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HHQ in alliance with HLP
ADVOCATES & SOLICITORS

Empower

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HHQ & HLP

Note from the Editorial Team

Dear Readers,

As we embark into the month of April with some of us observing the Holy month of Ramadan, we would like to take this opportunity to wish all of those celebrating a blessed and peaceful Ramadan. Ramadan is much more than abstaining from food and drink. It is a time to purify the soul, refocus attention on God, and practice self-discipline and self-sacrifice. We hope that this edition of Empower will be a source of knowledge for all our readers during this month of fasting and we also wish that all of you gain insight on the areas that we have covered in this edition.

The first article in this edition highlights one's rights as a homeowner with respect to property defects. It clearly sets out what a homeowner could do in certain situations and this is indeed very useful.

The second article is in respect of updates to the due diligence standard in respect of capital market proposals. This article would be useful to many of our corporate clients as it highlights the key points in recent guidelines that were released by the Securities Commissions of Malaysia.

The third article is in respect of a recent decision of our Federal Court which has effectively decided that service charge does not form part of minimum wage. This is an important decision as its impact is likely to be felt across all sectors and industries in the country.

The final article is on the topic of statutory adjudication in Malaysia and it deals with what one can do with an adjudication decision in their favour. This article would be useful for our clients who are regularly involved in statutory adjudications.

Finally, our Inside Out section in this edition covers some of the recent activities that we wish to share with you.

Happy reading!

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All articles in this publication are intended to provide a summary or review of the subject matter and are not intended to be nor should it be relied upon as a substitution for legal or any professional advice.

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KNOW YOUR RIGHTS AS A HOMEOWNER: WHAT CAN A HOMEOWNER CLAIM FOR FROM THE DEVELOPER IF THE PROPERTY HAS DEFECTS?

WRITTEN BY TEOH JACKLINE

THE DEFECT LIABILITY PERIOD EXPLAINED

The Defect Liability Period ("DLP") is defined as a period where the Developer is responsible to fix any defects and it begins from the date the Homeowner received delivery of vacant possession and keys of the property.

Under the Housing Development Act 1966 ("HDA"), the DLP is 24 months from the date of delivery of vacant possession. Within this period, the Homeowner of the property shall inspect for any damage, defects as well as poor or faulty workmanship. If there are any defects found in the property, the Homeowner shall make a written complaint to the Developer and/or Management Office in order to get them to rectify the defects at no cost.

To protect the Homebuyer's interest and to ensure that the Developer rectifies the defects, 5% of the purchase price (known as the stakeholder sum) will be retained by the stakeholder solicitor. The stakeholder solicitor will be identified in the Sale and Purchase Agreement ("SPA") entered between the Developer and the Homeowner.

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WHAT CONSTITUTES DEFECTS?

Defects may include any defects, shrinkage or other faults in the property due to defective workmanship or materials or; the property not having been constructed in accordance with the plans and descriptions. Clause 30(1) of SPA states that:

> **Any defect, shrinkage or other faults** in the said Parcel or the said Building or the common property which becomes apparent within twenty-four (24) months after the date the Purchaser takes vacant possession of the said Parcel and which are **due to defective workmanship or materials** or; the said Parcel or the said Building or the said common property **not having been constructed in accordance with the plans and descriptions** as specified in the **First and Fourth Schedules** as approved or amended by the Appropriate Authority, shall be repaired and made good by the Developer at its own cost and expense within thirty (30) days of the Developer having received written notice thereof from the Purchaser.

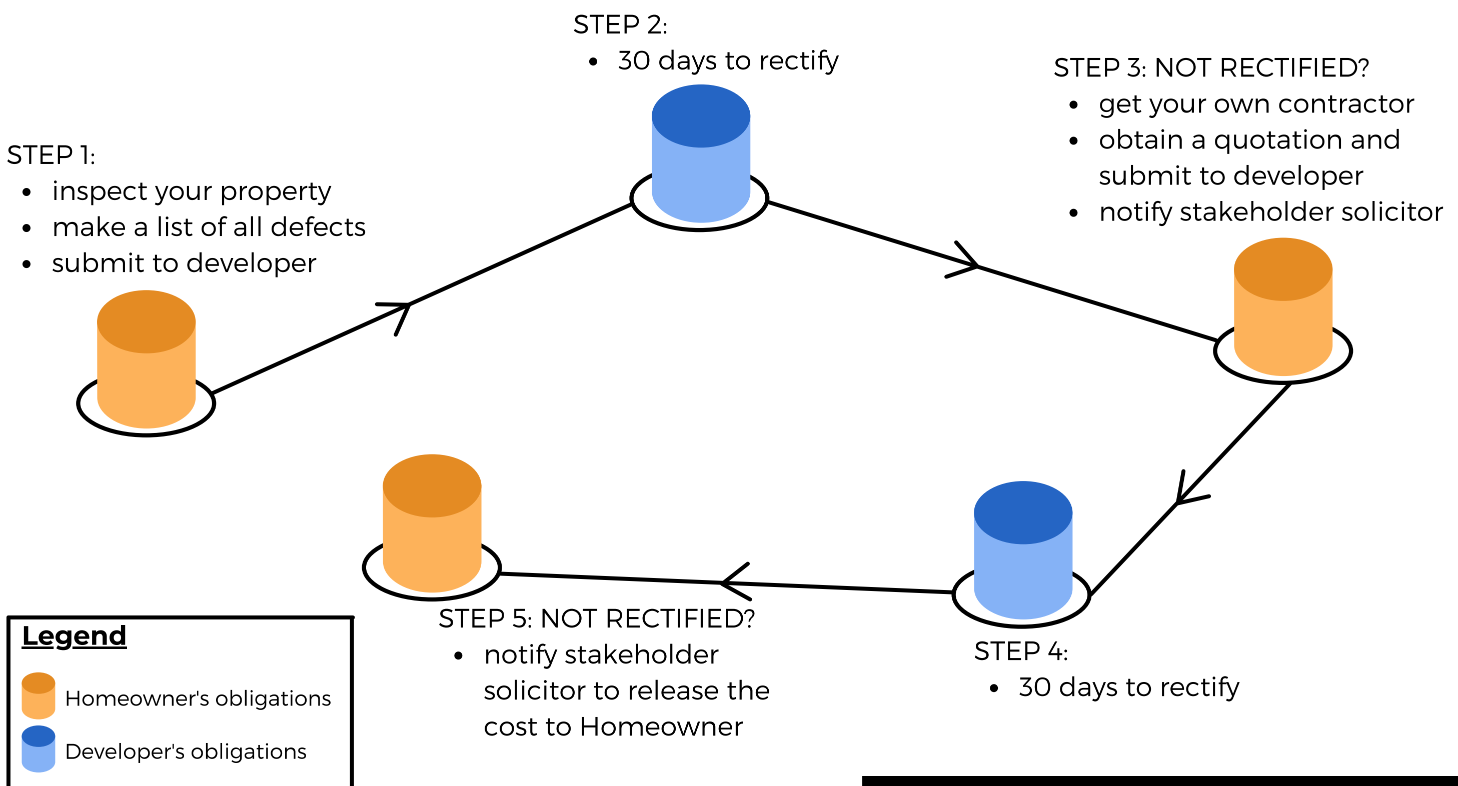
WHAT IS THE PROCEDURE TO LODGE A COMPLAINT ON THE DEFECTS?

The Homeowner shall lodge a written notice/complaint to the Developer and/or Management Office and the Developer shall rectify the defects within thirty (30) days from the date of receiving the said written notice.

If the defects were not properly rectified by the Developer, the Homeowner shall be entitled to carry out the works to repair and make good such defect himself/herself by appointing his/her contractor and requesting for a quotation on the cost of the repairs. The Homeowner shall then notify the Developer of the costs of repairing before the commencement of the works and shall give the Developer an opportunity to carry out the works within thirty (30) days from the date the Homeowner has notified the Developer of his / her intention to carry out and commence the works after the Developer's failure to carry out the works within the said thirty (30) days.

At the same time, the Homeowner shall inform the stakeholder solicitor to retain the stakeholder sum by way of email or written notice. In such an event, the stakeholder solicitor shall release such costs to the Homeowner within thirty (30) days after the receipt of the Homeowner's written demand specifying the amount of such costs.

The sample letter to stakeholder solicitor can be found here:
https://www.hba.org.my/help/sample.htm



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WHAT IS THE ALTERNATIVE WAY? COMMENCEMENT OF A CLAIM AT THE TRIBUNAL

Apart from bringing a civil action against the Developer, a Homeowner can actually seek remedy in the Homebuyer's Tribunal and even lodge a complaint to the Ministry of Housing and Local Government.

A homeowner may lodge with the Tribunal a claim in the prescribed form:
(Form 1: https://www.hba.org.my/laws/tribunal_reg/2002/form_1.htm) together with the prescribed fee (RM10.00) claiming for any loss suffered or any matters concerning his interest as a homeowner. A homeowner can file his claim at the Tribunal office or electronically.

Further information on Tribunal and forms can be downloaded at:

- https://www.kpkt.gov.my/
- https://ehome.kpkt.gov.my/

Upon lodging a claim with the Tribunal, a sealed copy of Form 1 will be returned to the claimant (who is the Homeowner) and the claimant shall serve one copy on the Respondent (who is the Developer). The secretary to the Tribunal shall then fix a hearing date. Every party shall have the right to attend and be heard at the hearing. No party shall be represented by an advocate and solicitor at the hearing unless the Tribunal is of the opinion that the matter in question involves complex issues of law and one party will suffer severe financial hardship if he is not represented by an advocate and solicitor. Every agreed settlement will be recorded by the Tribunal and every award made by the Tribunal shall be final and binding on all parties to the proceedings. Any person who fails to comply with the award made by the Tribunal within the period specified by the Tribunal commits an offence under Section 16AD of the HDA.

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UPDATE TO THE DUE DILIGENCE STANDARD IN RESPECT OF CAPITAL MARKET CORPORATE PROPOSALS

WRITTEN BY ADRIAN KOH HUI HUANG

The Securities Commission of Malaysia ("**SC**") has on 21 July 2020 issued the Guidelines on Submission of Corporate and Capital Market Product Proposals ("**New Guidelines**"), effective on 1 January 2021. The New Guidelines replaces amongst others, the Guidelines on Due Diligence Conducts for Corporate Proposals ("**Previous Guidelines**").

The New Guidelines have been introduced to reinforce shared responsibilities among parties involved in the submission of proposals to the SC. This article attempts to discuss and is limited to the revision to the due diligence standard imposed by the SC in respect of the submission of corporate proposals and capital market product proposals to the SC. We will not be discussing the liberalisation made to the principal adviser ("**PA**") regime.

1. LEGAL REQUIREMENTS

Generally, in Malaysia, the onus of assessing the merits of offering of securities is placed on investors. As such, the Malaysian regulatory framework governing the issuance and offering of securities requires a high standard of disclosure and due diligence to be conducted by all parties involved in the preparation and submission of corporate proposals to the SC.

The Capital Markets and Services Act 2007 ("**CMSA**") provides that any documents or information submitted to the SC must be true and not misleading and that there is no material omission. The CMSA imposes criminal and civil liabilities on parties in relation to the document and information submitted to the SC which contains any statement or information that is false or misleading and that there is a material omission.

Notwithstanding the above, the CMSA provides defence from prosecution or any proceeding for contravention of the CMSA if it can be shown that the enquiries made were reasonable in the circumstances and after making such enquiries, there are reasonable grounds to believe and did believe until the time of making the statement or provision of the information that the statement and information were true, not misleading and does not contain any material omission.

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2. PREVIOUS GUIDELINES

The Previous Guidelines set out obligations and standards expected of relevant parties in respect of the scope and quality of due diligence undertaken in the preparation and submission of corporate proposals to the SC. The key parties in a due diligence exercise include the applicant/issuer, their directors and promoters, PA, reporting accountants, legal advisers, valuers and such other advisers and experts.

The PA must exercise its own judgment in determining the scope and extent of due diligence for the corporate proposal in its entirety. The advisers/experts must also exercise their own judgment in determining the scope and extent of due diligence required under their agreed terms of reference and capacity as advisers/experts. In doing so, they must undertake their due diligence after having regard to the corporate proposal in its entirety.

The Previous Guidelines sets out non-exhaustive examples to be included in the scope and extent of due diligence required.

Area of Enquiries:

1. review and assessment of the applicant/issuer's historical financial performance;
2. review and assessment of the applicant/issuer's business plan and financials (including where applicable, any profit estimate, forecast or projection), and its performance;
3. review and assessment of the applicant/issuer's proposed utilisation of proceeds from the corporate proposal;
4. where a corporate proposal involves an acquisition of an asset, the disclosures made with respect to the value of the asset that is disclosed does reflect the fair value of the asset concerned;
5. reviewing all aspects of the business including, but not limited to material contracts, contingent liabilities and ongoing material litigations, material legal, business and economic/geopolitical risks which may have a material impact on the corporate proposal.
6. ensuring that the review of the applicant/issuer includes a physical inspection of the business and all key business premises and where appropriate, material assets, in relation to the corporate proposal with the view to assessing the quality, value, fitness for purpose and approval of relevant authorities of the premises and assets concerned.
7. verifying and assessing the scope, extent and feasibility of any proprietary rights (e.g. intellectual property, licenses, etc.) or product or technology being used, developed or proposed to be developed or used by the applicant/issuer in its business.

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3. NEW GUIDELINES

The new Guidelines set out the conduct requirements for the party who submits an application to the SC under Part VI of the CMSA and Part IIIA of the CMSA ("**Submitting Party**") and other parties involved in the submission of proposals to the SC, such as the applicant/issuer and its directors and promoters and advisers.

The New Guidelines shall not apply to the following:
(a) proposals set out in Schedule 5 of the CMSA;
(b) take-overs, mergers and compulsory acquisitions under Division 2 Part VI of the CMSA;
(c) proposals relating to the offering of digital token as set out in the Guidelines on Digital Assets;
(d) proposals relating to the offering, marketing and distribution of a permitted foreign fund as set out in the Guidelines for the Offering, Marketing and Distribution of Foreign Funds; and
(e) any documents or information submitted or deposited with the SC for reporting purposes.

Unlike the Previous Guidelines, the New Guidelines did not set out a list of non-exhaustive examples to be included in the scope and extent of due diligence. The New Guidelines provides that the Submitting Party and the qualified person are to determine the scope and extent of the due diligence, without setting any applicable threshold and areas of enquiries.

In the case where an adviser is appointed by the Submitting Party, the Submitting Party must determine the reference of the adviser, including the scope and extent of the task to be undertaken by the adviser. A qualified person assigned shall determine the scope and extent of the due diligence required for the specific proposal in its entirety, including enlarging or varying the scope of due diligence exercise should the qualified person becomes aware of any new information or development.

4. MALAYSIA'S EQUITY AND DEBT CAPITAL MARKETS DUE DILIGENCE GUIDES ISSUED BY THE MALAYSIAN INVESTMENT BANKING ASSOCIATION

The Malaysian Investment Banking Association has on 30 December 2020 issued a non-legally binding Malaysia Equity Capital Markets ("**ECM**") and Debt Capital Markets ("**DCM**") Due Diligence Guides ("Industry Guides"), effective 1 January 2021, in line with the New Guidelines and applicable to all corporate proposals which are submitted to the SC. The Industry Guides do not have any force of law and merely set out the best practice to be adopted in corporate proposals.

The Industry Guides seek to (i) enhance and clarify the standards of due diligence and disclosure in the submission of corporate proposals to the SC, (ii) set out the scope and extent of due diligence in a corporate proposal, roles of the parties involved and (iii) appropriate verification process.

In accordance with the Industry Guides, due diligence is the process of using reasonable efforts to investigate all material aspects of a corporate proposal and not about forms, questionnaires and checklists. In this regard:

(i) the PA should exercise its own judgement in determining the scope and extent of due diligence for the corporate proposal in its entirety; and

(ii) the advisers or experts should exercise their own judgement in determining the scope and extent of due diligence under their respective agreed terms of reference and capacity as advisers or experts. In doing so, they should undertake their due diligence after having due regard to the corporate proposal in its entirety.

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DUE DILIGENCE WORKING GROUP ("DDWG")

A DDWG is constituted to assist the applicant/issuer to meet the applicable legal requirements on the disclosure of information in the offering documents and to ensure that none of the statements and information submitted, or caused to be submitted to the SC, is false or misleading or contains any material omission. An effective DDWG should carry out such reasonable enquiries as deemed necessary to avail the applicant and its directors of a due diligence defence under the CMSA. The PA should determine the composition, membership and terms of reference of a DDWG, comprising at least, the PA, senior representatives of the applicant (at least 1 director or such other person authorised by the board of directors), advisers or such other appropriate experts.

In the event of any doubt, the matter should be referred to the DDWG for discussion as to what constitutes reasonable in the specific circumstances.

The roles of the members of the DDWG are as follows:

(i) The applicant/issuer, directors and key senior management - Ensure that the information submitted to the SC and provided to the PA and the advisers or experts in relation to the corporate proposal and as disclosed in the offering documents, is not false, misleading and does not contain any material omission.
(ii) PA - Responsible for the due diligence in relation to the entire corporate proposal. The PA should ensure that the information contained in the offering documents has no material omission, is not false or misleading and is consistent, and to this end, should undertake reasonable enquiries to achieve the same.
(iii) Advisers and experts (which include company secretary, reporting accountants, legal counsels, independent market researchers and valuers) - responsible for the due diligence in relation to their specific areas of expertise within their agreed terms of reference.

SCOPE OF DUE DILIGENCE

The DDWG may wish to have a due diligence planning memorandum to set out the scope and extent of the due diligence exercise and process, assign and allocate responsibilities of the members of the DDWG in relation to the due diligence exercise and determine the materiality.

The scope of the due diligence exercise should include the following area of enquiries:

(i) Products, services and operations of the applicant/issuer
(ii) Assets and operation of the applicant/issuer
(iii) Industry of the applicant/issuer
(iv) Material contracts (major customers and suppliers)
(v) Material litigation
(vi) Regulatory compliance
(vii) Related party transactions
(viii) Financial information

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VERIFICATION

The verifying parties in the DDWG should include the following:

(i) applicant/issuer - responsible for verifying all statements or information disclosed in the offering documents.

(ii) PA - responsible for verifying statements or information in the offering documents as may be within its areas of expertise,

(iii) legal counsels - responsible for verifying statements or information in the offering documents as may be within their scope of work in connection with the legal due diligence and verification exercise undertaken;

(iv) reporting accountants - responsible for verifying statements or information in the offering documents as may be within their scope of work including financial statements; and

(v) valuers or industry experts or independent market researchers - responsible for verifying statements or information in the offering documents as may be within their scope of work including matters arising from the valuation or industry review or the independent market research report respectively.

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SERVICE CHARGE IS NOT PART OF MINIMUM WAGE

WRITTEN BY CHAN JIA YING

Many industries collect service charges, including restaurants, banking, and travel and tourism. In the hotel industry, it is a standard practice to impose a 10% service charge on the bills to the customer, often in lieu of tipping. What happens to these service charges collected by the hotel, do they become part of the hotel funds or distributed to the employees?

On 24.3.2021, the Federal Court in the case **Crystal Crown Hotel & Resort Sdn Bhd (Crystal Crown Hotel Petaling Jaya) v Kesatuan Kebangsaan Pekerja-Pekerja Hotel, Bar & Restoran Semenanjung Malaysia [2021] MLJU 385** was asked to determine: -

(a) Whether under the National Wages Consultative Council Act 2011 ("**NWCCA**"), hoteliers are entitled to utilise part or all of the employees' service charge to satisfy their statutory obligations to pay the minimum wage?

(b) Whether having regard to the NWCCA and its subsidiary legislation, service charge can be incorporated into a clean wage or utilised to top up the minimum wage?

Both questions of law were answered in the **negative**.

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FACTS

The dispute began when the hotel employees insisted for their salaries to be aligned with the Minimum Wages Order 2012 (**MWO**) and for such wages to be separated from the 10% service charge imposed on the billings of the hotel's customers. It was then referred to the Industrial Court for adjudication in February 2012. In light of the NWCCA and the MWO, the trade union proposed to retain the service charge system together with a salary adjustment of 10% in the collective agreement. On the other hand, the hotel proposed to utilise service charge to pay the minimum wage.

It bears emphasis that all the courts below (namely the Industrial Court, High Court and Court of Appeal) took the same legal position, that service charge cannot be utilised to pay minimum wages.

FEDERAL COURT FINDINGS

As alluded to earlier, the Federal Court dismissed the appeal and answered the two questions of law in the **negative**. The salient points made by the apex court are summarised as follows:-

(1) SOCIAL LEGISLATION

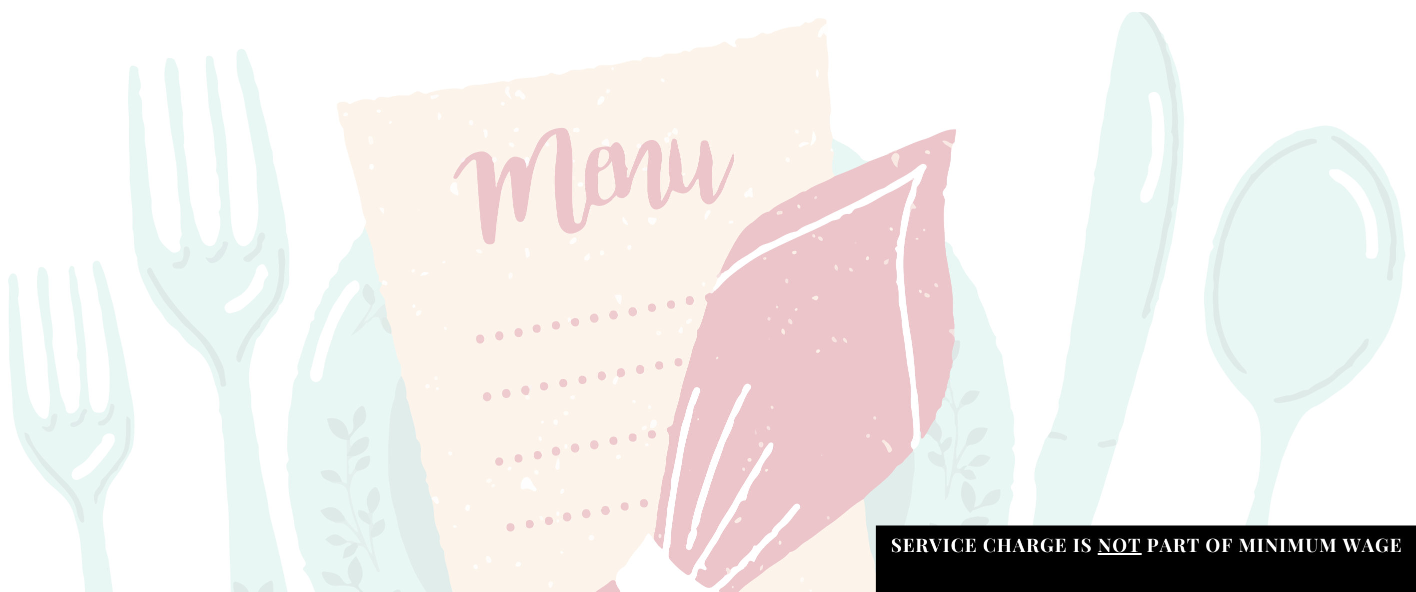
The Federal Court confirms that the Industrial Relations Act 1967 ("**IRA**"), NWCCA and MWO are social legislation enacted to meet the needs of particular sections of society, more particularly the vulnerable and marginalized sections. Their purpose is to protect and alleviate the plight of workmen and the working poor. As such, the IRA should be construed to ensure that the minimum wage stipulated under the NWCCA and MWO is achieved without abrogating other benefits enjoyed by the employees.

(2) BASIC WAGES DO NOT INCLUDE SERVICE CHARGE

Pursuant to the NWCCA, "wages" means "basic wages" and all other payments in cash payable to an employee for work done in respect of his contract of service, with certain exclusions. This means "basic wages" are to be treated separately from "all other payments in cash payable to an employee for work done in respect of his contract of service".

In addition, "minimum wage" means the basic wages determined by the Parliament under a minimum wages order. The NWCCA further provides that the rate of "basic wages" under a contract of service (including a collective agreement) must be increased to the minimum wages stipulated under the MWO. It follows that it is the "basic wages" that the NWCCA and MWO intend to increase to the minimum stipulated amount.

Thus, the question that arises in this case is whether "basic wages" include the element of service charge. If it does, the hotel would not have a problem meeting the minimum threshold for minimum wage. The Federal Court took the view that service charge could not be used to "top-up" or "substitute" any part of the minimum wages payable to employees. In other words, service charge is a separate and distinct contractual entitlement from basic wages.



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(3) SERVICE CHARGE IS HELD ON TRUST FOR THE EMPLOYEES

The Federal Court further added that service charges collected from the customers do not belong to the hotel or form part of the hotel's funds. In fact, the monies are held on trust for eligible employees. Given that the service charge collected never belonged to the hotel, it could not be appropriated or utilised by the hotel to meet or offset its statutory obligations.

The court held:-

> "[97] The Hotel collects the monies and does not mix or intermingle it with its own funds. These funds are kept separately, effectively in trust for the eligible employees to be distributed on a specific date as provided for in their contracts. This is further evidence of a lack of transfer of ownership of these funds. The Hotel in point of fact, acts as a fiduciary or trustee who holds the monies until distribution to the beneficiaries who are the eligible employees.
>
> [98] Therefore the correct analysis in law of the payment and receipt of service charge, is that it reflects a trust situation whereby the customer pays, and the eligible employees receive, the monies they are entitled to, through the trustee or fiduciary namely the Hotel."

(4) PRINCIPLES OF LAW PREVAIL OVER THE INTEREST OF A PARTICULAR SECTOR

The court was urged to take into account the impact of the Covid-19 pandemic on the hotel industry. Not only did the court indicate that the present appeal deals with wages relating back to 2012, the fact of the Covid-19 pandemic cannot be the reason to depart from the accepted principles of law in respect of the construction that "service charge" is not a part of "basic wages" under the minimum wage legislation.

COMMENTARY

This landmark decision sets a reminder to the working force that the statutory stipulation of a "minimum wage" represents the lowest level below which wages cannot be allowed to decline, and it is not open to be varied or altered by the market forces. The underlying rationale is the recognition that labour must be remunerated reasonably, and that exploitation of labour through the payment of low wages is unacceptable. The Federal Court also remarked that the decision is not confined to the facts of the appeal and that it has pronounced the material law on the relevant legislation which does not vary from time to time. Hence, it is not surprising that this decision would affect all sectors across the country. On that basis, it is key for all employers who may be affected to seek appropriate legal advice to re-evaluate their employment or service contracts, in particular, remuneration and benefit as well as the compensation structures in accordance with the law. Be mindful that the service charge collected is held on trust for the eligible employees, and most importantly, the service charge collected cannot be used as a means of meeting any shortfall of the minimum wages. Should this be the current practice of your organization, you would be running afoul of the law.

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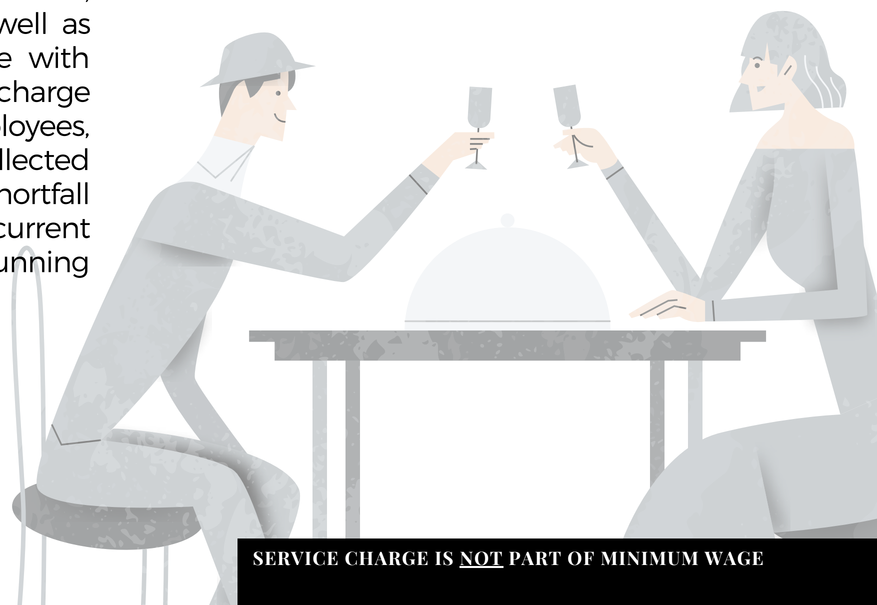

WHAT DO I DO WITH AN ADJUDICATION DECISION?

WRITTEN BY PAN YAN TENG

Once an adjudicator has made a decision on a dispute, the parties are bound to comply with it. If the unsuccessful party does not comply with the adjudicator's decision, the successful party is entitled to enforce the adjudicator's decision in court under Section 28 of the Construction Industry Payment & Adjudication Act ("**CIPAA**") 2012 - in other words, to seek a judgment from the court, ordering compliance with the adjudicator's decision.

However, the unsuccessful party also has the right to apply to the High Court to have the adjudication decision set aside - but only on limited grounds pursuant to Section 15 CIPAA 2012. That being the case, the Malaysian Courts are inclined to lean towards upholding an adjudication decision [see: ***Leap Modulation Sdn Bhd v Pcp Construction Sdn Bhd and another appeal*** [2018] MLJU 772]. The Court in ***AMT Engineering Services v AH Design Communication Sdn Bhd and another appeal*** [2018] MLJU 1860 also held that *"there is a general default towards upholding an Adjudication Decision unless a case under section 15 of the CIPAA has been made out..."* This position is in line with the object and intent of CIPAA 2012 which is to remedy the cash-flow problem which was prevalent in the Malaysian construction industry.

Once an order to enforce is obtained, Section 28(3) CIPAA 2012 provides that the order may be executed in accordance with the same rules on execution of the orders or judgment of the High Court set out in Order 45 of the Rules of Court 2012. We will set out some of the commonly used enforcement procedures in this article.

JUDGMENT DEBTOR SUMMONS

The principles guarding the application of Judgment Debtor Summons ("**JDS**") are laid down in Section 4 of Debtors Act 1957 together with Orders 48 and 74 of the Rules of Court 2012. A JDS is a summons issued by the court to be served on the Judgment Debtor to compel the Judgment Debtor to appear in court to provide information about its assets and whether it has sufficient means to settle the judgment debt [see: **Nakano (Malaysia) Sdn.Bhd. v Oriental Wealth (M) Sdn. Bhd.** [2000] MLJU 435].

Upon serving the JDS on the Judgment Debtor, the company's directors or officers will be required to appear in court on behalf of the company to provide information about the company's assets. If the Judgment Debtor does not appear in court despite the order has been duly served, the court may issue an order of arrest to bring him before the court or make an ex parte order against him. Upon the examination (or non-appearance) of the Judgment Debtor, the court may order the Judgment Debtor to pay the judgment debt either in one lump sum or by instalments ("**Court Order**").

In the event the Judgment Debtor fails to comply with the Court Order despite having sufficient means to satisfy the judgment debt, a judgment notice may be issued against the Judgment Debtor requiring the Judgment Debtor to show cause why he should not be sent to prison for failing to comply with the Court Order. If no sufficient cause was shown or the Judgment Debtor chooses to ignore the Court Order, it is a contempt of court and an Order of Committal may be made to commit the Judgment Debtor in civil prison for a period of up to six (6) weeks or until earlier payment of instalment is made.

It is, however, important to note that the Federal Court in the **Mohd Kamal bin Omar v United Overseas Bank (M) Bhd and other appeals** [2018] MLJU 600 held that an order made by the court under a JDS application filed pursuant to the Debtors Act 1957 does have the effect of modifying an original Judgment i.e. changing the judgment sum and/or the terms of payment. As such, it is of utmost importance that all Judgment Creditors are mindful of this case when deciding on the most suitable choice of proceedings to take to execute a judgment.

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GARNISHEE PROCEEDINGS

Garnishee Proceedings, as provided under Order 49 of the Rules of Court 2012, is another way to execute a judgment or court order. A Garnishee application may be applied to direct the Judgment Debtor's bank i.e., the Garnishee, to attach an amount from the Judgment Debtor's bank account sufficient to satisfy the judgment debt owed to the Judgment Creditor.

A Garnishee Proceeding may be initiated by filing an *ex-parte* Notice of Application supported by an affidavit to obtain a Garnishee Order Nisi (1st Stage – Show Cause Order). This Show Cause Order functions to summon the Garnishee to the court to explain whether or not the Garnishee owes any debt to the Judgment Debtor. When this Show Cause Order is obtained, the Judgment Debtor's bank account with the Garnishee will be frozen until the disposal of the proceeding.

Thereafter, the court will set a hearing for the Garnishee to show cause. During the hearing, the court will assess whether or not the amount garnished is disputed and other relevant factors raised by the Garnishee. In the event a Garnishee does not or fails to show cause, the court may make a Garnishee Order Absolute accordingly (2nd Stage – Order Absolute). Any payment made by the Garnishee in compliance with the Garnishee Order Absolute shall be a valid discharge of his liability to the Judgment Debtor.

WRIT OF SEIZURE AND SALE

Another good option to consider if the Judgment Debtor has many valuable properties is taking out a Writ of Seizure and Sale ("**WSS**"). There are two types of property which can be seized and sold, namely (i) movable properties; and (ii) immovable properties. Movable properties which may be the subject of a WSS includes vehicles, furniture, etc. Immovable property on the other hand is usually any landed property/land which the Judgment Debtor owns. However, there are certain items which are prohibited from being attached pursuant to Section 3 of the Debtors Act 1957. These include essential life items such as clothes and cooking vessels, pension, gratuity or allowance by the government, wages of the Judgment Debtor, etc.

Once an order for a WSS is obtained, the sheriff or bailiff will then auction the seized properties to satisfy the judgment debt owed by the Judgment Debtor. An auction of the seized property will be carried out on a date fixed by the court, with the assistance of a court-appointed auctioneer. The proceeds of the sale will then be utilized to satisfy the judgment debt.

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WINDING-UP PROCEEDINGS

Winding-up proceeding is the process of bringing an end to a company. The most common situation which results in the commencement of winding-up proceedings against a company is when the company is unable to pay its debts to their creditor(s) on time. Starting from 1 April 2021, the threshold for commencing winding-up proceedings under the Companies Act 2016 is now fixed at RM50,000.00 [see: **Gazette Notice** (GN No. 4159)].

The first step to commence a winding-up proceeding is to issue a statutory notice of demand pursuant to Section 466 of the Companies Act 2016 to the company. If the company fails to pay the amount demanded, there is a statutory presumption that the company is now insolvent. The Judgment Creditor can now file the court papers, known as a winding-up petition, to seek a court order for the winding-up of the company.

On this note, it is relevant to note that there is no requirement for the successful party in an adjudication to enforce the adjudication decision with the High Court under section 28 of CIPAA 2012 before issuing a statutory notice to wind up. According to the Court of Appeal in the case of **Likas Bay Precinct v. Bina Puri** [2019] 3 MLJ 244, winding up proceedings may be premised on an adjudication decision since it "*evinces the fact that the amount stated therein is due and owing*". Thus, the successful party may commence winding up proceedings based on an adjudication decision without first obtaining an order to enforce the same under section 28 of CIPAA. However, the unsuccessful party may still dispute a debt claimed pursuant to an adjudication decision if the unsuccessful party can show that the disputes are bona fide, and upon substantial ground [see: **ASM Development (KL) Sdn Bhd v Econpile (M) Sdn Bhd** [2020] MLJU 282].

Nevertheless, once a winding-up order is made by the court, a liquidator would be appointed to take control of the company and its assets in order to liquidate and distribute the proceeds to the company's creditors. Winding up may be one of the most effective forms of enforcing a judgment, but the proceedings can be time-consuming, costly, and there is also a degree of uncertainty in terms of the company assets left to be distributed to its creditors.

CONCLUSION

The above is not meant to be an exhaustive list. Whilst there are various ways available that a successful party in an adjudication proceeding can consider to recover its debts, it is advisable for the successful party to conduct a background search on the unsuccessful party in order to ensure that the chosen enforcement proceeding(s) is effective to get its hard-earned money recovered.

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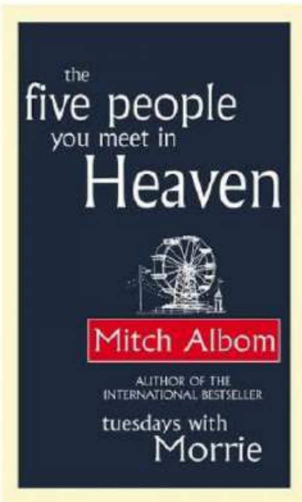
As part of our learning and development initiative, we have initiated Reading groups in both HHQ and HLP to promote and encourage reading and the sharing of ideas among our colleagues. We are passionate about personal and professional development at our firms and we believe that great leaders are like a sponge when it comes to the acquisition of knowledge, the development of new skill sets, and the constant refinement of existing competencies.

As a team, we realize the importance of learning and make reading a priority and not just something to do when "we are bored" or have "free time". The biggest leaders in the world are avid readers and they use the information acquired through reading in order to inspire, motivate, and lead those around them. We hope this initiative would inspire everyone in HLP and HHQ to keep growing and learning.

HIGHLIGHTED BOOK



BOOK CLUB

GO CLEAN, GO GREEN.

A clean and tidy workspace is what we should implement in our working environment to promote good employees' wellbeing and safety, prevent illness and sickness and reduce office hazards. With that in mind, in conjunction with Earth Hour, our colleagues in HHQ took some time off their busy schedules to clean up and green up!

Here are some pictures of our winning participants!

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