

Empower



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Note from the Editorial Team

Dear Readers,

Gong Xi Fa Cai to all of those celebrating!

We hope that this new year brings you all much happiness, success, good health and prosperity!

This is our first edition of Empower for 2022 and we hope that you would all find it insightful and practical as we strive to continue to provide you with the latest legal updates in Malaysia which we consider to be relevant and applicable.

We have four articles in this newsletter and the first article speaks about the new Housing Integrated and Management System (HIMS) which is a new single-entry system introduced by the National Housing Development to replace previously existing systems. Read the full article to find out more!

Our second article is indeed an extremely hot topic as it considers the Covid-19 (Amendment) Act 2022 which was gazetted earlier this month. The amendments to the Act would be relevant to housing developers and property buyers and if you fall in either one of these categories, then we are certain that you would find this article to be worth a read.

Our third article is a case summary of the Federal Court's recent decision in *KWSP v Edwin Cassian Nagappan* and this article would without a doubt be of interest to every one of you. The Federal Court's decision clarifies whether or not company directors could be made personally liable if the company defaults in its Employee Provident Fund contributions. Have a read to know the answer!

The last article we have is also a case summary of the recent Court of Appeal's decision in *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* and it considers the pre-emptive rights of existing shareholders of a company in its issuance of new shares to outsiders. The article sets out a practical guide which we think would be useful to those of you who wish to know more.

Finally, don't forget to check out our inside out section for our latest activities, initiatives and updates.

We hope that you enjoy reading this edition as much we enjoyed putting it together for you! Happy reading!

Empower is a monthly newsletter jointly published by

Halim Hong & Quek and Harold & Lam Partnership.

It is distributed for free and can be read on HHQ's or HLP's website at <https://hhq.com.my/> or <https://hlplawyers.com/>

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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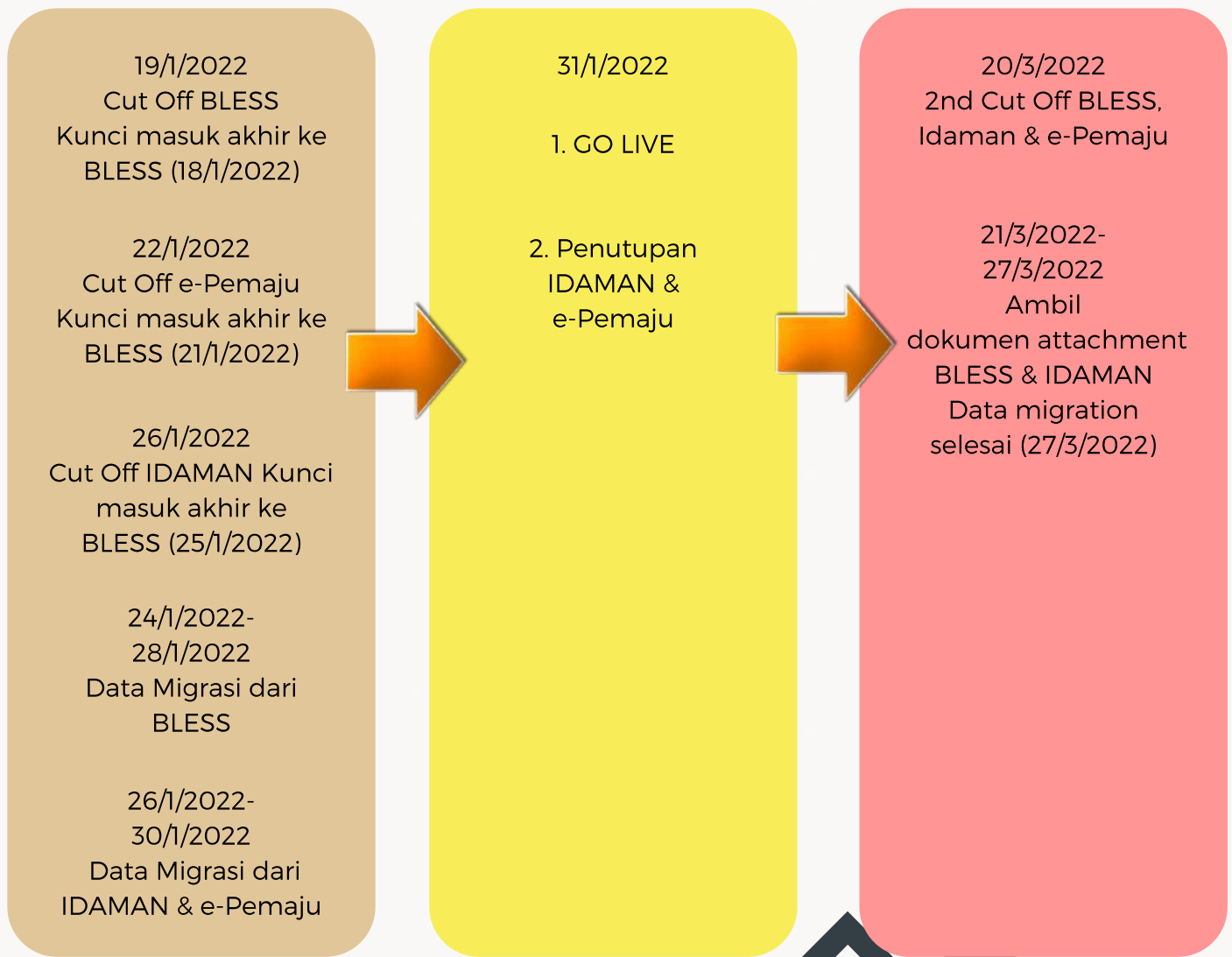
HOUSING INTEGRATED MANAGEMENT SYSTEM ("HIMS")

WRITTEN BY
TAN KEEN LING

The National Housing Development (JPN), KPKT has developed the Housing Integrated Management System (HIMS), a single entry system to replace BLESS, IDAMAN and e- Pemaju. On 31 January 2022, HIMS is expected to go live.

The HIMS timeline provided by KPKT is as follows:

HIMS TIMELINE ¹



¹ <http://kpkt-hims.rehda.com/>



HIMS is a system that incorporates the elements of application, monitoring, enforcement and data collection and it allows the developer to apply their Developer License ("DL") and Advertising Permit ("AP") separately in the system. Each developer will have one DL but every project under the developer will have separate AP and to be added under one DL.

The DL and AP certificate can be generated in HIMS once the JPN has verified and approved the said application. Please note that the developer has to obtain the DL first before the AP application.

Furthermore, the developer can generate sale and purchase agreement ("SPA") with eSPA function that is available in HIMS by filling up the details of the development project, personal information of the purchaser and the details of the unit or property for the sale and purchase transaction.

The developer shall update their DL and AP information always in HIMS to ensure that the SPA reflects the latest information of the development project.

The manual operation and additional information of HIMS can be found in <http://kpkt-hims.rehda.com/>.



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IMPORTANT CHANGES UNDER COVID-19 (AMENDMENT) ACT 2022 AFFECTING HOUSING DEVELOPERS AND PURCHASERS

**WRITTEN BY
TAN POH YEE**

The Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) (Amendment) Act 2022 ("the Act") was gazetted on January 13, 2022 and the Act introduces some key amendments affecting housing developers and purchasers as follows:

DEFINITION OF AGREEMENT AND FIRST AGREEMENT

Clause 38A of the Act defines an agreement to be a contract of sale for the sale and purchase of a housing accommodation as prescribed in Schedules G, H, I and J of the Housing Development (Control & Licensing) Regulations 1989.

It also defines "first agreement" as the first agreement entered into between a purchaser and developer for a housing accommodation. Therefore, whenever first agreement is mentioned in the provisions, it applies only to the first purchaser who entered the sale and purchase agreement of the property with the housing developer and the provision will not apply to subsequent purchasers.

NEW PROVISION UNDER PART XIA PROVIDING MODIFICATION THE LAW OF HOUSING

Clause 38B of the Act proposes that the developer shall not impose any late payment charges for unpaid instalments between January 1, 2021 to December 31, 2021. This would mean that if the developer is going to claim for late payment charges from the purchaser, the developer will have to exclude the late payment due for the said period, if the purchaser is able to show that his failure to pay instalments due during the said period was due to measures by government to prevent Covid-19. Note that the provision only applies to the first agreement entered before May 31, 2021.

DEVELOPER MAY APPLY TO THE MINISTER FOR EXTENSION OF TIME TO DELIVER VACANT POSSESSION

Under the sale and purchase agreement of a housing accommodation, the housing developer has a duty to deliver vacant possession of the property within a fixed timeline, failing which it will be liable to pay liquidated ascertained damages to the purchaser for the period delayed.

For the purpose of calculation of liquidated ascertained damages, the housing developer may apply to the Minister of Housing and Local Government (thereafter referred to as the Minister) to exclude the period between January 1, 2021 to December 31, 2021. The reason for such application must be that it was unable to deliver vacant possession within the prescribed timeline due to the measures by the government to prevent the spread of Covid-19 virus.

Application to the Minister must be made before the expiry of time for delivery of vacant possession under the sale and purchase agreement and this relief is only applicable to first agreement entered before May 31, 2021.

TAKING OF VACANT POSSESSION

Clause 38D of the Act provides that where after the housing developer has served to the purchaser a notice to take vacant possession of the property and the purchaser is unable take vacant possession between the period of June 1, 2021 to October 31, 2021 or during any period excluded by the Minister, the purchaser will not be deemed as having taken vacant possession of the property.

DEFECT LIABILITY PERIOD

Clause 38E of the Act provides that for purpose of calculation of damages arising from defects to the property during the defect liability period, the period between June 1, 2021 to October 31, 2021 is to be excluded.

EFFECT OF THE MODIFICATION

Any exclusion or extension granted by the Minister does not affect any exclusion or extension obtained under Sections 34, 35 and 36 of the Act. Further, the modifications do not affect any legal proceedings already commenced or judgment obtained to recover late payment charges or liquidated ascertained damages payable during the period of Oct 24, 2020 until date of publication of this new provision.

CONCLUSION

The amendments above are meant to assist housing developers and purchasers whose contractual obligations under a sale and purchase agreement are affected due to measures by the government to control the spread of Covid-19 virus. We hope that the amendments will work out to address the issues currently faced by housing developers and purchasers in a sale and purchase of a housing accommodation.



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EPF CONTRIBUTION - PERSONAL LIABILITY OF COMPANY DIRECTORS

CASE SUMMARY: LEMBAGA KUMPULAN WANG SIMPANAN PEKERJA v EDWIN CASSIAN NAGAPPAN [2021] 7 CLJ 823 [“EDWIN CASSIAN’S CASE”]

WRITTEN BY CHAN JIA YING

- 1) Where a company defaults in its Employee Provident Fund (EPF) contributions, can company directors be made personally liable? The answer is **YES**.
- 2) Are the directors jointly and/or severally liable for the unpaid EPF contributions? This was the crux of the Federal Court's decision in Edwin Cassian's Case.
- 3) Section 46 of the EPF Act 1991 (“**EPF Act**”) provides that the directors of a company will be made jointly and severally liable for the contributions due and payable to the EPF. The said Section 46 reads as follows:-

“Where any contributions remaining unpaid by a company, a firm or an association of persons, then, notwithstanding anything to the contrary in this Act or any other written law, **the directors of such company** including any persons who were directors of such company during such period in which contributions were liable to be paid, or the partners of such firm, including any persons who were partners of such firm during such period in which contributions were liable to be paid, or the office-bearers of such association of persons, including any persons who were office-bearers of such association during such period in which contributions were liable to be paid, as the case may be, **shall together with the company, firm or association of persons liable to pay the said contributions, be jointly and severally liable for the contributions due and payable to the Fund.**”

THE FACTS

- 4) The EPF Board commenced a suit against a company (Fixed Interior Collections Sdn Bhd) and its directors, Edwin and Bernard (all 3 as Defendants) for the company's failure to make the employer's contributions on behalf of its employees. The parties then entered into a consent judgment, whereby each Defendant agreed to pay the EPF Board the arrears in 24 instalments including dividends, interest and legal fees.
- 5) The pertinent terms of the consent judgment read as follows: -

*“MAKA ADALAH PADA HARI INI DIHAKIMI SECARA PENGHAKIMAN PERSETUJUAN bahawa **Defendan-Defendan hendaklah membayar kepada Plaintiff...**”*

- 6) Following the default in the consent judgment, the EPF Board issued a bankruptcy notice against Edwin and presented a creditor's petition against him in respect of the whole sum under the consent judgment. Edwin applied to set aside the bankruptcy notice and creditor's petition which was allowed by the Senior Assistant Registrar ("**SAR**").
- 7) The reasons given by the SAR was that, in the absence of the words "jointly and severally" liable in the consent judgment, the liability ought to be jointly shared and in equal proportion. Therefore, the sum demanded in the bankruptcy notice and the creditor's petition against Edwin for the full judgment sum is excessive, thereby rendering them as defective.
- 8) On appeal to the High Court Judge, the Learned Judge agreed with and upheld the SAR's decision.
- 9) Dissatisfied with the decision, the EPF Board appealed to the Court of Appeal. Similarly, the Court of Appeal placed emphasis on the wordings of the consent judgment which is a contract binding upon the parties. The Court of Appeal went on to hold that it cannot import the phrase "joint and several" notwithstanding the express provisions of Section 46 of the EPF Act. On that basis, the Court of Appeal dismissed the appeal and upheld the decisions by the lower courts.
- 10) Subsequently, the EPF Board appealed to the Federal Court and the question of law before our apex court is: -

"Whether this Court should give effect to the liability on a "joint and several" basis as provided under section 46 of the Employees Provident Fund Act 1991 in a situation where the words "joint and several" were not specifically stated in the court judgment."

- 11) The Federal Court unanimously answered the above question in the affirmative.

FEDERAL COURT'S DECISION

- 12) The Federal Court overturned the decision of the Court of Appeal and held that the EPF Act being a statutory law prevails over the terms of the consent judgment. Therefore, it is not open to the courts to stultify, vary or whittle down the clear provisions promulgated by Parliament in relation to liability for EPF contributions by construing judgments in a manner which is not consonant with the EPF Act.
- 13) In reaching its decision, the Federal Court referred to Section 44(1) of the Contracts Act 1950 on joint liability:-

*"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel **any one** or more of the joint promisors to **perform the whole** of the promise."*



- 14) Accordingly, the EPF Board is entitled to proceed against Edwin, Bernard or the company, or all three in order to procure the full performance as evidenced from Section 44 of the Contracts Act 1950.
- 15) The court went on to hold that merely inserting the word “jointly” is insufficient to halve liability. There must be express words to that effect to state that the liability of the joint promisors is to be borne in equal proportions.
- 16) Given the effect of the statutory provisions above and in the absence of the express joint liability, it must follow that the liability under the consent judgment in this case be both joint and several.

Key Takeaways

17) Based on the decisions made by the Federal Court and the courts below, the key takeaways are: -

- i) company directors are personally liable (jointly or severally) for the failure of the company to make EPF contribution for its employees;
- ii) notwithstanding the express provision of Section 46 of the EPF Act that sets out the personal liability of company directors as jointly and severally liable for any unpaid EPF contributions by the company, such liability can be apportioned (if the parties agree) and may be expressly recorded in a consent judgment, if applicable; and
- iii) in the event parties agree to the apportionment of liability, such apportionment must be expressly stated in the judgment. For example: -

“A and B as company directors are to pay the EPF Board the sum of XX jointly in equal proportion”

“A and B as company directors are to pay the EPF Board the sum of YY jointly in the proportion of 60% (by A) and 40% (by B)”

18) This flexibility to contract out of the statutory provisions on joint and several liability would be a useful “apportion liability” tool to companies comprising of decision-making directors, sleeping directors and/or director cum shareholders.



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KNOW YOUR PRE-EMPTIVE RIGHTS AS AN EXISTING SHAREHOLDER OF A COMPANY IN ITS ISSUANCE OF NEW SHARES TO OUTSIDER(S)

WRITTEN BY
TAN LEE WEEI

PRE-EMPTIVE RIGHTS TO NEW SHARES

Pre-emptive Rights are statutory rights accorded to the holders of existing shares (“**Existing Shareholders**”) by virtue of Section 85(1) of the Companies Act 2016 (“**CA 2016**”). It provides that, subject to the constitution, where a company issues shares which rank equally to existing shares in terms of voting or distribution rights, those shares shall first be offered to the Existing Shareholders. This is to ensure that the relative voting and distribution rights of the Existing Shareholders would be maintained if the offer were accepted.

Such an offer shall be made to the Existing Shareholders in a notice specifying the number of shares offered and the time frame of the offer. If the offer is not accepted after the expiry of the period specified in the notice, it would be deemed to be declined and the directors may proceed to dispose those shares in such manner as the directors think most beneficial to the company.

The Pre-emptive Rights are typically found to be incorporated in the companies’ constitution which is also known as the contractual Pre-emptive Rights.

COMMON PRACTICE IN MALAYSIA

It is not unusual to find that most of the ordinary resolutions prepared by the Malaysian companies do not specifically set out the Pre-emptive Rights of the Existing Shareholders, with the assumptions that the Existing Shareholders would be aware of the likelihood of the dilution of their shareholding in the event of issuance of new shares and have impliedly agreed to waive the exercise of their Pre-emptive Rights when they approve such resolutions.



DENIAL OF STATUTORY AND CONTRACTUAL PRE-EMPTIVE RIGHTS

It was not until the recent Court of Appeal's decision in *Concrete Parade Sdn Bhd v. Apex Equity Holdings Bhd & Ors* [2021] 9 CLJ 849 which held that an Existing Shareholder cannot be denied its Pre-emptive Rights unless there is "direction to the contrary" given during a general meeting, prior to such new shares being offered to outsiders.

In this case, the Court of Appeal disagreed with the High Court's judgment that there had not been any contravention of the rights of pre-emption due to the fact that the placement has been approved by the shareholders at the extraordinary general meeting. It was, on the other hand, of the view that no resolution passed at a general meeting can completely displace the Existing Shareholders' Pre-emptive Rights in the new shares. This was what sought to be done in this case via the subscription agreements where the breach was held to be oppressive and the issuance of the placement shares under the subscription agreements constitutes an unfairly prejudicial conduct within the meaning of Section 346 of the CA 2016, as it had resulted in:

- i) the unjustified dilution of the appellant's shareholding in the company as an additional 20 million new shares had been issued to the outsiders despite the statutory safeguard in Section 85 of the CA 2016, where the legislative intent was to "maintain the relative voting and distribution rights of the Existing Shareholders"; and
- ii) the loss of opportunity to enhance the appellant's shareholding in the company by subscribing for part of the placement shares.

The Court further emphasised that a resolution does not constitute a "direction to the contrary" for the following reasons:

- i) A "direction to the contrary" must be obtained before any shares are offered to outsiders. In this case, the resolution was passed after the subscription agreements were signed for the offer of the placement shares to the seven placees. It follows that the resolution could not retrospectively allow the issuance of new shares to outsiders, in breach of Section 85 of the CA 2016.
- ii) For a "direction to the contrary" to be operative, the proposed resolution must set out all the requisite information regarding the Existing Shareholders' Pre-emptive Rights under Section 85(1) of the CA 2016 i.e.:
 - a) The Existing Shareholders had a statutory Pre-emptive Right to be offered any new shares which rank equally to existing shares issued by the company;
 - b) By voting in favour of the resolution for the issuance of the new shares, the Existing Shareholders would be waiving their Pre-emptive Rights; and
 - c) A waiver is only effective if the party waiving it had knowledge of his legal rights and with that knowledge consciously chose not to exercise the same.





PRACTICAL GUIDE

- i) Although Section 75 of the CA 2016 grants directors the general power of allotment of shares in a company, it cannot be invoked to bypass the safeguards under Section 85 of the CA 2016. The Pre-emptive Rights must be waived via ordinary resolution. This is because Section 85 of the CA 2016 is not subjected to Section 75 of the CA 2016 and the former is only subjected to the constitution which makes no reference to the latter. Further, the express wording of Section 75 of the CA 2016 states that the directors “shall not exercise any power to allot shares in the company” unless the prior approval by way of resolution by the company has been obtained.
 - ii) The resolution must at least set out expressly that the Existing Shareholders have the statutory and contractual Pre-emptive Rights and by voting in favour of the resolution, the Existing Shareholders will waive their respective Pre-emptive Rights.
 - iii) Waiver of Pre-emptive Rights must be obtained before new shares are offered not on a pro-rata basis.
 - iv) For public listed companies, the Pre-emptive Rights cannot be removed by the company’s constitution despite Section 85 of the CA 2016 says “subject to constitution”. Pre-emptive Rights are required to be incorporated into the constitution of public listed companies pursuant to Paragraph 7.08 of the Main Market Listing Requirements (“MMLR”).
- v) Set out below are some of the circumstances where waiver is required to be sought for new issuances in public listed companies:
- a) General mandate for issue of securities in accordance with Paragraph 6.03 of the MMLR and Section 75 of the CA 2016;
 - b) Issue of securities in accordance with Paragraph 6.05 of the MMLR and Section 75 of the CA 2016;
 - c) Allotment of shares to directors etc. in accordance with Paragraph 6.06 of the MMLR;
 - d) Issue of convertible securities in accordance with Part I, Chapter 6 of the MMLR;
 - e) Share issuance scheme or share grant scheme in accordance with Part G, Chapter 6 of the MMLR; and
 - f) Dividend reinvestment scheme in accordance with Part G(A), Chapter 6 of the MMLR.



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STRATEGIC ALLIANCE OF



With great pleasure, we would like to announce the extension of the strategic alliance of

HALIM HONG & QUEK and HAROLD & LAM PARTNERSHIP.

It has been a great collaboration in 2021, hence we continue this effort to bring additional sophistication and experience to our respective existing and potential clients both locally and internationally.



POST FLOOD CLEAN-UP CAMPAIGN

In collaboration with Tzu Chi Malaysia, Halim Hong & Quek's partners and staff voluntarily join the post flood clean-up campaign in Taman Sri Muda from 25th to 26 December 2021. We hope our little contribution can make a difference for those impacted by natural disaster.





I was stunned by the aftermath of Taman Sri Muda's flood. It was a total disaster to the occupiers and the community. You may have seen from the news reporting, YouTube and pictures, but nothing could have hit so hard in your heart unless you saw the muddy surroundings and wrecked households on the spot. I am proud of my fellow HHQ colleagues, who have stepped out to the forefront despite short notice. - Dato' Quek Ngee Meng, Managing Partner of Halim Hong & Quek

From what we witnessed at ground zero, the sense of helplessness experienced by the flood victims became so vivid and I am sure the attendees at the clean-up can feel the same. I am grateful to have made it there, did little of what I can to show love and to give them little hope and courage to rebuild their home. I want to help again in future but I really hope there's no next time. - Mr Lum Man Chan, Partner of Halim Hong & Quek



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f Halim Hong & Quek

In view of this, Halim Hong & Quek came out with an initiative – **Flood Victim Legal Aid.**

Our firm provide free legal consultation to all flood affected victims. Feel free to reach us to make an appointment.

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