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JEFF LEONG, POON & WONG

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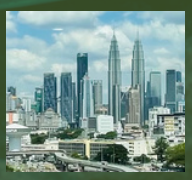

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SENIOR PARTNER'S NOTE

Greetings!

It is a privilege for me to have this eMag to share my thoughts and hopes for our firm, as we look forward to seeing JLPW grow from strength to strength.

My sincerest appreciation to the JLPW family for your resilience throughout this Covid pandemic. I know it has affected each of us in one way or another, with some directly down with the illness and I am truly impressed at how we have stuck together and continued to deliver quality work to our clients.

I am pleased and excited to see the country now returning to business as usual and I am sure many would agree too. We miss the interactions with colleagues and clients that somehow, Zoom connections may not quite bridge. I am convinced that a return to work-from-office routine will foster closer relationships and cooperation whilst strengthening the JLPW firm culture and identity.

With more & more countries removing all forms of travel restrictions altogether, I look forward to developing and re-establishing cross-border work, an area where we have had a strong footprint in.

Let us always put our best foot forward! Agile, adaptable and always professional – these are traits that will ensure success & longevity in our business. Never let our guard down; let us forge ahead together!

Sincerely,

Kenny Poon

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SENIOR PARTNER OF
JEFF LEONG, POON & WONG

What are the avenues available for management bodies to recover charges due from parcel owners in stratified properties? The implications of such avenues, as well as latest court decisions.

BY RAYMOND SABASTIAN

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1. Introduction

In the contemporary world, it is usual to maximise commercial and residential expansion, resulting in more stratified properties being erected by developers, in response to growing urban populations and rapidly changing lifestyles, as well as breakthroughs in the engineering.

Stratified properties are those high-rise buildings which do not only comprise individual parcels, but also consist of a common area, an area that does not belong to any parcels, but is used or capable of being used or enjoyed by all the parcel owners of the building, such as stairs, fire escapes, entrances, lobbies, lifts, driveways, parking areas, swimming pool, gym, club-houses, and others ("Common Property"). Not just high-rise buildings, but also some types of landed property with Common Property features, notably in gated and guarded communities, are categorised as stratified properties.

Having said that, Common Property is a key aspect of stratified properties, since it requires continual upkeep and administration in order for occupiers to use and enjoy it. As a result, it is governed by a set of rules to address its own challenges, disputes, and discrepancies. **The Strata Management Act 2013 ("SMA"), Strata Title Act 1985 and Strata Title (Amendment) Act 2016 ("STA") and the regulations established under the SMA, the Strata Management (Maintenance and Management) Regulations 2015 ("SM Regulation")** came into effect, establishing comprehensive procedures, powers and duties and responsibilities of developer, joint management body ("JMB"), management corporation ("MC") and subsidiary MC (collectively referred to as "Management Bodies").

2. Formation of Management Bodies

Following the initial delivery of vacant possession of parcels to the respective parcel owners, the developer shall be responsible for property maintaining and managing of the Common Property, and until such time prescribed under **Section 17(1) of the SMA** the baton will be passed to JMB, which consists of the developer and the parcel owners. In the case that the parcels have been duly sub-divided at the time of delivery of vacant possession of parcels to the respective parcel owners, MC will be established instead of JMB or upon the opening of a strata register book after the strata titles to the respective parcels have been issued.

3. Collection of Maintenance Charges & Sinking Fund by Management Bodies

In order for the Management Bodies to carry out the maintenance and management of the Common Property efficiently and to keep it in a state of good and serviceable repair, the Management Body is empowered under the provisions of SMA to determine, impose and collect maintenance charges and sinking fund (collectively referred to as "Charges") from all parcel owners of the building. It is important that parcel owners pay the Charges on time since they are essentially operational costs meant for daily repairs and upkeep of the Common Property.

The most common issue that the Management Bodies may face in carrying out their duties is non-payment of Charges from parcel owners and this may prompt the Management Bodies to take such action appropriate, within the powers conferred under the **SM Regulation**, to compel the parcel owners to pay such Charges, amongst others:-

3.1 Imposing Late Payment Interest

Reg 6(2) of the Third Schedule of SM Regulation – If any Charges remain unpaid by the parcel owners at the expiry of the period of fourteen (14) days of receiving notice from the Management Bodies, the parcel owners shall pay interest at the rate of ten percent (10%) per annum on a daily basis, or at such rate set forth by the Management Bodies at a general meeting, until the date of actual payment of the Charges due. However, pursuant to **Section 25(6)(b) of the SMA**, such interest shall not exceed ten percent (10%) per annum.

3.2 Publishing Defaulters' List

Reg 6(3) of the Third Schedule of SM Regulation – The Management Bodies may compile a defaulters' list that includes the names of defaulting owners, their respective parcels, and the amount of the Charges that remains unpaid and may display the defaulters' list on the notice boards in the building provided that such list must be updated by the Management Bodies at the end of each calendar month.

Wong Ming & Anor v Megan Avenue II Management Corporation & Ors [2022] MLJU 513

Brief facts

In this case, the Plaintiff (parcel owners) claims damages against the Defendant (Management Corporation) for alleged defamatory statements via a defaulters' list containing the Plaintiff's name which the Defendant had published on all notice boards in the building despite the fact that the Plaintiff, at that juncture, has no outstanding Charges due with the Defendant. Upon complaint by the Plaintiff, the Defendant immediately took down the list containing the Plaintiff's name and tendered an apology to the Plaintiff for the mistake followed by the publication of a notice of apology on all the notice boards in the building.

Despite so, an action was initiated by the Plaintiff against the Defendant on the basis that the list was inaccurate and untrue which had lowered them in the estimation of right-thinking society and cast an unfavourable imputation on them.

High Court (Kuala Lumpur)

The learned judge finds that the defaulters' list containing the Plaintiff's name is not defamatory in nature and thus dismisses the Plaintiff's claim on the following grounds:-

- Although the Defendant has wrongfully named the Plaintiff as one of those owing an outstanding sum to the Defendant, it is crucial to take note of the prompt action taken by the Defendant in removing the list after receiving a complaint from the Plaintiff. Not only that, the Defendant has also posted a correction and apology for the mistake. The court is also of the view that no malice or ill-intention can be seen from the list, in law an act is malicious if done intentionally without just cause or excuse. So long as a person believes in the truth of what he says and is not reckless, malice cannot be inferred from the fact that his belief is unreasonable, prejudiced or unfair *(Horrocks v Lowe [1972] 1 WLR 1625)*.
- The court agrees with the Defendant's argument that the list does not impute any dishonourable and/or bring discreditable towards the Plaintiff in natural and ordinary meaning as the statements complained of were not construed as to expose the Plaintiff to hatred, ridicule or contempt in the mind of a reasonable reader would tend to lower the Plaintiff in the estimation of right-thinking society generally; and moreover, the words used in the list were neutral and well within the confines of the Defendants' duty to notify all parcel owners of the collection status as of the date stated in the list.
- In a similar vein, at the time of publication of the list, the Defendant had no idea that the Plaintiff has paid. The Defendant premised that at the material time, the Plaintiff did not email the bank-in slip and details to the Defendant, making it impossible for the Defendant to know of such payment. Therefore, the position remains that in the absence of the proof of payment or notification from the unit owners (as expressly required in the Defendant's invoices), there will be a delay in updating the records and so the Defendant was under the impression that the facts at the material times were correct and there was the outstanding amount due and payable by the Plaintiffs. Only after the complaint was made, the Defendant was aware of the payments and the Defendant did not sit idle. The Defendant had promptly taken down the notice no less than 24 hours after it was posted.
- Having examined the words of the impugned notice, we were satisfied that the mind of any ordinary person reading the impugned notice would not assume anything defamatory of the same. The impugned notice did not accuse the Plaintiff of any wrongdoing, instead he was required to contact the Defendant to settle outstanding issues between them.

3.3 Deactivation of Access Cards

Reg 6(4) of the Third Schedule of SM Regulation – The Management Bodies may, at the expiry of a period of fourteen (14) days specified in item 3.1 hereof, and without prior notice, deactivate a defaulter's electromagnetic access device such as card, tag or transponder until such time the remaining sum in respect

of his parcel has been fully paid, together with a charge not exceeding Ringgit Malaysia Fifty (RM50) only that may be imposed for the reactivation of the electromagnetic access device. During the period of the deactivation, the Management Bodies may require the defaulter to sign in a defaulters' register book each time the defaulter requires any assistance for entry into or exit from the building.

In **Mok Siou Min v Hampshire Residences Management Corp & Ors [2018] MLJU 336**, the High Court held that:-

- Although **Reg 6(4) of the Third Schedule of SM Regulation** empowers the Management Bodies to deactivate access cards without notice, the Management Bodies may do so only upon the expiry of fourteen (14) days after the defaulter receives written notice from the Management Bodies.
- Apart from this, **Section 78(1) of SMA** requires written notice to be served on the defaulter for recovery of the sum due.
- In the present case, no such notice was served to the defaulter and the court found that the deactivation of access cards is not in accordance with SMA or the SM Regulations and as such is unlawful.

3.4 Access to the Common Facilities or Services is Restricted or Suspended

Reg 6(5) of the Third Schedule of SM Regulation – The Management Bodies may suspend or prohibit a defaulter from using the common facilities or services provided in the building, including any car park bay in the common property that has been designated for the use of the defaulter.

Ng Min Lin V 2Hampshire Management Corporation [2022] MLJU 664

Brief facts

In this case, the Plaintiff (the parcel owner) had defaulted in paying the Charges to the Defendant (Management Corporation), and as a result, the Defendant deactivated the Plaintiff's access card and prevented him from access to the lifts henceforth the Plaintiff brought an action against the Defendant whereas the summary of Plaintiff's case is as follows:-

- The Plaintiff submitted that the Defendant was not entitled under **Reg 6(5) of the Third Schedule of SM Regulation** to prevent the Plaintiff and/or the Tenant from using the lifts as the said regulation does not cover 'lifts' as common facilities.
- The Plaintiff argued that the Defendant's action in preventing the Plaintiff and/or the Tenant from using the lifts was a direct violation of the Plaintiff's right to peaceful enjoyment of the parcel.
- Furthermore, the Plaintiff contended that the Defendant ought to have exhausted all its legal remedies provided under **Section 78 of SMA** before deliberately preventing the Plaintiff and/or the Tenant from accessing the parcel.

High Court (Kuala Lumpur)

The presiding judge Mr. John Lee Kien How @ Mohd Johan Lee JC held that the Plaintiff's claim against the Defendant was based on the Defendant's unlawful acts of preventing the Plaintiff and/or the Tenant to access the parcel and other common facilities of the building. After perusing the cause papers, the witnesses' statements, the notes of proceeding, the written and oral submissions and the replies by the parties, the learned judge dismissed the Plaintiff's claim on the following grounds:-

- All residents of the said Apartment use the lifts and they do not belong to anyone exclusively. They cannot be personal properties or parcels belonging to any of the owners in the building. At all material times, they are fully maintained by the management corporation and not by any of the residents alone. They are not registered or owned by anyone. All of these fit the key and essential characteristics of a "common property" and "facility". The lifts are, therefore, undoubtedly common property and are facilities for the usage of the residents and visitors. That being said, the Plaintiff's contention that the lifts are not one of the common properties or facilities is totally misplaced and is bound to fail. Hence, the Defendant has the right to prevent the Plaintiff and/or the Tenant from accessing the lifts.
- Plaintiff's submission that the Defendant's action in preventing access to the lifts was tantamount to taking control and possession of the parcel would not suffice since the Plaintiff and/or Tenant was still able to access the parcel by other means, such as using the service lift. Hence, the Plaintiff had failed to show to the Court that the Defendant had indeed obtained or taken such unlawful control or possession of the parcel.
- The word "may" used in **Section 78 of SMA** is not mandatory but merely a choice to act or not. As such, the natural and ordinary meaning of **Section 78 of SMA** does not make

the filing of recovery actions mandatory, but rather it gives discretion to the management corporations to either commence an action against the defaulted parcel owners or to resort to any other mechanism.

3.5 Instalment Payment Scheme

Reg 6(6) of the Third Schedule of SM Regulation – Management Bodies may enter into any written instalment payment scheme with a defaulting parcel owner to enable them to settle their outstanding sum in the such number of instalments or upon such terms and conditions as the Management Bodies shall deem fit and proper, including withholding any other action permitted under the **SM Regulation**.

3.6 Recovery of Charges by Auction of Movable Property

Reg 35-42 of SM Regulation – These regulations empower the Management Bodies to apply to the Commissioner to issue a warrant of attachment authorising the attachment of any movable property belonging to the defaulting parcel owner which may be sold by auction conducted by the Management Bodies under the supervision of the Commissioner to recover the Charges due to the Management Bodies. All regulating processes, rules, notifications, prescribed forms, timelines and other needed actions by Management Bodies to collect the outstanding Charges by this means are more specifically described in these regulations and also in **Section 35** and **Section 79 of SMA**.

3.7 Recovery of Charges by Claim in Court or Before the Tribunal

Section 34 and **Section 78 of SMA** provide that the Management Bodies may serve on parcel owner a written notice demanding payment of the sum due within the period as may be specified therein, which shall not be less than fourteen (14) days from the date of service of the notice, and if any sum still remains unpaid by the parcel owner after the expiry of fourteen (14) days, the Management Bodies may file a summons or claim in a court of competent jurisdiction or in the Tribunal to recover the said sum. Management Bodies may seek legal advice and counsel for Court and/or Tribunal proceedings.

4. Hefty Fine and Imprisonment Terms

All parcel owners in stratified properties should be aware of the hefty fine and imprisonment terms that may be imposed on them if they fail, refuses and/or ignore to pay the outstanding Charges due to the Management Bodies upon expiry of fourteen (14) days from the date of notice of demand served to them in the prescribed Form 11 or Form 20 (as the case may be). **Under Section 34(3) and Section 78(3) of the SMA**, parcel owners who, without reasonable excuse, fail to comply with this notice commit an offence and shall on conviction, be liable to a fine of not exceeding RM5,000.00 or to imprisonment for a term not exceeding 3 years or to both, and in the case of a continuing offence, the parcel owner may be liable to a further fine not exceeding RM50.00 for every day or part thereof during which the offence continues after conviction.

In addition, pursuant to **Section 123 of the SMA**, parcel owners who fail to comply with the Tribunal's award commit an offence and shall, on conviction, be liable to a fine not exceeding RM250,000.00 or to imprisonment for a term not exceeding 3 years or to both, and in the case of a continuing offence, to a further fine not exceeding RM5,000.00 for every day or part thereof during which the offence continues after conviction.

5. Conclusion

We have seen here that it is essential for all parcel owners to pay the Charges due to the Management Bodies on time and comply with the strict requirement of law, not only to prevent the repercussions, but also to ensure that the fund is sufficient to preserve the value of the building, after all it is parcel owners right and exclusive use.

Short Term Rental Arrangement in Malaysia

BY CARMEN LEE

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1. Abstract

Short-term rentals have been a lifesaver for many property owners and landlords in the past few years. With the help of the Internet, online platforms like Airbnb, ibilik, and HomeAway allow property owners to rent out their property as short-term accommodation to generate profitable and additional revenue. However, from the perspective of common homebuyers who choose to live in stratified buildings, these short-term arrangements have continually raised genuine worries and complications in regard to privacy and safety. This article aims to explore the practicability of regulating these short-term rentals in stratified properties.

2. Defining Short Term Rental Arrangement

According to the **Malaysian National Land Code 1965 ("NLC"),** there are only two forms of rental arrangements, namely "Leases" and "Tenancies". Leases are typically referred to as long-term rental properties, usually for a period of three years or more; Tenancies on the other hand are commonly known for their shorter rental period.

Unfortunately, **Short-Term Rental Arrangements ("STRA")** like Airbnb do not fall anywhere within the boundaries of the aforementioned rental arrangements as listed in the NLC. These short-term rental arrangements differ in terms of rental duration, usually for a period of a few days up to a few weeks, and rental purposes. According to the **Urban Redevelopment Authority (URA) of Singapore**, short-term rental arrangements can be defined as a rental period of less than three consecutive months[1], and is usually associated with holidays and business trips.

3. The State Government's View Toward Short Term Rental Arrangement

Although STRA has been around for some time, there is no specific law in Malaysia that has been passed to legalize nor regulate it. In the year 2016, the Urban Wellbeing, Housing, and Local Government Ministry issued a statement regarding the legality of STRA, stating that STRA via Airbnb is an online "transaction and agreement made between the host and the traveller" and as a result can be viewed as a private agreement between two or more individuals, in which the Ministry have no direct authority to interfere. Hence, in the absence of any specific federal law governing STRA, it is currently being monitored and dealt with differently by the local government in each individual state.

3.1 Strict Approach in Sabah

In Sabah, Airbnb was initially deemed illegal. In a seminar held in 2017, titled "*Airbnb: Challenges and the Way Forward*", it was explained that Airbnb is essentially "a commercial activity" and does not fit the designated nature nor safety requirements of residential buildings. However, after review by the Sabah State Government, they have drafted some guidelines for Airbnb hosts to refer to. In general, owners of properties on lands zoned for commercial or commercial mixed-use only are allowed to rent out their units as short-term rentals with the condition that they apply and seek approval for a lodging house license to operate, at the same time complying with all fire safety requirements in the accommodation.

3.2 Relaxed Approach in Penang

In 2018, the City Council of Pulau Pinang (MBPP) had taken strict actions based on complaints from the public. They issued summons against owners who rented out their residential properties for short-term stays[2]. This was justified on the grounds that STRA violates two existing laws, the **Municipal Council of Penang Island (Trades, Businesses, and Industries), By-Laws 1991 and Town and Country Planning Act 1976**.

However, in January 2021, the Commissioner of Building under the MBPP released a letter stating that the hosts of STRA must first get approvals from their respective residential managements[3], after which the

[1] *https://www.ura.gov.sg/Corporate/Property/Residential/Short-Term-Accommodation (Assessed on 19th June 2022)*
[2] *see Kashmirjit Kaur A/P Harbans Singh – "Airbnb & Malaysian Stratified Homes" [2019] 1 LNS(A) viii*
[3] *https://www.iproperty.com.my/guides/is-short-term-rental-airbnb-legal/ (Assessed on 19th June 2022)*

relevant managements would then conduct an annual general meeting (AGM) to seek at least 75% approvals from the unit owners. Any violations to any house rules relating to STRA as laid down by the management would incur a fine of RM200[4].

3.3 STRA deemed as tenancy in Johor

In Johor, STRA has severely affected local budget hotel owners and strong objections have been raised against STRA hosts[5]. Despite these objections, the Johor Bahru City Council (MBJB) does not prohibit STRA in the state as it was considered similar to the common "tenancy agreement" between landlords and tenants[6].

3.4 Power of regulation delegated in Klang Valley

STRA is not banned in Selangor and Kuala Lumpur. However, it was encouraged by Kuala Lumpur City Hall (DBKL) that any individual, property agent or businesses involved in renting residential properties for short-term stays to register with DBKL[7].

In November 2015, the Commissioner of Buildings (COB), Kuala Lumpur addresses the issue of STRA in its directive whereby the residential managements of stratified buildings are allowed to amend their respective by-laws (as provided under the **Third Schedule of the Strata Management Act 2013**) with the effect of either regulating or expressly prohibiting STRA[8]. Subsequently in 2018, the COB further publishes a detailed guideline for residential managements in effecting any changes to their existing by-laws[9].

4. The Current Legal Position of Short-Term Rental Arrangement

4.1 Statutory Law

In Malaysia, all stratified properties are governed by the **Strata Management Act 2013 ("SMA 2013")** and the **Strata Management (Maintenance and Management) Regulations 2015 ("SMR 2015")**. This Act prescribes, inter alia, a set of by-laws known as the 'Third Schedule' which must be adopted and used for the management of stratified buildings. The provisions of the by-laws are, in essence, "mutual covenants" which must be complied by the parcels' owner, as well as "any chargee or assignee, lessee, tenant, or occupier of a parcel"[10].

Currently, there is no provision in the SMA 2013 that specifically addresses the issue of STRA. Nevertheless, a self-regulated management corporation which was formed by the parcel owners is allowed to "make additional by-laws" or make an amendment to the existing provisions of the by-laws to regulate the use and enjoyment of stratified properties by passing a special resolution[11].

Since SMA 2013 allows the strata management bodies to regulate their own schemes, the legalization of STRA could then be regulated by adding a specific by-law providing for or against the STRA or even allowing it with restrictions. The enforcement of any such additional provisions is also strengthened by **Section 32(3)** and **70(2) of the SMA 2013** which also allows management corporations to impose a maximum fine of RM200.00 against any "parcel owner, occupant or invitee" who infringes such provisions.

4.2 Case Law

4.2.1 English Case of O'Connor (Senior) & others v. The Proprietors[12]

This is an appeal to the Privy Council from the Court of Appeal of the Turks and Caicos Islands concerning an issue of considerable interest and significance in relation to the short-term use of units in a residential condominium development named The Pinnacle.

The respondent is the body corporate charged under the **Strata Titles Ordinance (CAP 9.04) ("the Ordinance")** empowered to make by-laws for the purpose of regulating the control, management, administration, use and enjoyment of the strata lots at The Pinnacle.

The material by-laws for The Pinnacle, which are the subject of this appeal was:

"7.1 Each Proprietor shall:

...

9. Not use or permit his Residential Strata Lot to be used other than as a private residence of the Proprietor or for accommodation of the Proprietor's guests and visitors. Notwithstanding the foregoing, the Proprietor may rent out his Residential Strata Lot from time to time provided that in no event shall any individual rental be for a period of less than one (1) month ... (Emphasis added)"

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[4] *Ibid note 4.*
[5] *Ibid note 3*
[6] *Ibid note 3*
[7] *Ibid note 3*
[8] *see Commissioner of Buildings, Kuala Lumpur – "Pekeliling COBKL 2015/16"*
[9] *https://www.dbkl.gov.my/pesuruhjaya-bangunan-cob/ (Assessed on 19th June 2022)*
[10] *Regulation 1, Third Schedule; Strata Management (Maintenance and Management) Regulations 2015).*
[11] *sections 32 and 70 of Strata Management Act 2013*
[12] *[2017] UKPC 45*

In this present case, the appellants ("the O'Connors") own a unit at The Pinnacle and they have allowed their unit to be occupied by paying holidaymakers for periods of less than one month at a time. The respondent sought an injunction to restrain such use, contending a contravention of by-law 7.1.9. The appellants defended the claim by arguing that the by-law 7.1.9 was of no effect, alleging that it contravenes **Section 20(4) of the Ordinance** which stipulates:

"No by-law shall operate to prohibit or restrict the devolution of strata lots or any transfer, lease, mortgage or other dealing therewith or to destroy or modify any easement implied or created by this Ordinance"

The trial judge found in favour of the unit owners but subsequently the Court of Appeal reversed that decision and granted an injunction. The case was appealed to the Privy Council.

Privy Council in dismissing the appeal, held that by-law 7.1.9 is valid as a legitimate restriction on the use of residential strata lots and it does not involve an impermissible restriction on leasing as contrary to **Section 20(4) of the Ordinance**. The aforesaid judgement is grounded on the basis that:

(a) Even though **Section 20(4) of the Ordinance** prohibits restrictions on dealing in strata lots, it does not prevent restrictions on the uses of the lots, even if such restrictions may have the inevitable effect of restricting the potential market for the lots,

(b) By-laws are to be construed benevolently, having regard to their purpose in assisting the good management of the development for the benefit of its residents overall. They are to be accorded a degree of respect and deference by the courts.

(c) It is noteworthy that by-law 7.1.9 is expressed to apply, to a "residential strata lot", namely a unit "intended for use as a residence".

(d) The first sentence of by-law 7.1.9 is a highly limiting restriction by allowing only the residential use by the proprietor of the strata lot. However, this was further relaxed by the second sentence of by-law 7.1.9 whereby it provides a measure of relief by allowing residential use by others, including exploitation for rental by third parties, provided always that any letting is for at least one month.

(e) Following the approach in Caradon District Council v Paton (2001) 33 HLR 34 where Latham LJ held that:

"Both in the ordinary use of the word and in its context it seems to me that a person who is in a holiday property for a week or two would not describe that as his or her home. It seems to me that what is required in order to amount to use of a property as a home is a degree of permanence, together with the intention that that should be a home, albeit for a relatively short period, but not for the purposes of a holiday."

In brief, it was held that short-term use by transient holiday-makers is different in character from long-term residential use. A person in the rented property for a week or two is not using the same as his home or residence; such use lacks a degree of permanence.

(f) The temporal requirement in by-law 7.1.9 is justifiable because it attempts to limit the use of the lot to that of a residence by ensuring the degree of stability in occupation required to preserve residential use.

(g) All in all, by-law does not prohibit letting; it prohibits use other than as a residence.

For the foregoing reasons, the Privy Council upheld a strata by-law which ban holiday lettings of less than one month.

4.2.2 Reaffirmed in a Malaysian Federal Court's case of Innab Salil & Ors v. Verve Suites Mont' Kiara Management Corporation [2020] 10 CLJ 285

4.2.1.1 Brief Facts

In this case, the plaintiff was the Management Corporation ("MC") incorporated pursuant to the **Strata Titles Act 1985 (STA 1985)** to maintain and manage a residential development known as "Verve Suites" and the defendants were parcels owners of Verve Suites who leased out their units on short term and long-term rental arrangement ("Unit Owners").

On 18 November 2015, the Commissioner of Building Kuala Lumpur (COBKL) issued a directive, vide "**Pekeliling COBKL 2015/16**" addressing the issue relating to short-terms rentals in strata building in and around Kuala Lumpur under the COBKL. In general, the directive permitted the addition of by-laws prohibiting the use of strata residential units from being used as homestay or tourist use except with the permission of the management body.

Following the issuance of the said directive, the MC held an Extraordinary General Meeting ("EGM") on 25.03.2017 and passed, inter alia, a house rule ("House Rule No. 3") prohibiting all forms of short-term rental activities involving the use of residential units by unit owners. The Unit Owners, in defiance of the House Rules No. 3, continue to engage in short term rental activities. As a result, the MC issued a fine of RM200 per day against the Unit Owners who failed to abide to the House Rule No. 3.

Dissatisfaction with the prohibition of short-term rentals by the MC, the Unit Owners initiated the Strata Management Tribunal proceedings against the MC, challenging the validity of the House Rule No. 3. The action was subsequently dismissed by the Tribunal.

The MC then filed an action in the High Court for the enforcement of House Rule No. 3 and an injunction order against the Unit Owners from breaching the said rule. In response, the Unit Owners objected, stating that House Rule No. 3 violates **Section 70(5)(a) of the Strata Management Act 2013 ("SMA")**.

4.2.2.2 The Unit Owners' Contention

The Unit Owners argued that House Rule No. 3 contravened Section 70(5)(a) of the SMA which was reproduced as below:

(*5) No additional by-law shall be capable of operating-*
(a)To prohibit or restrict the transfer, lease or charge of ***or any other dealing with any parcel of a sub divided building or land****; and*
(b)To destroy or modify any easement expressly or impliedly created by or under the Strata Titles Act 1985.

The Unit Owners contended that short-term rentals fall within the ambit of *"any other dealing with any parcel of a sub divided building of the land"*. The word "dealings" takes its definition from **Section 5 of the NLC** which means any transaction with respect to alienated land effected under Division IV, and any like transaction effected under the provisions of any previous land law, but does not include any caveat or prohibitory order. One of the types of dealings under Division IV of the NLC is tenancies for a term not exceeding three years. The Unit Owners further submit that the short-term rental is actually a form of tenancy exempt from registration under **Section 213 of the NLC** as the period is less than three years.

Thus, House Rule No. 3 which prohibited short-term rentals has infringed **Section 70(5)(a) of SMA** because it restricts the proprietor's usage of the individual's units. The said Act merely empowers the MC to manage the common property but such power does not extend to restrict the respective parcel owner's inherent right in dealing with their own property including but not limited to selling, renting or leasing their parcels and that house rule should not be oppressive and unreasonable such that they will adversely affect the individual proprietor's rights.

4.2.2.3 Decision by High Court

The learned High Court judge held that short-term rental guests are merely transient lodgers and referred to Airbnb's terms of service which describes the booking by the guest as "a licensee" and hence short-term rental is not tenancy.

Further, the learned High Court judge held that House Rule No. 3 as an additional by-law which was voted and passed by a special resolution by a majority of 96:3 is valid and enforceable pursuant to **Section 70(2) of the SMA**. It is also not in any way contrary to **Section 70(5)(a) of the SMA** as it serves to preserve the safety and security of all the residents in the condominium and to protect the common property.

However, the High Court though found in favour of the MC, struck down that part of House Rule No. 3 which imposes a daily fine of RM200 against the Unit Owners, for each day infringement continues, as it violates **Section 70(2) of SMA 2013**. It was held that **Section 70(2)(i)** of the same only allows a fine of RM200 for each breach of any by-law. Not by day.

4.2.2.4 Decision by Court of Appeal

The Court of Appeal upheld the decision of the High Court.

On the point of whether the word "dealing" in **Section 70(5) of the SMA** applies to short-term rentals, the Court of Appeal held that short-term rentals are arrangements which are temporary in nature and the relationship between the Unit Owners and the short-term renters is one of licensor and licensee, and not one of landlord and tenant.

As such, "dealings" should not be subjected to the definition founded in the NLC. To interpret otherwise would defeat the concept of strata living where owners have joint ownership and peaceful and quiet enjoyment to the common property and facilities of the strata scheme without any outside interference from third parties or strangers.

Further, the Court of Appeal observed from **Section 70(5)(a) of the SMA** which states that "no additional by-law shall be capable of operating to prohibit or restrict the… lease… of a subdivided building or land…" and lease as defined in **Section 221(2) of the NLC** is for a term exceeding three years, therefore the reference to the word "lease" in **Section 70(5)(a) of Act 757** must be taken to mean a lease under the NLC. Therefore, the practice by the Unit Owners for short term rentals which are less than three years, can never be construed as a "lease" protected by **Section 70(2) of the SMA** but a bare license for a permissive occupancy which the majority of the strata community in Verve Suites agreed to prohibit through the passing of House Rule No. 3.

In relation to whether short-term rentals fell within the scope of tenancies exempt from registration,

the Court of Appeal analysed **Section 316 to 318 of the NLC** on the application for endorsement of tenancy exempt from registration, the application procedure and the cancellation thereof. The Court of Appeal concluded that it would be impractical for the Unit Owners to endorse short-term guests on the register document of title and cancel the same for every short-term rental. Hence, tenancy exempted from registration under NLC is not intended to cover short-term stays given on its nature of temporary occupation.

The Court of Appeal further held that whilst the SMA allows the imposition of a fine of RM200 for any breach of by-laws, it does not provide for nor envisage an imposition of a RM200 fine for each day of continued infringement. Hence, the management corporation in this case was not authorised to impose a fine for each day the infringement continued.

4.2.2.5 Decision by Federal Court

(a) Whether the house rules may override and supersede the express land use on the title imposed by the State Authority under Section 120 of the NLC.

The Unit Owners argued that Verve Suites are held under a title which has a category of usage: building with an express condition that the land shall be used for commercial building with the purpose of service apartments and commercial only as imposed by the State Authority pursuant to **Section 120 of the NLC**. Hence, House Rule No. 3 is illegal as it prohibits the owners of the commercial service suites from commercial usage, in particular, for short-term rental.

To resolve the apparent conflict between **Section 120 of the NLC** and **Section 70 of the SMA 2013**, the Federal Court held that the provisions must be read harmoniously, and as the result of harmonious construction of these provisions, the conditions and restrictions of use as imposed by the State Authority onto the title of the land, do not preclude the management corporation from promulgating further rules, regulations or by-laws for the purposes provided for by law.

The grant of powers or rights by one particular provision in a law does not mean that such rights may not at the same time be restricted by other provisions of the law.

(b) Whether the management corporation's enforcement of the house rule no 3 is in violation of Section 70(5) of the SMA 2013.

The Federal Court after considering all the relevant authorities from the English and Malaysian cases held that the there is no singular test to determine whether an occupancy is a tenancy or a licence. The Court will need to consider the whole circumstances of each case by looking at the following principles:

i. Whether there is proof that the owner of the premises granted the occupier the right to exclusive possession of the premises. If the answer is affirmative, then it is highly likely that the arrangement is a tenancy and not a licence.

ii. Where the occupier is unable to establish that he has obtain exclusive possession of the premises, the court must nonetheless determine the nature and quality of the occupancy by analysing the terms of any written or oral agreement between the parties.

iii. 'Intention' or 'nature and quality' refers to specific indicators such as whether parties intended the occupier to have certain rights and obligations which are consistent with that of a tenant under tenancy laws.

iv. Where there is no proof of exclusive possession and there is no intention manifested that the nature and quality of the occupancy do constitute a tenancy, it would be appropriate for the court, in those circumstances, to conclude that the arrangement was intended to be merely a licence and not a tenancy.

v. Whatever labels the parties use to describe their arrangement or the occupancy, for example, 'lease', 'tenancy' or 'licence' is relevant in the determination of their intention and the nature and quality of the occupancy, but is neither decisive nor conclusive.

vi. In each and every case, particular emphasis needs to be paid to the parties' substantive obligation under the agreement, whether written or oral, and not so much the language and labels they ascribed to the words.

In this instant appeal, the Federal Court having putting aside the label of "license" used in the Airbnb terms of service and read carefully the said terms, find that there are certain terms which are inconsistent with tenancy rights. For example, cl. 8.2.1 of Airbnb terms of service reserved the right of the host to re-enter the premise in the event the occupants fail to leave the premise on time whereas in tenancy, if a tenant holds over, he cannot be removed except in accordance with an order of possession. In addition, cl. 8.1.3 of Airbnb terms of service on the renters' obligation to regulate the number of guests that can allow into the premises.

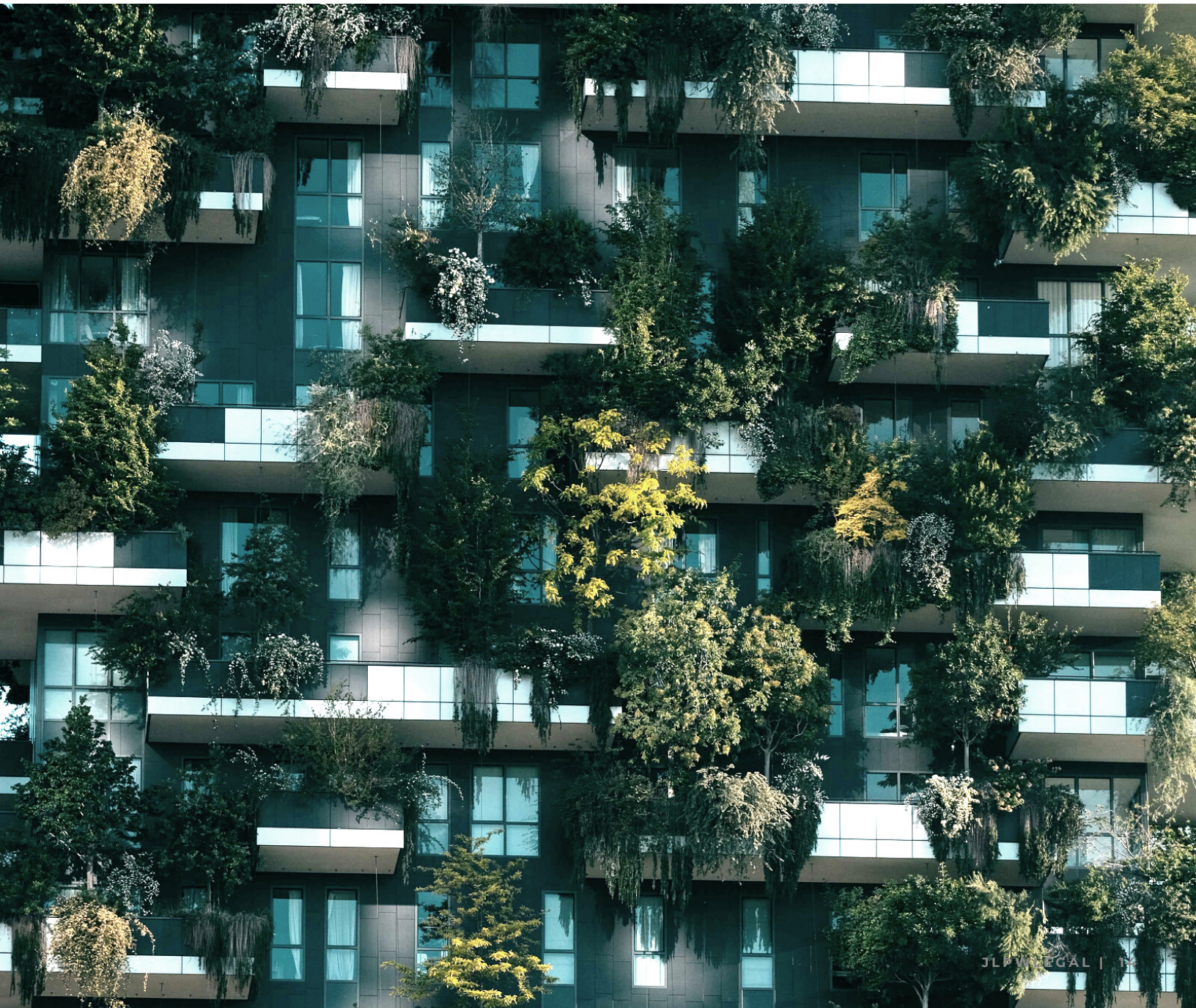
indicates that the said renters do not have the right to manage their own use of the premises to the exclusion of the Unit Owners.

For the abovementioned reasons, the Federal Court held that there is no proof by the Unit Owners of exclusive possession on the part of short-term renters nor does the evidence suggest that the nature and quality of the occupancy of the said renters was ever intended to be a tenancy. Hence, the said arrangements are nothing more than mere licences and therefore do not amount in law to "dealings" within the ambit of **Section 70(5) of the SMA 2013**. Accordingly, house rule no 3 is not ultra vires **Section 70(5) of the SMA 2013**.

5. Conclusion

Our apex Federal Court's decision has been long-awaited to solidify the regulations passed by condominium management bodies and brings finality to the issue of legality of the house rule which prohibit the STRA.

This decision would surely impact the market of STRA and the parcel owners who have been renting their strata properties as a short-term rental accommodation. Nevertheless, this decision has benefits and protected the residents in the strata community of their right to the quiet enjoyment of the property without any interference and disturbance from the outsiders.



JLPW Online Internship Welcome Event

On the 4th April 2022, JLPW welcomed 18 Online Interns from the Northwest University of Political Science and Law, Xi'an, China ("NWUPL") to join our corporate and litigation departments for a 3-month long Online Internship Programme. The Welcome Event was attended by Mr Jeff Leong, Senior Partner of JLPW; Ms Ma Cheng, Vice Dean of the Graduate School of NWUPL; Ms Chen Mengqi, Deputy Director of the Office of International Exchange and Cooperation of NWUPL; members of JLPW; as well as representatives from NWUPL.

The Welcome Event heard the speeches of Mr Jeff Leong, Ms Ma Cheng and Ms Chen Mengqi on the promotion of cross-border cooperation as well as international academic exchange. The speakers also wished their best to the online interns as they commence their Online Internship with hopes that the experience would nurture and inspire the budding talents.

China's Consumer Rights Day

A presentation by Mr. Ganesh Nathan

In line with China's Consumer Rights Day, an international workshop on consumer rights was held on 15th March 2022. The topic of the workshop was "Legal Framework from a Consumer's Stand" and its purpose is to explore the availability of consumer protection in different jurisdictions. Guest speakers included distinguished lawyers from China, Australia and Malaysia.

Mr. Ganesh Nathan, a partner and the Head of Dispute Resolution of Messrs. Jeff Leong, Poon & Wong, joined the online workshop as a guest speaker. Mr Ganesh's presentation began with the various national legislations which provide consumer protection and concluded with the enforceability of mediation clauses in Malaysia. Also attending the workshop were Toh An Ni (Associate) and Lim Yuh Shiun (Pupil-in-chambers).

Key Changes that came with the Occupational Health and Safety (Amendment) Act 2022

BY CHIAM YEUNG CHIEN

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With the beginning of the transition to the endemic phase and lifting of the movement restrictions in Malaysia, various economic sectors in the country are beginning to reopen[1]. This has seen a majority of the Malaysian workforce gradually returning to their offices full-time and with it, a greater emphasis on health and safety at the workplace.

In light of this development, this article seeks to discuss the legislation surrounding health and safety at places of work in Malaysia by noting some of the key changes that were passed in the Occupational Safety and Health (Amendment) Act 2022 ("**OSHAA 2022**"), which will amend the Occupational Safety and Health Act 1994 ("**OSHA 1994 / the Act**").

Previously, health and safety in the workplace was governed under the OSHA 1994 and the Factories and Machinery Act 1967 ("**FMA**"). This was changed through the repeal of the FMA by Parliament.[2] The repeal of the FMA was to be taken together with the amendments under the OSHAA 2022, which was gazetted on 16th March 2022.

1) Scope and applicability of the Amendment

Under the amended Section (2) of the OSHAA 2022, the Act has been widened to cover "all places of work throughout Malaysia"[3], and now applies to the majority of employees and workers with the exception being domestic servants, armed forces and workers onboard ships governed under inter alia the Merchant Shipping Ordinance 1952[4].

The significance of this change is that it greatly expands the scope of coverage of the OSHA 1994 and ensures that the health, safety and welfare of employees not previously covered under the OSHA 1994, such as those from the public services and those from statutory bodies, are protected whilst carrying their duties.

Another point to note from the amendment is that although not expressly provided for in the Act, nor commented on yet by the Department of Safety and Health ("**DOSH**"), is that there has been suggestion from the Minister of Human Resources in the Parliament debate hansards that the Act will apply to employees working remotely as well.[5]

From an employer's point of view, this means that they will have to take into account whether proper equipment and safety training policies have been provided and are in place to sufficiently protect those employees who continue working remotely.

2) Rights of employees to remove themselves from imminent danger

One of the key changes brought about by the OSHAA 2022 is that employees will have a right to remove themselves when facing imminent danger[6] towards their health and safety whilst at the workplace.

If an employee fulfills the 2 prerequisites of the newly introduced Section 26(A)(1), namely by informing his employer of his reasonable belief that imminent danger exists at his place of work and his employer fails to take

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[1] *"Malaysia to transition to endemic phase of Covid-19 on April 1, says PM', The Edge Weekly, 08 March 2022, https://www.theedgemarkets.com/article/malaysia-enter-endemic-phase-april-1-says-pm*

[2] *'Factories and Machineries (Repeal) Act 2022, Act 835 has received royal assent on 04 March 2022 and was gazetted on 16 March 2022, but has yet to come into effect https://lom.agc.gov.my/principal.php?type=original*

[3] *Section 2(a) of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*

[4] *Section 2(b) of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*

[5] *Hansard, 27 October 2021, Bil. 20, Page 97.*

[6] *Section 23 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648 inserts the definition of 'imminent danger' as "a serious risk of death or serious body injury to any person that is caused by any plant, substance, condition, activity, process, practice, procedure or place of work hazard. into the OSHA 1994.*

any action on the matter, he is then entitled to exercise his right to remove himself from such imminent danger and shall be protected by Section 26(A)(2) from any undue consequences and discrimination from his employer, such as a dismissal from or injury to his employment.[7]

3) What are the duties owed by principals to its contractors and sub-contractors under the new OSHAA 2022?

The next point of consideration is the addition of Section 18A to the OSHA 1994 which sets out the obligations owed by a 'principal', who is defined in the Act as "*...any person who in the course or for the purpose of his trade, business, profession or undertaking contracts with a contractor for the execution by or under the contractor of the whole or any part of any work undertaken by the principal*".[8]

Similar to the duties owed by an employer under the OSHA 1994, a principal has to ensure that the safety and health of any contractor or sub-contractor employed or engaged by him as well as those workers employed or engaged by such contractors and sub-contractors are protected under the Act.[9]

The new Section 18A to the Act further elaborates on some of the duties owed by principals, which include inter alia, (a) the provision and maintenance of plants and systems of work, (b) making arrangements for time and resources in connection with construction work activities and (c) the provision of such information, training and supervision.[10]

4) Conducting risk assessments

The addition of Section 18B[11] to the OSHA 1994 introduces new duties on an employer, self-employed person and principal to conduct risk assessments with regard to the safety and health risks posed to persons who may be affected by his undertaking at work. In the event that a risk is found to be present after the assessment, the employer, self-employed person and principal is required to implement risk control measures to eliminate or reduce said risks.

While the above changes are welcomed, there is a potential issue whereby the employers and principals take liberties with the assessment of risk based on the Hazard Identification, Risk Assessment and Risk Control ("**HIRARC**") issued by the DOSH, which has its own assessment scale and may not be reflective of each industry's needs and requirements.[12]

The question then shifts to whether an employer is justified in not taking steps to eliminate hazards where it is unlikely to occur, or where risk of injury only arises in the event of misuse of machinery, which will hopefully be addressed in upcoming guidelines issued by the DOSH or by case law.

5) Increase in penalties under the OSHA 1994

To ensure that health and safety provisions in the act are complied with, the OSHAA 2022 also seeks to increase the penalties that may be imposed on employers, self-employed persons and principals from RM50,000.00 to RM500,000.00 for any breach of their duties under the OSHA 1994[13].

As for designers, manufacturers and suppliers who have breached their duties under the OSHA 1994, their fines have been increased from RM20,000.00 to RM200,000.00.[14]

It should be noted however, that prior to the OSHAA 2022 coming into effect, the courts have been conservative with the imposition fines for breaches of the OSHA 1994, which is evidenced by the statistics published on the DOSH website showing that most fines are below the maximum limit of RM50,000.00,[15] thus

[7] *Section 23 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[8] *Amended Section 3(1)(xviii) of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[9] *Section 16 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[10] *Section 16 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[11] *Section 16 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[12] *Page 12, Guidelines for Hazard Identification, Risk Assessment and Risk Control https://www.dosh.gov.my/index.php/competent-person-form/occupational-health/regulation/guidelines/hirarc-2/1846-01-guidelines-for-hazard-identification-risk-assessment-and-risk-control-hirarc-2008/file*
[13] *Section 17 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[14] *Section 20 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648*
[15] *https://www.dosh.gov.my/index.php/prosecution-case*

Further to the above, the scope of potentially liable persons under the OSHA 1994 will be widened to cover not just body corporates and its directors, managers and secretaries, but also the compliance officers, partners and other officers in the company of a similar role.[16]

These persons covered under the widened scope of the amendment can be held jointly or severally liable for any breaches committed by the company or relevant body, and the only defence available to them is to show that such breaches were committed without their knowledge and consent, and that he has taken all reasonable steps and due diligence to prevent the commission of the breach.[17]

In practice, what this suggests is that a workplace will need to have in place proper health and safety policies, systems and standard operating procedures for them to rely on the aforementioned defence.

Conclusion

With the amendments brought by the OSHAA 2022, greater clarity has been provided with regards to the duties and obligations owed by employers and principals towards their employees or contract workers.

Employers and principals now have to place greater care on protecting their employees' and contractors' health and safety and the OSHAA 2022 has empowered employees to take positive action for their own wellbeing.

It is hoped that with this brief article, both employers and employees will be aware of some of their rights and obligations and are able to properly navigate the challenges and responsibilities to create a safer workplace.

[16]Section 43 of the Occupational Safety and Health (Amendment) Act 2022, Act A1648 extends the liability of a person committing an offence under the Act or any subsidiary legislation to a "...company, limited liability partnership, firm, society or other body of persons, a person who at the time of the commission of the offence was a director, compliance officer, partner, manager, secretary or other similar officer of the company, limited liability partnership, firm, society or other body of persons or was purporting to act in the capacity or was in any manner or to any extent responsible for the management of any of the affairs of the company, limited liability partnership, firm, society or other body of persons or was assisting in its management."

[17]Ibid

General Overview of Digital and Electronic Signatures in Malaysia

BY JAVENE FAN

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Digital technology has accelerated tremendously during the global COVID-19 pandemic. As movements and contacts were restricted, businesses have no option but to turn to digital technology to hold virtual meetings and transact all business activities. Such a shift toward digital technology has moved businesses away from pen and paper to paperless signatures as the mode of execution of documents.

In Malaysia, there are two types of legally recognised paperless signatures, namely electronic signature and digital signature. The terms "electronic signature" and "digital signature" are not the same although they are often used interchangeably.

What is Electronic Signature?

Governed by the Electronic Commerce Act 2006 ("**ECA**"), electronic signature is broadly defined as *"any letter, character, number, sound or any other symbol or any combination thereof created in an electronic form adopted by a person as a signature"[1].*

An electronic signature exists in various forms, including but not limited to a 'digital signature', a short message service ("**SMS**"), the typing of a name, a signature made electronically using a device such as a stylus or a scanned version of an actual signature or created via software which is then used to 'sign' documents electronically.

Pursuant to Section 9 of the ECA, an electronic signature is valid and legally enforceable if:

(a) it is attached to or is logically associated with the electronic message;
(b) it provides adequate identification of the person and indicates the person's approval of the information to which the signature relates; and
(c) it is as reliable as it is appropriate for the purposes and the circumstances in which the signature is required in the sense that:
  (i) the means of creating the electronic signature is linked to and under the control of that person only;
  (ii) any alteration made to the electronic signature after the time of signing is detectable; and
  (iii) any alteration made to that document after the time of signing is detectable.

In the case of **Yam Kong Seng & Anor v Yee Weng Kai [2014] 4 MLRA 316**, it was held that the SMS had fulfilled the requirements of an electronic signature under the ECA as the sender was adequately identified with the telephone number representing the sender of the electronic message. The court further confirmed that it would be sufficient if there was any mark which identifies the act of the party, perhaps in the form of a mark or by some distinguishing feature peculiar only to that person, then the acknowledgement had been signed.

In short, electronic signatures for purpose of the ECA can be in the form of any mark, created using any electronic means.

What is Digital Signature?

Digital signature is a subset of electronic signatures and is governed under the Digital Signature Act 1997 ("**DSA**"). A digital signature is defined as "*a transformation of a message using an asymmetric cryptosystem such that a person having the initial message and the signer's public key can accurately determine: (a) whether the transformation was created using the private key that corresponds to the signer's public key; and (b) whether the message had been altered since the transformation was made"[2].*

[1] Section 5 of the ECA
[2] Section 2 of the DSA

In other words, digital signature is a signature generated using an asymmetric cryptosystem that is verified by reference to the public key listed in a valid certificate issued by a licensed certification authority ("**LCA**") and such is deemed valid and legally binding if it is created in accordance with the DSA. A document signed with a digital signature in accordance with the DSA shall be as legally binding as a document signed with a handwritten signature, an affixed thumbprint or any other mark[3].

Currently, there are only four LCAs that issue legally binding digital certificates:

1) Pos Digicert Sdn Bhd
   [Registration No.: 199801001482 (457608-K)]
2) MSC Trustgate.Com Sdn Bhd
   [Registration No.: 199901003331 (478231-X)]
3) Telekom Applied Business Sdn Bhd
   [Registration No.: 199701039843 (455343-U)]
4) Raffcomm Technologies Sdn Bhd
   [Registration No.: 201001015771 (1000449-W)]

Pursuant to Section 62 of the DSA, where a rule of law requires a signature or provides for certain consequences in the absence of a signature, that rule shall be satisfied by a digital signature where:

(a) that digital signature is verified by reference to the public key listed in a valid certificate issued by an LCA;
(b) that digital signature was affixed by the signer with the intention of signing the message; and
(c) the recipient has no knowledge or notice that the signer (i) has breached a duty as a subscriber or (ii) does not rightfully hold the private key used to affix the digital signature.

In short, digital signatures use certificate-based digital IDs to authenticate the identity of the signer, which provides a higher level of security and assurance. Each signature is bound to the document with encryption which demonstrates proof of signing and such validation is done through LCA. DSA also ensures additional security measures to safeguard the subscriber's private key information by imposing a fiduciary responsibility on the LCA.

Limitations

(a) *Government Authorities' Requirement*
Even though electronic signatures and digital signatures are recognized in Malaysia, there are specific types of legal documents that require notarisation and attestation, which cannot be signed electronically. Common examples include affidavits used in court proceedings and instruments effecting dealing with the real property under the National Land Code. In practice, government authorities such as Lembaga Hasil Dalam Negeri and land registry would only accept documents signed with wet signatures.

(b) *Regulatory Requirement*
Pursuant to the ECA, electronic signature shall not be applicable to the transactions or documents relating to:

(i) Power of Attorney;
(ii) The creation of wills and codicils;
(iii) The creation of trusts;
(iv) Negotiable instruments (for example cheques or promissory notes);
(v) Notice of demand or notice to be served prior to commencing of legal proceedings; and
(vi) Courts documents.

Therefore, these types of documents cannot be executed in electronic form if they are intended to be legally binding.

Conclusion
In a nutshell, electronic signatures and digital signatures are viable alternatives to conventional pen and paper signatures. However, the use of electronic signatures and digital signatures warrants careful consideration in light of the abovementioned factors.

[3] Section 62(2) of the DSA

Expert's Voice-"It is working with people, people and people"

Margaret G P Fong

Margaret G P Fong - Chief People Officer
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More than 40 years of experience in various human capital positions in the food, motor, chemical, insurance, property, construction, manufacturing, hospitality and financial services industries. In addition, seven years of experience in operations encompassing underwriting, customer service, claims and branch operations where Margaret was the SVP in Great Eastern Life Assurance, a leading insurance company. She was attached to a government agency, PIDM as General Manager, Human Capital. Her last position was CHRO, in OSK Holdings Berhad a public listed family owned conglomerate overseeing Group HR.

Holds a degree in business administration from Ottawa University, US, Diploma from the Life Office Management Association, US, Diploma in TESOL from London Teacher Training College, UK and a Masters in Human Resource Management, University of Canberra, Australia.

What kind of goals would you have in mind in your work as HR at JLPW?

I see our colleagues here, especially the lawyers, being technically very strong and competent. Hence what I would like to do for JLPW is to ensure that we have a humanized workplace – whereby both lawyers and support staff feel safe and respected, motivated to innovate, and inspired to get work done efficiently. Historically speaking, business strategies have always revolved around production and outcome, and for the longest time, human capital was deemed a mere instrument to achieve those goals. This applies to most of the organizations that I have been in. My experience is that the workforce has been empowered to set their own terms and financial compensation alone is not enough to motivate people to work hard, as professionals are seeking humanized work environments – where their voices can be heard, and where collaboration, inclusivity, and transparency are upheld. This is especially true after their "pandemic" experience.

Can you tell us about your proudest achievement in JLPW or what makes you proud of JLPW?

To me since I joined a year ago, there is not one proudest achievement, every moment is happy and fulfilling as long as I am able to do something for my colleagues, and that my colleagues share the same sentiment. I would like to give a simple example, I remember when I first stepped in and my maiden hiring was Jack Tan, from Corporate together with Kenny. He was such an amicable candidate, someone you can warm up to immediately. He accepted our offer almost immediately without any fuss and that makes me feel good. Then came along Zac, Hui Peng, Cynthia & Henry with equally no fuss. Of course, it also goes without saying that having the Senior Partners appreciate my contributions and value gives me the motivation and enthusiasm to go the extra mile.

It is your first time working as HR in a law firm, how would you describe your experience in working at JLPW compared to your previous job?

I joined JLPW right in the smack of the MCO so it was really tough for the first couple of months when I had to do everything myself from printing to typing to preparing documents to be sent out. For the past 2 decades, I always have a team of staff with me and in my last employment in OSK, I had a workforce of 2200 with 35 HR reports with 6 line of businesses where it was a matter of providing oversight and delegation.

I was able to survive because the conveyancing support team were extremely helpful to ensure that I did not fail. On this score, I must say a BIG thank you to Lynette, Kathy and Natirah. I remember that I had to generate the MITI letters on a weekly basis and I didn't know how to do mail merge and even simple conversion to PDF of files, which they helped me. I also want to thank Joy (with her "curry puff" bun) by making me very welcome with her "edible" curry puffs and brownies and weighing in occasionally to ensure that I was good. Kenny's support was also undeniable and unwaveringly so that of course, was another enticing factor.

What are you looking for in terms of career development in JLPW?
What I want to do is to continue using my skills, knowledge and expertise to touch the lives of the community at large, especially the millennials and I hope to do this in JLPW through coaching, mentoring and supporting them. In addition, the SPs are very gung-ho on sustaining and growing the business and I am extremely excited so every day is an opportunity where I want to contribute to the growth of the firm and play an instrumental role.

When working in JLPW, how do you stay up-to-date on country-specific labour laws and HR regulations so that our firm will always rely on the latest law and regulation especially in HR management?
With the greater use of digital tools and technology, it is not difficult to stay updated as long as I make time for it. Moreover, my HR network is wide and encompassing.

Why did you choose JLPW?
I was approached by HireSeniors who was in collaboration with Khazanah Berhad and they offered me a few options. I checked out JLPW because I had no experience in the legal industry and wanted new experience in a different line of business so I checked out JLPW on the website and liked what I saw. The initiative between HireSeniors and Khazanah was for 6 months but the fact that I am still here, tells it all.

How would you describe working at JLPW?
I can only say that the environment is very harmonious and conducive and there is no politicking nor backstabbing so that is of paramount importance unlike some companies where I have been, where you need to apple polish" the right party and look over your shoulder each and every time which makes it a very stressful and toxic environment. Having said that, it is not a bed of roses all the time and there are occasions when there are disagreements and squabbles which is a norm and acceptable part of life whether work-related or home. With the integration of Ganesh and team, it sort of liven the whole environment and makes life even more interesting.

How would you describe your work style?
I like to think that I am very people-centric and very engaging which is why I am designated as "Chief People Officer". People have told me that my leadership style is very transparent and consistent. I try to treat everyone fairly and equally. That had helped me to earn the trust of my past teams and hope it will be the same here. When somebody works for me, they know what to expect, and they know I will treat them fairly and with integrity. Again, from my experience, I have found that people not only prefer to work in this type of situation but also perform their best when treated this way. They then allow me coach, mentor and nurture them in a way that I deem fit.

What did you like most about working as a HR?
It is working with people, people and people. When they fail, I feel that I have failed too and likewise when they succeed, it is also success for me. I have gone through mentoring and coaching young management trainees and to see them now at the helm of an organisation, it brings much pride and satisfaction. Not to mention that till this day, they have not forgotten me.

"It always seems impossible until it's done"
-Nelson Mandela

UPLIFTING CAREER with SUCCESS EXCELLENCE& INTEGRITY

The Regulatory Framework for Initial Exchange Offering Operators: An Overview

BY JACK TAN WAI KIT

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1. Introduction

Cryptocurrencies have attracted tremendous attention from the public in recent years as a medium for initial coin offerings ("ICOs"). Through ICOs, entrepreneurs may raise funds for their venture by offering cryptocurrencies (i.e., digital tokens registered on a blockchain) in exchange for monies directly from the investors. As an innovative way of fundraising, the ICO can be structured in various manners depending on the intention of the issuers. Due to the inherent flexibility in structuring an ICO, the issuer may raise funds even without incurring debt or equity obligations.

Furthermore, the entire process of ICOs is carried out online and the cryptocurrencies are launched on the issuer's website without: (i) going through the traditional financial intermediaries and centralised institutions (e.g., a licensed exchange), (ii) the participation of licensed advisers (e.g., an investment banks); and (iii) the issuance of a prospectus-like disclosure document. In some instances, the collection and distribution of funds raised in the ICO are executed and transpired automatically on the blockchain of the digital tokens in a split second by leveraging the smart contract technology.

These characteristics of ICOs have enabled issuers to raise huge sums of money in an easier and cheaper manner than the traditional financing options. It is, therefore, not surprising that some entrepreneurs consider ICOs as a revolutionary way of financing that reimagines how businesses can raise capital for their projects and venture.

2. Risks of ICOs

As discussed, ICO can be structured in a myriad of creative ways according to the need of the digital token issuers. Nonetheless, there are some concerns that the lack of regulations may cause ICO to be structured in a manner that serves to restrict the legal protection for investors against the ICO issuer.[1]

While many companies have managed to raise millions and more via ICOs, industrial researchers found that a substantial number of the ICOs turned out to be scams in which the fundraising companies disappeared after they have collected monies from investors. Some of the ICO companies either failed or did not carry out any activity after the the fundraising stage.[2] In the end, only a very small portion of the ICO issuers managed to list their digital tokens on exchanges for public trading. Moreover, it is pertinent to note that the ICOs are predominantly launched by the issuer and/or other parties who are not the licensed financial intermediaries and it also does not require the issuer to provide a proper disclosure document prepared according to the existing securities laws for the investors to understand the issuer and the underlying project. These situations can heighten the risks of fraud and other unscrupulous behaviours, if left unregulated.

In addition, since the entire process of the ICO happens online, this novel fundraising method is also susceptible to cyber risks. The cyber security of the ICO process remains a big concern that needs to be addressed by regulations as there are various hackings involving ICOs happened in the past causing severe financial loss to the investors and the leak of personal data. The abovementioned risks associated with ICOs have prompted the regulators to promulgate laws or issue guidelines to regulate the blockchain fundraising space.

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[1] *Securities Commission Malaysia, 'Proposed Regulatory Framework for the Issuance of Digital Assets through Initial Coin Offerings (ICOs)' [2019] Public Consultation Paper No 1/2019.*

[2] *Ahmad Naqib Idris, 'Tech: ICOs still raising billions despite scams and dead projects' (The Edge Malaysia, 26 September 2018) <https://www.theedgemarkets.com/article/tech-icos-still-raising-billions-despite-scams-and-dead-projects> accessed 9 June 2022.*

3. Legal Frameworks

In Malaysia, the Capital Markets and Services (Prescription of Securities) (Digital Currency and Digital Token) Order 2019 ("**Prescription of Securities Order 2019**") was enacted to recognise digital assets (including the cryptocurrencies) as "securities" for the purposes of the securities laws. Under the Prescription of Securities Order 2019, the digital assets are broadly classified into 2 main categories, namely "digital currency" which functions as a medium of exchange and is interchangeable with money; and "digital token" as a digital representation of the right or interest of a person in any arrangement as recorded on a distributed digital ledger whether cryptographically secured or otherwise.

Given that the digital assets are now recognised as "securities" under the Prescription of Securities Order 2019, they are effectively under the Capital Markets and Services Act 2007 ("**CMSA**") regime and come within the purview of Securities Commission Malaysia ("**SC**"). Following that, SC, being the financial market regulator in Malaysia, has also issued the Guidelines on Recognized Markets ("**RM Guidelines**") as well as the Digital Assets Guidelines ("**DA Guidelines**") under Section 377 of the CMSA to regulate the digital asset markets.

Under the DA Guidelines, an electronic platform operator may register with SC ("**IEO Operator**") to operate a digital platform ("**IEO Platform**") for issuers to offer their digital tokens on the said platform. The offering or issuance of the digital tokens on the IEO Platform would be considered as an initial exchange offering ("**IEO**"). As opposed to ICOs where the issuers offer the digital tokens to the public directly, IEO issuers are required to offer their digital tokens through the IEO Platform operated by the IEO Operator.

With these requirements, IEO is the only recognised manner for an issuer to offer its digital assets in Malaysia and it must be done on the platform run by the SC registered IEO Operator.

4. IEO Operators in Malaysia

As of the date of this article, we note that SC has registered 2 IEO Operators, namely Kapital DX Sdn Bhd and Pitch Platforms Sdn Bhd, as the initial step to promote digital asset innovation in Malaysia.[3] With the continuing developments in the digital asset market and the increasing demand for IEO in Malaysia, it can be foreseen that the SC may register more IEO Operators for the years to come.

Save for the 2 registered IEO Operators, other entities operating platforms to offer digital assets in Malaysia without being registered or approved by SC will need to cease all their activities with immediate effect and refund all monies received from the investors. For those operators who offer, issue or distribute any digital asset without being registered under the relevant SC's guidelines, SC reminded that once convicted, they may be liable to a fine not exceeding RM10 million or imprisonment for a term not exceeding 10 years or both. [4]

5. The Regulations on IEO Operators

An applicant who intends to be registered as an IEO Operator must fulfil and comply with the requirements provided in Part C of the DA Guidelines. The major requirements applicable to the IEO Operator under the DA Guidelines are, inter alia as follows.

5.1 Eligibility and Criteria for Registration

An applicant must be a Malaysian-incorporated company with a minimum paid-up capital of RM5,000,000.00.[5] Notwithstanding that, SC has the discretion to impose additional financial requirements on an IEO Operator that is commensurate with the nature, operations and risks posed by the IEO Operator. Further, in order to be registered as an IEO Operator, the applicant must also satisfy other requirements set out in Paragraph 15.01 of the DA Guidelines.

Note that the IEO Operator is the entity that operates an electronic platform for the hosting of IEOs. If an applicant of the IEO Operator also intends to facilitate the trading of digital assets or operate a secondary

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[3] *Securities Commission Malaysia, 'SC Registers Two Initial Exchange Offering (IEO) Operators' (Securities Commission Malaysia, 23 March 2022) <https://www.sc.com.my/resources/media/media-release/sc-registers-two-initial-exchange-offering-ieo-operators#:~:text=The%20Securities%20Commission%20Malaysia%20(SC,in%20the%20digital%20assets%20space.> accessed 9 June 2022.*

[4] *Ibid 4.*

[5] *Digital Assets Guidelines ("DA Guidelines"), Paras 13.04 and 14.01.*

market of digital assets on its platform, the applicant must also be registered as a digital asset exchange operator pursuant to RM Guidelines.

5.2 The Obligations of the IEO Operators

The IEO Operator, being a financial intermediary recognised under the DA Guidelines, is required to assume certain quasi-regulatory functions to control and oversee the IEOs that may take place on its electronic platform. In light of that, IEO Operator must perform the following before approving an IEO:[6]

(a) Carry out due diligence and critical assessment on an issuer of the digital tokens.

(b) Exercise its judgment and carry out a critical assessment of the issuer's compliance with the requirements in the DA Guidelines.

(c) Assess the issuer's white paper[7] to ensure that its contents encompass the information required under the DA Guidelines and are not false or misleading, or contain any material omission.

Moreover, the IEO Operators must also perform the additional obligations with respect to the operation of the IEO Platform according to the requirements in Paragraph 17.04 of the DA Guidelines.

5. 3 Risk Management

To reduce the risks of failure of the IEO Operators, SC has imposed certain risk management duties on the IEO Operators. Pursuant to DA Guidelines, the IEO Operators must, among others, identify and manage risks associated with their business and operations, and mitigate their impact through the use of appropriate systems, policies, procedures, and controls. Further, an IEO Operator must have a business continuity plan that addresses events posing a significant risk of operational disruptions. The business continuity plan should at least incorporate the use of a secondary site and should be designed to ensure that critical information technology systems can resume operations within reasonable recovery time objectives following any disruptive event.[8]

5.4 Conflicts of Interest Management

Under the DA Guidelines, SC has imposed certain obligations on the IEO Operator to address and reduce the risks of conflicts of interest. The IEO Operator is required to disclose on its platform if it holds any shares in any of the issuers or digital tokens issued by any issuers hosted on its platform; or if it pays any referrer or introducer or receives payment in whatever form in connection with an issuer hosted on its electronic platform.[9]

5.5 Handling of Investors' Monies and Digital Tokens Hosted on Its Platform

The IEO Operator must also maintain at least 1 trust account with a licensed Malaysian financial institution for monies invested by the investor on the digital tokens issued through its platform.[10] As an investor protection measure, the DA Guidelines dictated that the IEO Operator can only release the investors' monies to the issuer of the digital tokens provided that the conditions precedent imposed by the guidelines and the IEO Operator have been fulfilled.

In addition, the IEO Operator is also required to: (i) ensure that the investors' digital tokens are properly safeguarded from conversion or inappropriate use; (ii) establish and maintain a secured storage medium designated to store the digital assets; and (iii) establish a system to keep accurate and up-to-date records of the digital assets held.[11]

5.6 Outsourcing

The DA Guidelines allow the IEO Operator to farm out part of its functions or works to third parties provided that this is done according to the relevant provisions in the guidelines. Pursuant to the DA Guidelines, the IEO operator must select an appropriate and efficient service provider for its outsourcing arrangement, and monitor the outsourcing arrangement continuously to ensure that it does not lead to any business disruption and negative consequences to the token holders.

6. Conclusion / Remarks

In the largely unregulated ICOs, digital tokens are offered directly by the issuer to investors in exchange for fiat

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[6] *DA Guidelines, Para 17.03.*

[7] *Note that "white paper" is defined by DA Guidelines to mean "the document issued by the issuer accompanying an IEO describing, among others, the detailed information of the issuer, the IEO and the IEO project, and includes a supplementary white paper."*

[8] *DA Guidelines, Para 17.09.*

[9] *DA Guidelines, Para 17.12.*

[10] *DA Guidelines, Para 17.15(c).*

[11] *DA Guidelines, Para 17.15(f).*

currencies without going through any registered intermediary. The lack of regulation for offering digital tokens at the early stage of this financial innovation has resulted in many scams and fraudulent events that damage investor confidence in the digital asset scape.

To foster this financial innovation while protecting the public investors, Prescription of Securities Order 2019 was enacted to recognise digital assets as securities and bring them within the purview of SC. Following that, SC has issued a few guidelines (including the DA Guidelines) to regulate the digital assets market in Malaysia. Pursuant to the DA Guidelines, SC has registered 2 IEO Operators to run the electronic platform responsible for the hosting of IEOs in Malaysia. Now, the issuers of digital tokens are required to offer the digital tokens only on the platform operated by the registered IEO Operators.

Under the DA Guidelines, the registered IEO Operators are required to be the "gatekeeper" of the digital asset offerings. In this regard, they will need to inter alia undertake a comprehensive due diligence exercise on the issuer and assess the issuer's proposal as well as its disclosure documents before allowing the issuer's digital tokens to be hosted on their platform. These requirements and obligations are crucial to safeguard the investor interest, prevent financial fraud and ensure stability in the overall digital asset ecosystem.

The digital asset market is only at its infancy stage and the acceptance of digital assets is still low in Malaysia. With proper regulations, the digital asset market will be able to grow rapidly and contribute positively to the Malaysian economy.

Given that the IEO platform operated by the IEO Operator is the only avenue for the offering of digital assets in Malaysia, it is interesting to see if SC will register more IEO Operators in the near future when the digital assets markets are more mature and the demands for IEOs are increasing.

For more information about the legal framework governing the IEO Operator and generally about the regulations of IEO in Malaysia, please do not hesitate to contact us.

Disclaimer: *This article is not intended to act as, or substitute legal advice. If you have specific queries or require legal advice, please feel free to contact us.*

Shareholders Prohibited To Use Company Funds To Oppose Oppression Actions and Winding Up Petition

BY TOH AN NI

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When there is a shareholders' dispute, shareholders tend to resolve their dispute by pursuing an action based on oppression or commencing a winding up petition. This article aims to discuss the possibility of relying on just and equitable ground in these actions.

Section 346(1)(a) to (b) of the Companies Act 2016 (CA 2016) provide remedies for member or debenture holder of a company if the affairs of the company are conducted or the powers of the directors are exercised in a manner oppressive to one or more of the members or debenture holders including himself or in disregard of their interests as members, shareholders or debenture holders of the company; or that some act of the company has been done or is threatened or that some resolution of the members, debenture holders or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or debenture holders, including himself.

Alternatively, shareholders may file a winding-up petition pursuant to Section 464 and Section 465 (h) of the Companies Act 2016, which provides that the Court may order the winding-up if it thinks that it is just and equitable to do so.

The main question that concerns the petitioner is whether the shareholders are allowed to use company funds to oppose the oppression action and/ or winding-up petition. The answer is in the negative. In the case of **Shabaruddin Ibrahim v Ruslan Ali Omar & Ors [2020] 1 LNS 1403**, the Plaintiff, as a director cum shareholder, brought an action for oppression against the Defendants, and the High Court referred to the case of **Dato' Tan Toh Hua v Tan Toh Hong [2001] 1 CLJ 733** which held as follows:-

> "[115] As regards the appointment of Messrs Badharul Bahrain & Partners as solicitors for the Defendants and the use of the company's funds to pay their fees, learned counsel for DSI relied on the case of Dato' Tan Toh Hua v. Tan Toh Hong [2001] 1 CLJ 733;[2001] 1 MLJ 369 at 373 where the Court of Appeal quoted with approval the following statement by Harman J in Re A Company (No 004502 of 1988); ex p Johnson [1992] BCLC 701 where Harman J at pp. 702-703 said:
>
> 'The principle was drawn to the profession's attention by the decision of Hoffman J in Re Crossmore Electrical & Civil Engineering Ltd [1989] BCLC 137 at p 138 where he said:
>
> The company is a nominal party to the s. 459 petition, but in substance the dispute is between the two shareholders. It is a general principle of company law that the company's money should not be expended on disputes between shareholders.'
>
> That reminder of the classic view was based on Hoffman J on Pickering v. Stephenson [1872] LR 14 Eq 322, so nobody can suggest that it is a new development.'"

Besides, in the case of **Drico Ltd v Drico (Water Specialist) Sdn Bhd & Ors [2011] 1 LNS 488**, the High Court held that :-

> "94. Learned Counsel for the petitioner referred to the case of Dato' Tan Toh Hua & Ors v. Tan Toh Hong & Ors [2001] 1 CLJ 733; [2001] MLJ 369 where the Court of Appeal made it clear that directors could not use company monies to fund shareholder's disputes as the company is only a nominal party and the dispute is purely between shareholders. The Court held that it was a misfeasance to do so."

In conclusion, using company funds to oppose oppression actions or winding-up petitions in the guise of just and equitable ground is unfair to the petitioner and other shareholders, as company funds should only be used for company's matters. The court should prevent such practice to protect the rights of both the petitioners and company's shareholders.

CASES OF INTEREST – DR'S PICK

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1. "No To Judicial Management for Public Company", says COA

The Court of Appeal has recently affirmed the decision made by the High Court in the case of Re Scomi Group Bhd [2021] 10 CLJ 975. The applicant sought an order, pursuant to sections 404 and 405 of the Companies Act 2016 ("the 2016 Act"), that the applicant be placed under judicial management of a judicial manager. The question before the High Court, among others, is whether the applicant, can apply for a judicial management order. It is worth, at this juncture, to reproduce section 403(b) of the 2016 Act which provides that 'this Subdivision shall not apply to a company which is subject to the Capital Markets and Services Act 2007' and to mention that the subdivision referred to in section 403(b) is Sub-division 2 of Division 8, Part III of the 2016 Act which relates to the division in respect of corporate rescue mechanisms in particular judicial management.

In answering the question in the affirmative and by adopting the purposive approach, the Court held that the words of section 403(b) of the 2016 Act are abundantly clear in that it does not give rise to any ambiguity and that the applicant, being a public listed company subject to the Capital Markets and Services Act 2007, is precluded from availing itself of the judicial management order.

Notwithstanding the decision of the Court, it is interesting to note that Companies Commission of Malaysia has in its Consultative Document On The Proposed Companies (Amendment) Bill 2020 proposed that section 403(b) of the 2016 Act be amended to allow public companies to adopt the judicial management.

2. Meaning of 'shall'

The word 'shall' was once again scrutinised by the Court. One of the questions posed to the Federal Court in the case of Bursa Malaysia Securities Bhd v. Mohd Afrizan Husain [2022] 4 CLJ 657 was whether, in light of the word 'shall' used in Rule 16.11(2) of the ACE (access, certainty, efficiency) Market Listing Requirements ("AMLR"), Bursa has to de-list a listed corporation upon a winding-up order being made. In answering the question in the negative, the apex court held that the word 'shall' does not always denote a mandatory obligation and takes its meaning from the context in which it is used. Reference was made by the Federal Court to Black's Law Dictionary where the word 'shall' is defined as

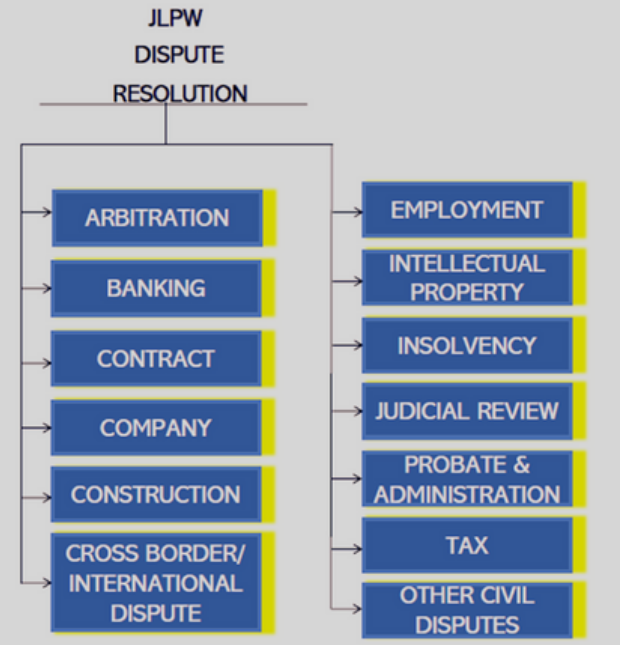
i) has a duty to; (this is the mandatory sense that drafters typically intend that courts typically uphold)
ii) should;
iii) may;
iv) will; and
v) is entitled to.

The Federal Court further held that it is the obligation of the Court to construe Rule 16.11(2) in such a way to ascertain the true intention of the Parliament and the word "shall" ought to be construed to comprehend the purpose and object of the AMLR. The purpose of the AMLR is not to regulate Bursa but to enable Bursa to regulate persons participating in the market. Therefore, Bursa is not mandatorily bound to de-list the company by reason of Rule 16.11 (2) AMLR notwithstanding the express provisions of section 11 of the Capital Markets and Services Act 2007.

3. *Country Garden Danga Bay Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor* [2022] 4 AMR 425, FC

In this case, there was a Sale and Purchase Agreement ("SPA") between the Second Respondent (Purchaser) and the Appellant (Developer) to purchase a unit described as parcel Block 11-A-3402 ("the Unit"). The second respondent accepted the delivery of vacant possession on 1.11.2017. After taking vacant possession, the second respondent renovated the said unit to suit his requirements. However, the second respondent later filed a claim against the appellant on 2.1.2018 at the first respondent, the Tribunal for Homebuyer Claims ('Tribunal'), alleging that the Appellant had delivered the wrong unit because it came with an open balcony and not covered balcony which he had requested for and sought for damages.

The Federal Court held that the Tribunal does not have jurisdiction to consider the balcony issue raised by the second appellant as the specification for a covered balcony was not a term of the SPA. The Tribunal's jurisdiction shall be limited to a claim based on a cause of action arising from the express terms contained in the SPA and exclude any other collateral contracts outside the SPA. Furthermore, the second respondent was estopped by himself when he accepted the vacant possession and renovated his unit thereby exercising his right to ownership. As such, the second respondent was estopped from claiming that he was given the wrong unit.



4. *Skyworld Holdings Sdn Bhd & Ors v Skyworld Development Sdn Bhd & Anor* [2022] 3 MLJ 426, FC

The respondents were the registered owners of two 'SkyWorld' registered trademarks in Class 37. Both marks are identical with the phrase 'design the experience' below the mark but one had additional four Chinese characters below the phrase.

The respondents, in the business of real estate development, said the word 'SkyWorld' formed part of the names of their companies. The respondents sued the appellants, who were largely involved in the business of tourism, for trademark infringement and passing off, claiming that the appellants' use of the word 'Skyworld' as their corporate name and in their website domain name and in the name of a development project they had proposed to carry out in Sabah were infringing as they so closely resembled the respondents' registered trademarks as to be likely to confuse or deceive the public.

The High Court, in finding that there was no merit in the plaintiffs' claim and deciding in favour of the defendants, found that the use of the infringing names was not likely to deceive or confuse the public, the plaintiffs failed to establish that the goodwill of the Skyworld names and marks were 'well-known' and that there was no likelihood of confusion arising from the use of the infringing names. The Court of Appeal, however, set aside the whole of the High Court's decision.

The Federal Court held that there was no infringement and agreed with the High Court's decision. The High Court correctly decided that there was no trademark infringement as the competing marks, which differed visually to a great extent and the marks were not identical or so nearly resembling each other that they were likely to deceive or cause confusion in the course of trade in relation to those marks. Since elements of confusion or deception were not established, the tort of passing off was also not made out.

Digital Banking Licenses In Malaysia

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The recent announcement by Bank Negara Malaysia on the five (5) successful applicants for the digital bank licences as approved by the Minister of Finance Malaysia, namely a consortium of Boost Holdings Sdn Bhd and RHB Bank Bhd; a consortium led by GXS Bank Pte Ltd and Kuok Brothers Sdn Bhd; a consortium led by Sea Ltd and YTL Digital Capital Sdn Bhd; a consortium of AEON Financial Services Co Ltd, AEON Credit Service (M) Bhd and MoneyLion Inc; and a consortium led by KAF Investment Bank Sdn Bhd[1] (collectively known as "Digital Banks"), has allowed Malaysians (both consumers and enterprises) to have alternate financial services to meet their specific circumstances and needs aside from the current conventional financial services.

Advantages of Digital Banks

Digital Banks offer banking and financial services completely online, without the need to go to branches. Though conventional banks do offer this convenience to the customers, Digital Banks do not have as many physical infrastructure and manpower compared to conventional banks and thereby able to provide more competitive borrowing rates to consumers and enterprises. Besides, Digital Banks will benefit businesses, especially small and medium enterprises, as they can enjoy easier access to loans and hopefully quicker fund approvals and disbursements. Furthermore, as Digital Banks utilise data analytics to generate insights regarding consumer behaviour, businesses can gain better access to more personalised solutions for consumers.

Lastly Digital Banks increase competition and consumer choice in a market that has been dominated by large conventional financial services players that have had little incentive to develop more sophisticated services and lower costs to consumers.

Challenges to the Digital Bank

"Incumbent (Conventional) banks have taken years to establish trust. It is going a while for digital banks to prove their reliability and viewed as safe by consumers, especially in tech. Not all consumers are comfortable with Digital Banks, especially because they do not have a physical presence. Developing the infrastructure is also critical as this will come from a key aspect of their success. Regulators and policy makers will play a role in this[2]" said Ms Shweta Jain, Head of Product (Digital, Analytics, and Platform), at Finastra Malaysia Sdn Bhd.

According to Jain, cyber security is still a concern when it comes to digital bank technology. The Digital Banks have to ensure that all the banking services conducted online via apps or mobile devices will not be compromised[3].

Mr Aravind Varadharajan, the MetricStream senior vice president and managing director of Asia Pacific also highlighted the importance of taking precautions in cyberspace to protect the digital banking security against malware and ransomware attacks[4].

Conclusion

The establishment of the Digital Banks in Malaysia will definitely benefit both consumers and enterprises in Malaysia. We believe that small and medium enterprises will be the biggest beneficiaries of Digital Banks as they contribute half of Malaysia's Gross Domestic Product as well as the working population[5] in Malaysia.

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[1] Bank Negara Malaysia, 'Five successful applicants for the digital bank licences', (29 April 2022, Bank Negara Malaysia), <https://www.bnm.gov.my/-/digital-bank-5-licences > accessed 19 June 2022

[2] Techwire Asia, 'How successful will digital banks be in Southeast Asia?', (14 June 2022, Aaron Raj), < https://techwireasia.com/2022/06/how-successful-will-digital-banks-be-in-southeast-asia/> accessed 19 June 2022

[3] Techwire Asia, 'How successful will digital banks be in Southeast Asia?', (14 June 2022, Aaron Raj), < https://techwireasia.com/2022/06/how-successful-will-digital-banks-be-in-southeast-asia/> accessed 19 June 2022

[4] New Straits Times, 'Rise of digital banking breeds new security concerns: MetricStream', (7 Februry 2022, Azanis Shahila Aman), <https://www.nst.com.my/business/2022/02/769270/rise-digital-banking-breeds-new-security-concerns-metricstream/> accessed 19 June 2022

[5] The Malaysian Reserve, 'SMEs to benefit the most from digital banks', (21 March 2022, Azalea Azuar), <https://themalaysianreserve.com/2022/03/21/smes-to-benefit-the-most-from-digital-banks/> accessed 19 June 2022

My Pupillage Experience at Jeff Leong, Poon & Wong

BY LOW YI MING

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My pupillage journey at Jeff Leong, Poon & Wong has been an exciting one, to say the least. I was involved in the corporate practice of the firm where I had to accustom myself to the fast-paced environment of the practice.

The main learning takeaway during my pupillage journey is a better understanding of corporate transactions, especially the initial public offering ("IPO") process. The first file that I worked on as a pupil in the firm was an IPO file seeking a proposed listing on the ACE Market of Bursa Malaysia, which was a good starting point for my journey in the corporate field. I have learnt a lot from the due diligence process, and I am grateful to have had the chance to participate in site visits with my team, to obtain a better grasp and understanding of the due diligence process.

Aside from IPO work where I was mainly involved in drafting due diligence reports, preparing and drafting documents and conducting legal research, I had the opportunity to be involved in a variety of other corporate advisory transactions, with notable files including advising on the necessary licences required for a foreign corporation seeking to start a business in Malaysia and a proposed acquisition of a company by a Special Purpose Acquisition Corporation listed on the New York Stock Exchange.

I was also afforded opportunities to learn from other members of the firm through the firm's in-house trainings. These in-house trainings provided me with insights into different areas of legal practice, legal updates and developments in Malaysia and practical guidance and tips on dealing with clients.

The firm recognize the importance of being resilient, having a sense of responsibility, and teamwork. With this, I am grateful to the partners and associates for their willingness to teach, guide, and support me throughout my pupillage journey. With every new file, be it legal research or conducting due diligence, I have learnt to recognize and value the many aspects required to become a valuable asset in the legal industry. In terms of the culture of the firm, I have found it to be an enjoyable one. Even with the social restrictions brought about by the pandemic, I am grateful for the friendships that I have made with the pupils, lawyers, and staff of the firm. Everyone has been supportive and friendly from day one.

These nine months of my pupillage journey have been nothing short of transformational, and it has contributed immensely towards my personal and professional growth. I am excited to continue my journey with the firm as an associate to further learn and grow in my legal career.

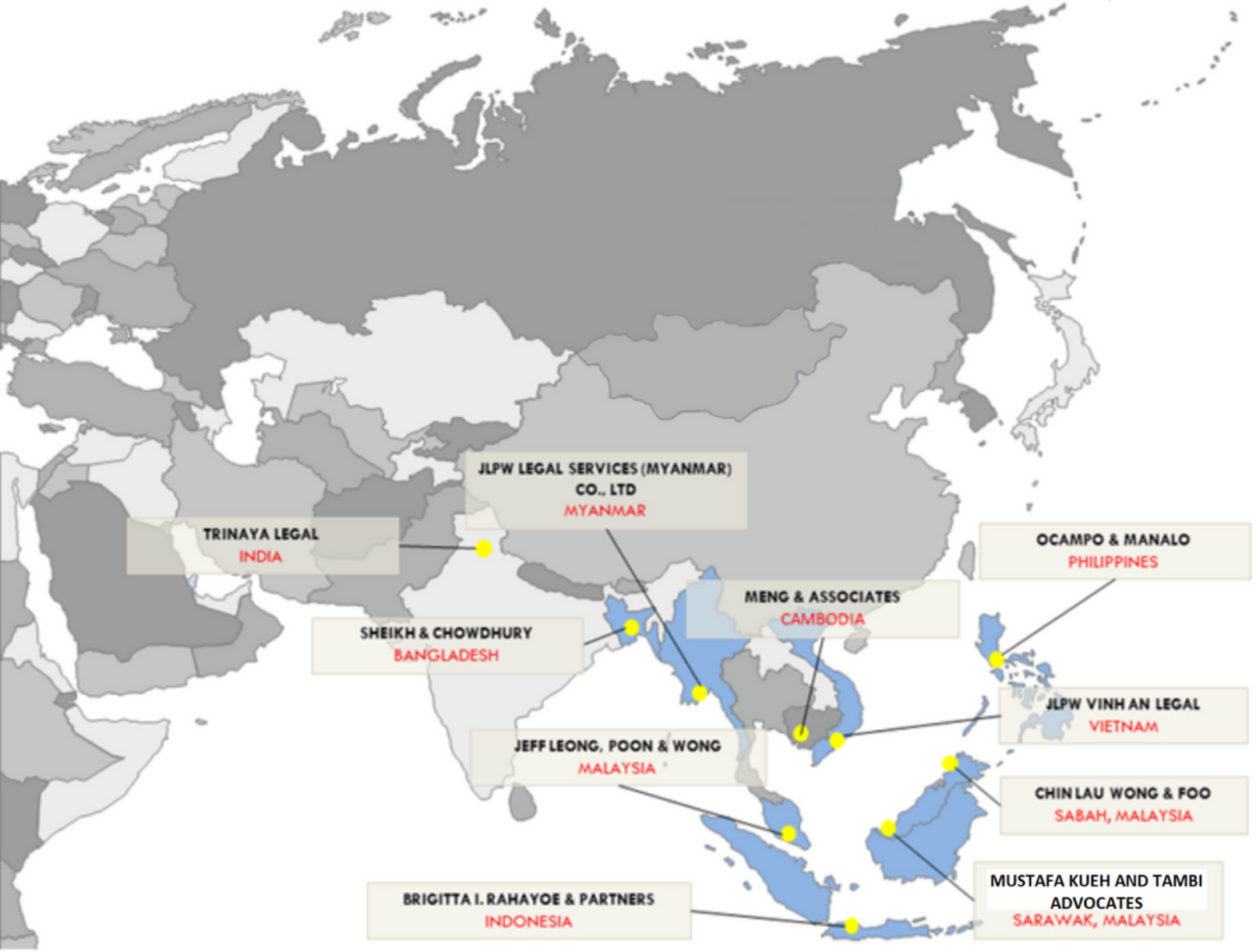
My Experience As An Intern at JLPW

BY FARISHAH IRINA KHAN

I thoroughly enjoyed my internship at Messrs Jeff Leong, Poon & Wong (Advocates & Solicitors) (JLPW). I am extremely honoured to have had the opportunity to carry out my industrial training course as an intern at JLPW. The environment is very uplifting and friendly. It was such a positive and valuable experience overall.

I have gained so much new knowledge, not only from my supervisor, but also from the advocates, solicitors and the staff there. They were always willing to teach and get me involved to strengthen my knowledge in the legal world that could be applicable, both in my law studies and future legal career, as I am still a third-year law student at the Faculty of Law, Universiti Teknologi MARA. I was supplied legal knowledge that I had not, and may not have, covered during my brief time as a law student, giving me insights into the reality of the legal industry. It was an all-rounder experience, from learning how to prepare a written get-up, to attending court matters. I have learned far more than I had anticipated when I stepped into this internship, and I value every hour I have been here and everything I have learned. The internship experience at JLPW exceeded my expectations and has provided me with sufficient knowledge and experience, which would certainly help in advancing my future career.

My time as an intern at JLPW was enriching. It was the most educational experience of my undergraduate degree as it gave me the opportunity to experience the legal world outside of the classroom and gain a sense of what it's like to transition into the workforce.



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Jeff Leong, Poon & Wong was founded in 1999. Our founding partners were part of the regional cross-border team of a leading law firm in South East Asia with extensive experience in cross-border investments, joint ventures, mergers and acquisitions and capital markets. From 2001 to 2011, we were affiliated with an international law firm operating across many jurisdictions within Asia Pacific region. From an initial team of 3 founding partners in 1999, we have prospered and grown to more than 30 lawyers today.

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Malaysia Chin Lau Wong & Foo, Kota Kinabalu,
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