP to eligible full time students pursuing training at the vocational and diploma levels, it was proposed that expenses incurred in implementing the SIP be given double deductions. Conditions for the companies under the current SIP are to be maintained. This is effective from Y/As 2015 to 2016.

- *Stamp duty*
  It was proposed to extend the 50% stamp duty exemption on instru-

ment of transfer and loan agreement by a Malaysian acquiring his first residential property not exceeding RM500,000, for sale and purchase agreements executed from 1 January 2015 to 31 December 2016.

- *Training*
  Further deductions were proposed to be given on training expenses incurred by companies for employees to obtain industry recognised certifications and professional qualifications such as in the field of accounting, finance and project management. Such training programmes must be approved by the agencies appointed by the Minister of Finance.

Finance Bill (No 2) 2014 ("Finance Bill")

The Finance Bill was tabled before the Dewan Rakyat together with the proposed Budget 2015. Some of the proposals in this year's Finance Bill in relation to the Income Tax Act 1967 ("ITA") and the Real Property Gains Tax Act 1976 ("RPGTA") are:

Income Tax Act 1967

- *Proposed new Section 75B(3) & (4)*
  Under the Limited Liability Partnerships Act 2012, companies and partnerships can be converted to limited liability partnership ("LLP"). The proposed sub-sections provide and clarify that the person assessable and chargeable to tax for any tax prior to conversion to LLP in cases where assessments were raised after conversion:

  – in the case of partnerships — every partner, and

  – in the case of companies — the LLP.

- *Proposed new Section 91(5)*
  Under the current provisions of Section 91(1) of the ITA, the DGIR can raise an assessment or an additional assessment within five years after the expiration of a year of assessment for all tax cases including those relating to transfer pricing.

  This sub-section seeks to increase that period to seven years for transfer pricing cases under Section 140A(3) of the ITA.
- *Proposed amendment to Section 99(4)*
  One year ago, Section 99(4) was introduced to restrict the taxpayers' right to appeal against a deemed assessment where a taxpayer can only do so if he is aggrieved by a public ruling made under Section 138A of the ITA.

  This proposed amendment provides that the taxpayers would also have a right of appeal against a deemed assessment when he is aggrieved by an assessment made as a result of complying with any practice of the DGIR generally prevailing at the time the assessment is made.

  However, it is uncertain as to what amounts to the prevailing practice of the DGIR at a particular moment of time.

- *Proposed amendments to Sections 112(1) and 115(1)*
  These proposed amendments seek to increase the maximum fine from RM2,000 to RM20,000 for the various offences such as failure to furnish a return, the failure to give notice of chargeability or attempting to leave Malaysia without paying the relevant taxes specified in a certificate issued under Section 104 of the ITA.

Real Property Gains Tax Act 1976

- *Proposed amendment to Section 21B(1)*
  This is to increase the retention sum retained by the acquirer upon a disposal of real property from 2% to 3% of the consideration.

CHRISTOPHER TAY HANMIN
TAX & REVENUE PRACTICE GROUP

For further information regarding Tax matters, please contact

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

[1] The *Tenth Malaysian Plan (2011–2015)* a comprehensive blueprint prepared and published by the Economic Planning Unit of the Prime Minister's Department. A copy of which can be found here http://www.epu.gov.my/epu-theme/RMKE10/rmke10_english.html.

[2] For the lists of goods and services exempted, zero-rated and those granted relief from GST, please refer to http://gst.customs.gov.my/en/rg/Pages/re_odr.aspx.

CASE NOTE

Seek Keng Leong v Bursa Malaysia Securities Bhd

IN THIS ARTICLE, NICHOLAS TAN CHOI CHUAN REVIEWS THE CASE OF **SEEK KENG LEONG V BURSA MALAYSIA SECURITIES BHD** ON WHETHER BURSA MALAYSIA SECURITIES BERHAD ("BURSA") HAS THE POWER TO GRANT ORDERS OF RESTORATION.

The powers granted to Bursa in relation to the enforcement of the Main Market Listing Requirements ("Listing Requirements") are undoubtedly wide ranging. Pursuant to paragraph 16.19 (previously paragraph 16.17), Bursa is empowered to take or impose any of the actions or penalties as stipulated in that paragraph against listed companies and/or its directors or officers for any breach of the Listing Requirements. Some of the actions or penalties that Bursa may take are issuance of a caution letter, issuance of a public reprimand, imposition of a fine not exceeding RM1 million and any other action it deems appropriate.

This case concerns the ambit of Bursa's powers, specifically whether the orders of restoration imposed by Bursa were within its powers under the Listing Requirements. In this case, Bursa had imposed fines and orders of restoration against the applicants, Seek Keng Leong and Goh Bank Ming (the "Applicants"), for breaches of the Listing Requirements.

Brief facts

Bursa had, through its Listing Committee ("LC") and Appeal Committee ("AC"), ordered that the Applicants were liable for the losses suffered by a listed company, LIQUA. Both had authorised the payment of monies by LIQUA even though the products were not yet delivered to LIQUA and thus clearly putting the interest of LIQUA in great jeopardy. The Applicants filed by way of judicial review for an order to quash the decision made by the AC that had found them guilty of breaches of the Listing Requirements and the penalties imposed on them including fines and orders of restoration.

The issues

The High Court had to consider the following issues:

(1) whether the orders of restoration imposed against the Applicants were without proper legal basis, and

(2) whether Bursa had erred in finding the Applicants guilty of breaches of the Listing Requirements.

The High Court held that Bursa's findings that the breaches were serious in nature could not be challenged as a reasonable tribunal in a similar circumstance would have reached the same conclusion as did the AC on the amount of the fines imposed on the Applicants. However, the High Court quashed the orders of restoration made against both Applicants. This article will focus on the reasoning of the High Court with regard to the orders of restoration.

Orders of restoration

The High Court held that Bursa's powers under the Listing Requirements (in this case paragraph 16.19) did not expressly provide for a restoration order to be imposed. The counsel for Bursa urged the High Court to adopt a purposive approach to decipher the true intention of the drafters of the Listing Requirements and to adopt an interpretation of the Listing Requirements which would best promote the principles on which the Listing Requirements were based (paragraph 2.05 of the Listing Requirements).

However, the High Court, despite being mindful of the principles contained in the Listing Requirements, held that such provisions cannot be utilised to mete out a sanction of such nature as a restorative order. The High Court held that, if the drafters of the Listing Requirements intended to confer Bursa with such power to impose an order for restoration, such intention ought to be expressed within the Listing Requirements.

According to the High Court, "*an order of restoration is penal in effect vis-à-vis the person on whom it is imposed" and "the accepted canon of interpretation for legislation of penal nature is that the provision creating the penal sanction must be clearly and unambiguously expressed in no uncertain terms*". Therefore, the High Court held that the Listing Requirements do not empower Bursa to impose orders of restoration.

Bursa argued that paragraph 16.19(1)(b)(vi) and (viii) of the Listing Requirements was couched in such a way that granted it wide powers. Under those subparagraphs, Bursa is empowered to:

> "*(vi) [impose] one or more conditions for compliance;*
> *(viii) any other action which [Bursa] may deem appropriate.*"

The High Court however accepted the argument of the Applicants' counsel that subparagraph 16.19(1)(b)(vi) refers to Bursa's power to impose conditions in order to ensure compliance of the sanctions enumerated in the preceding subparagraphs. As to sub-paragraph (viii), although the language may appear at first glance to be conferring on Bursa a wide range of "other actions" that it may deem appropriate to take, those "other actions" could not be larger than those sanctions which were expressed in the preceding subparagraphs. The

High Court reiterated that orders of restoration must be clear and expressed in the Listing Requirements.

Further, in the judgment, the High Court referred to the power to make certain orders under Capital Markets and Services Act 2007 ("CMSA") (being the parent Act pursuant to which the Listing Requirements derive the statutory basis) and held that a person wishing to obtain an order of restitution (which in the view of the High Court was similar, if not synonymous, with an order of restoration) under the Act must do so through an application to the Court.

The High Court acknowledged that superior courts and courts in other mature capital markets have been in favour of giving regulators in Bursa's position a rather free hand in discharging its functions. Notwithstanding this, the onus is on Bursa to prove that it has the necessary power to impose such restoration order and the Court would be slow to second guess if Bursa had such powers.

Moving forward

On 21 October 2014 the Court of Appeal upheld the decision of the High Court. Although at the time of writing this article the judgment of the Court of Appeal has yet to be published, it has been reported[1] that the Court of Appeal had rejected Bursa's contention that it should be allowed unfettered discretion to impose penalties as any order of restitution must be done by court order. Bursa was reportedly considering an appeal to the Federal Court[2].

It would be interesting to observe, if indeed an appeal is made, whether the Federal Court would uphold the decision of the Court of Appeal and the High Court in light of previous cases whereby orders of restoration were granted namely **Bursa Malaysia Securities Bhd v Tengku Dato Kamal Ibni Sultan Sir Abu Bakar & Ors** and **Tengku Dato' Kamal Ibni Sultan Sir Abu Bakar & Ors v Bursa Malaysia Bhd**[3]. Those cases were referred to in the High Court but were distinguished. It remains to be seen whether the Federal Court would take the same view as in **Seek Keng Leong**.

NICHOLAS TAN CHOI CHUAN
CORPORATE AND COMMERCIAL PRACTICE GROUP

For more information regarding Corporate and Commercial matters, please contact

Grace C G Yeoh
gcgyeoh@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

[1] "Bursa gets wings clipped" by Terence Fernandez as published in *The Edge Financial Daily*, 24 October 2014.
[2] Supra.
[3] **[2010] 6 CLJ 581**.

www.shearndelamore.com

Advocates & Solicitors
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Peguambela & Peguamcara
Notari Awam
Ejen Paten Berdaftar
Ejen Cap Dagangan
Ejen Rekabentuk Perindustrian

This Newsletter is produced by the Knowledge Management Department. Please contact the Department or the Newsletter Editorial Committee at km@shearndelamore.com, if you need any further information on this Newsletter.

PARTNERS AND PRACTICE GROUPS

DISPUTE RESOLUTION

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

Rodney Gomez
rodney@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sagadaven Thangavelu
sagadaven@shearndelamore.com

Nad Segaram
nad@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

Lai Wai Fong
waifong@shearndelamore.com

Jimmy Liew
jimmyliew@shearndelamore.com

Sathya Kumardas
sathya@shearndelamore.com

Alexius Lee
alexius@shearndelamore.com

Sheila Ramalingam
sheila@shearndelamore.com

Kavitha Karuppannan
k.kavitha@shearndelamore.com

TAX & REVENUE

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Irene Yong Yoke Ngor
irene.yong@shearndelamore.com

Cynthia Lian
cynthia@shearndelamore.com

CORPORATE & COMMERCIAL

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Dato' Johari Razak
jorazak@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Marhaini Nordin
marhaini@shearndelamore.com

FINANCIAL SERVICES

Christina S. C. Kow
christina@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

Pamela Kung Chin Woon
pamela@shearndelamore.com

INTELLECTUAL PROPERTY & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

Zaraihan Shaari
zara@shearndelamore.com

Jyeshta Mahendran
jyeshta@shearndelamore.com

Janet Toh Yoong San
janet.toh@shearndelamore.com

Ameet Kaur Purba
ameet@shearndelamore.com

Michelle CY Loi
michelle.loi@shearndelamore.com

ENVIRONMENTAL

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sheila Ramalingam
sheila@shearndelamore.com

PENANG OFFICE

J. A. Yeoh
yeoh@shearnpg.com.my

J.J. Chan
jchan@shearnpg.com.my

COMPETITION LAW & ANTITRUST

Dato' Johari Razak
jorazak@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

REGULATORY COMPLIANCE & ENFORCEMENT

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Alvin Julian
alvin.julian@shearndelamore.com

EMPLOYMENT & ADMINISTRATIVE LAW

Sivabalah Nadarajah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

Reena Enbasegaram
reena@shearndelamore.com

IMMIGRATION

See Guat Har
guat@shearndelamore.com

PERSONAL DATA PROTECTION & PRIVACY LAWS

Rabindra S.Nathan
rabindra@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

INFRASTRUCTURE & PROJECTS

Rodney Gomez
rodney@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Tee Joe Lei
joelei@shearndelamore.com

ENERGY, NATURAL RESOURCES & GREEN TECHNOLOGY

Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Goh Ka Im
kgoh@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

REAL ESTATE

Sar Sau Yee
sysar@shearndelamore.com

Aileen P. L. Chew
aileen@shearndelamore.com

Anita Balakrishnan
anita@shearndelamore.com

Ding Mee Kiong
mkding@shearndelamore.com

TELECOMMUNICATIONS & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

KUALA LUMPUR Office:
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

PENANG Office:
6th Floor
Wisma Penang Garden
42, Jalan Sultan Ahmad Shah
10050 Penang
T 604 226 7062
F 604 227 5166
E shearnd@po.jaring.my

Newsletter Editorial Committee
Goh Ka Im
Christina S.C. Kow
K. Shanti Mogan
Marhaini Nordin
Zaraihan Shaari
Lai Wai Fong

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PRINTER Inch Design & Communications (001291647-h) A88, Jalan Tuanku 2, Taman Salak Selatan, 57100 Kuala Lumpur. Malaysia. Tel 603 7983 3141 Fax 603 7983 2961