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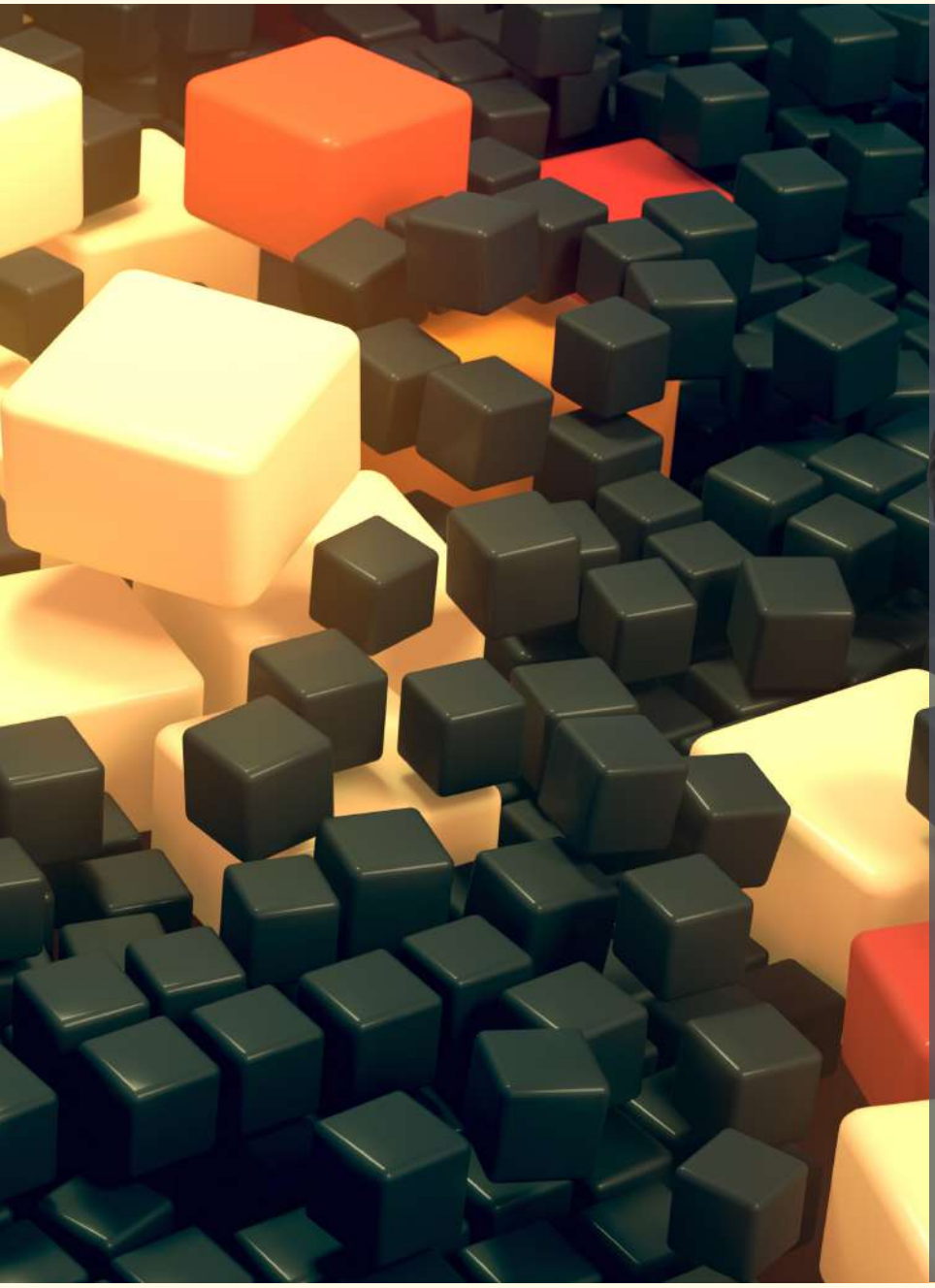
HLP
ADVOCATES & SOLICITORS

Empower



WHAT'S INSIDE THIS ISSUE:

A MONTHLY NEWSLETTER BY
HHQ & HLP

Note from the Editorial Team

Dear Readers,

As we have now concluded the Chinese New Year festivities, let us all welcome the year of the Tiger with hope and aspirations for the year to be blessed in all ways that matter most to us.

In this month's edition of the newsletter, we have some very interesting articles to share with you. For the very first time, we provide you with an exclusive Q&A with the senior partners of Messrs Harold & Lam Partnership, namely Mr. Harold Tan and Mr. Lam Wai Loon whom have both been extremely candid on their personal thoughts concerning court experiences and conducting online hearings. This is an article that you do not want to miss at any cost!

Our second article is also extremely relevant as it sets out methods and practices on how to deal with issues in relation to inter-floor leakages within a strata scheme. It's a one stop article which articulates and answers in detail, most of the questions one might have in relation to inter-floor leakages within a strata scheme and this is certainly a must read for all.

Our third article is a practical guide which we believe many of our clients in the construction industry will find useful. It highlights the importance of construction document management and explains why it is absolutely necessary to have a systematic and structured document management system in place.

Our fourth and fifth articles are both case studies on two important recent decisions of the Court of Appeal and Federal Court respectively. The fourth article explains the Court of Appeal's decision in *Ahmad Zulfendi bin Anuar v Mohd Shahril bin Abdul Rahman* wherein the Court of Appeal has decided that the lack of a driving license, road tax or insurance coverage should not be factored into increasing the liability of the said road user in a motor vehicle accident claim. The fifth article on the other hand elucidates the Federal Court's decision in *Maritime Intelligence Sdn Bhd v Tan Ah Gek* wherein the court had occasion to decide on the issue of whether or not an employer can rely on post-dismissal discoveries as reasons to justify the dismissal of an employee in an unfair dismissal claim.

Finally, don't forget to take a look into our Inside Out section for the firms latest updates and activities!

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/**

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INTERVIEW WITH MR. HAROLD TAN & MR. LAM WAI LOON

WRITTEN BY
SYED MOHAMED ASHIQ & LIM REN WEI

The editorial team had the opportunity to speak to the senior partners of Messrs. Harold & Lam Partnership, **Mr. Harold Tan** and **Mr. Lam Wai Loon**, on some of their court experiences and thoughts on preparing and conducting online hearings.

Q: 'Hearing', 'trial' and 'mention' are some of the terms that we frequently hear or read in relation to court procedures or court proceedings. These are definitely terms that you come across daily as a lawyer. But just for the benefit of people outside the legal profession or perhaps, not familiar with legal matters, could you please briefly explain what are court hearings and trials in general?

Mr Harold Tan Mr Lam Wai Loon

Harold: Generally, hearings concern interlocutory applications or appeals before the Judge, registrar or assistant registrar which does not require the attendance and statement by witnesses. Whereas, trials are full proceedings which are conducted with the attendance of witnesses.

Lam: There are slight differences between the term hearing and trial where lawyers and laymen may sometimes use it interchangeably. Generally, hearings are usually for the purposes for counsel to make a submission on the merits or any issues arising from a particular case or for a particular application. Trials are specifically for evidence taking process where the witness will be present in court to assist the court. Whereas, mention is to facilitate the management of a case in court.

Q: So, we're still in the midst of this Covid-19 pandemic, which you would agree, has brought about changes to every aspect of our lives. The world we're living in is so different now – the 'new normal' so to speak. We understand that the court process has also changed significantly. We saw the civil courts embracing virtual hearings and moving away from physical hearings in the court room. Even though our economy has re-opened (to a certain extent) we still see judges preferring virtual hearings. What is your personal take on the introduction of virtual hearings? And is this actually something the Judges are empowered to do?

*(Answer note: Newly inserted **Section 15A of the Courts of Judicature Act (CJA) 1964**, states that the court may conduct civil or criminal matters through remote communication technology.)*

Harold: I reckon that with the amendments made to the CJA (Court of Judicature Act) there ought to be no dispute whether the courts (and Judges) can conduct civil or criminal matters via remote. I am actually glad that the Court has chosen to conduct these proceedings with remote technology during the pandemic. This pandemic merely expediated the process of including remote technology in Court proceedings.

It was once the practice that all filings be conducted physically, so firms would have "riders" who would collect the documents from the law firm offices, go to Court, collect their numbers and proceed to physically file the cause papers. There is also the receipt of the sealed copies from Court. Those days, some firms would have a PO Box in the Court itself, for the Courts to drop the sealed copies of cause papers to be collected by the "riders." This was later changed with the advent of technology and the Courts adopting (and amending to include) e-filing systems. Which has definitely made it more efficient. This is natural as there is benefit in efficiency.

continued from page 3

Lam: There are no specific rules prohibiting the conduct of a virtual hearing or trial, especially in light of the newly inserted provisions in the Courts of Judicature Act (CJA) 1964. However, if counsel are able to convince the court that the holding of a virtual hearing or trial would prejudice their client, especially in criminal proceedings, then the case would be likely to proceed with physical hearing or trial. It would not be very common for such prejudice to arise in civil proceedings.

There are definitely advantages and disadvantages of the introduction of virtual hearing. In fact, some counsel prefer to conduct the case remotely via virtual hearings or trial due to the convenience of it. After all, it depends on the nature of the case. For example, complex cases which need extensive explanations where multiple documents would need to be referred and compared at the same time (especially in construction matters), it may be more time effective as everything can be done instantaneously. Whereas during virtual hearing, it may take more time to share screen the documents separately.

Q: How was it for you then, to conduct trials and hearing virtually? Did you find it difficult at the beginning, or was it a very natural transition for you?

Harold: Lawyers are averse to procedural changes and filing has always been done physically. The initial introduction of conducting these matters virtually was not easy, because of the unknown.

Personally, I, myself was skeptical at first, considering the difficulty at first in setting up the system. However, after conducting hearings and trials virtually, it is a process that would make hearing more efficient. I find it efficient for appeals and hearings to be conducted virtually, but personally, trials I find it better conducted in-person.

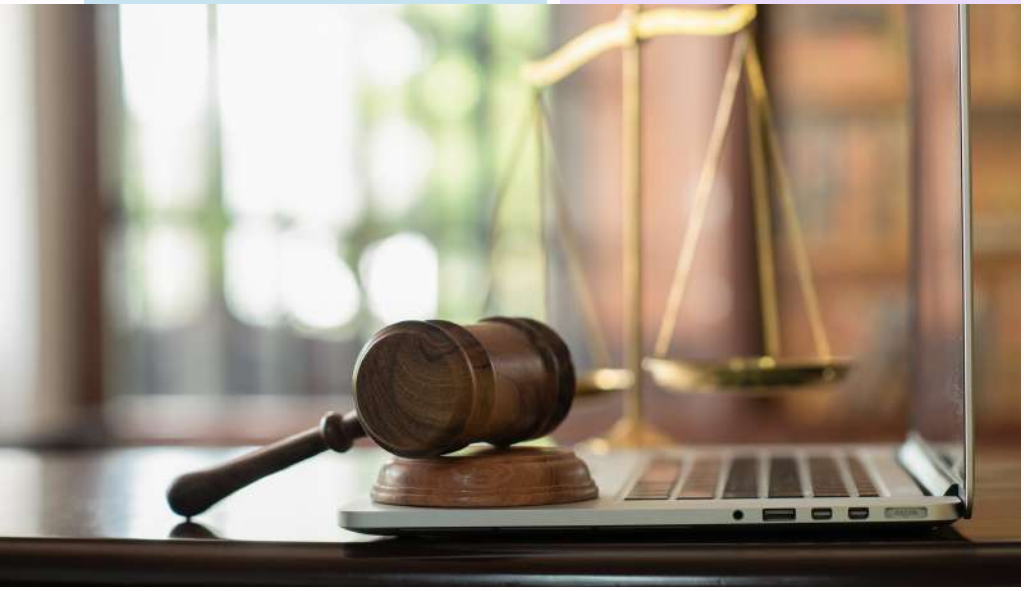
Lam: Initially there are certain challenges conducting hearing or trials virtually among lawyers, due to the unfamiliarity with it. However, as the Covid-19 situation prolonged, I noticed that all parties, including counsel and judges, are getting more comfortable in conducting hearings and trials virtually.

Q: With virtual hearings, there comes a new set of issues such a unstable internet connection, audio and video clarity, and presentation of documents virtually etc. As counsel, how do you prepare in view of these new challenges? Has your preparation process changed since the introduction of virtual hearings and trials?

Harold: Well, we have to learn to share screen effectively in order to present documents during hearings. It is more tedious to set up the documents and prepare the necessary for the hearing. But, your own approach to the hearings does not change. There is efficiency in sharing screen to present documents, but a physical copy is more engaging during cross examinations in trial.

Lam: There are certain challenges in conducting trial online. particularly relation to examination of witnesses. Counsel sometimes take indication from the body language, demeanor, and reaction from the witness in strategizing their approach in examining the witness. Ultimately for some counsel, it may affect the effectiveness of the evidence taking process online, in comparison to physical hearing.

Regarding the preparation process, I believe that it shouldn't be much of a difference as counsel or their juniors should generally be familiar with the documents that will be presented to court, regardless of whether the documents were to be presented physically at court, or be presented via share screen.



continued from page 4

Q: Court hearings are meant to be open to public (in general), and one of the reasons, we understand, is so that justice is not just done but also be seen to be done. In view of the courts' move towards virtual hearings, do you think that justice can no longer be seen to be done?

Harold: *(Contemplation)*
I don't think so. To begin with hearings in chambers were never conducted in open court in front of public audience. Personally, I also rarely see non-parties attending or being interested in matters which does not concern them. Perhaps there is a drawback concerning open court petition as members of the public would have been able to attend those hearings. Justice is still done.

Lam: I do not think that the conduct of hearing or trial virtually would affect the public's confidence in the judiciary, as apart from high profile cases, it is actually unusual to see the public attend to cases which does not concern them. Ultimately, it would still depend on the decisions and reasonings given by the judge.

Q: We have to ask this then: Virtual Hearing vs Physical Hearing. What would you vote?

Harold: In my opinion, physically, definitely for trial. Virtual hearings are efficient for in chambers proceedings and ones which rely only on documentary evidences. I would vote for it.

Lam: In my opinion, I would pick physical hearing, especially for complex cases which requires a lot of explanation from counsel with documentary evidence.

Q: There may be some junior lawyers or soon-to-be-lawyers reading this. Can you share with us some of your advice/tips for junior lawyers in preparing for virtual hearings?

Harold: Identify the relevant documents which you would be referring to in advance and also prepare in advance. You may also consider preparing the counsel, and witness of the documents which they would be referring to as well. Apart from that, there is not much difference in preparation that a normal process.

Lam: There are not much difference in terms of preparation which affects the substance of the matter. Perhaps, it just relates more to the technological preparation to ensure that you are familiar with Zoom (or any other platform used to conduct virtual hearings or trial). This is so that the pace and flow of the submissions or evidence taking process is not affected due to any technical difficulties.

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DEALING WITH ISSUE ON INTER-FLOOR LEAKAGE WITHIN A STRATA SCHEME

WRITTEN BY
TEOH ZI HAN

It is no surprise that inter-floor leakage is a big nuisance and concern to all parties living in a strata development, as it does not only involve an individual strata parcel owner and it usually takes a long period of time for the repair to be completed. It has been one of the reasons people are hesitant to buy a strata parcel when compared to landed property.

However, strata parcel owners may now have a recourse in the form of **Regulation 55 to 64 of the Strata Management (Maintenance and Management) Regulations 2015 ("SMR")**, which had been introduced to address this issue. The provisions in SMR lay out the specific obligations, procedures and timelines for the relevant parties when an inter-floor leakage claim arises.

According to the SMR, an inter-floor leakage occurs when there is evidence of dampness, moisture or water penetration on the ceiling or on any furnishing material, including plaster, panel or gypsum board attached, glued, laid or applied to the ceiling that forms part of the interior of a parcel, common property or limited common property, as the case may be.

WHAT TO DO ABOUT THE INTER-FLOOR LEAKAGE IN STRATA PARCEL?

Firstly, a parcel owner must give notice of the leakage to the developer, joint management body, management corporation or subsidiary management corporation (**"Management"**), as the case maybe.

WHAT TO EXPECT AFTER SERVING NOTICE?

The Management has a duty to inspect the affected parcel, any other parcels and common property to identify the cause and the party responsible for the leakage **within 7 days** from the date of receipt of the notice.

When the Management is determining the cause and the party who is responsible for the inter-floor leakage, the following matters will be considered:

a) the defect in the affected parcel is presumed to be within the parcel above the affected parcel or common property, unless proven otherwise (section 142 of the Strata Management Act 2013);

b) any defect in the water meter, water pipe, drainage pipe, sewerage pipe, gas meter, gas pipe and duct that serves more than one parcel is a defect of the common property or limited common property;

c) any defect in the water meter, water pipe, drainage pipe, sewerage pipe, gas meter, gas pipe and duct that serves only one parcel is a defect of that parcel even though the water meter, water pipe etc may be situated or embedded in common or limited common property or void space above the ceiling or wall or floor, as the case may be.

DEALING WITH ISSUE ON INTER-FLOOR LEAKAGE WITHIN A STRATA SCHEME

continued from page 6

In terms of who is the responsible party, this will depend on the source of leakage and whether the leakage occurred within the defect liability period, or after as shown in the table below:-

Possible causes of leakage	Party responsible for the defect
Defective workmanship or materials of parcel or parcel was not constructed in accordance with the plans and description approved by the appropriate authority	The developer pursuant to the sale and purchase agreement if the defect occurs within the defect liability period
Defective workmanship or materials or common property was not constructed in accordance with the plans and description approved by the appropriate authority	The developer is the party responsible or the affected parcel can claim against Common Property Defects Account if the defects occurs within the defect liability period
Caused or attributable to another parcel that occurs after the defect liability period	Owner of that parcel shall, without prejudice to his right to seek indemnity from any other party, take steps to rectify within 7 days from date of receipt of Form 28, if fail to do so, the relevant management body shall take necessary steps to rectify and recover all cost and expense from the party responsible
Caused by or attributable to common property or limited common property that occurs after the defect liability period	The relevant management bodies shall take steps to rectify the leakage within 7 days of the date of issue of Form 28

DEALING WITH ISSUE ON INTER-FLOOR LEAKAGE WITHIN A STRATA SCHEME

continued from page 7

WHAT TO EXPECT AFTER THE INSPECTION?

Once the Management has completed the inspection, they must issue a certificate of inspection in Form 28 stating the cause of the inter-floor leakage, and the party responsible to rectify it, **within 5 days** from date of inspection.

WHAT IF A PARCEL OWNER DOES NOT AGREE WITH THE FINDINGS OF THE INSPECTION?

He/she may refer to the Commissioner of Building (COB) who shall ascertain the cause of the leakage and the party responsible and the decision of the COB shall be complied with by all parties concerned.

WHAT IF PARCEL OWNERS DO NOT ALLOW ACCESS TO THE PERSON OR BODY CARRYING OUT INSPECTION OR RECTIFICATION WORKS?

It is a criminal offence for parcel owner to refuse access to the person or body carrying out the inspection and rectification work after the 7 days written notice is given. In cases of "emergencies", where the likelihood of flood or danger to life or property resulting from the leakage is materially increased, the requirement to serve 7 days written notice for access is waived.

WHAT IF NO ACTION TAKEN AFTER NOTICE IS GIVEN?

As a last resort, the parcel owner may commence legal proceedings in court or refer the matter to Strata Management Tribunals (**"Tribunals"**).

CONCLUSION

In conclusion, SMR had addressed the issue of inter-floor leakage in a strata housing development by setting out a clear standard operating procedure (SOP) in handling inter-floor leakage claim swiftly. It is important to note that parcel owners should exhaust the remedies provided in SMR before seeking assistance from the court or Tribunals (Badan Pengurusan Bersama Mahkota Parade v Pesuruhjaya Bangunan Majlis Bandaraya Melaka Bersejarah [2016] 1 LNS 1080) to avoid disappointment.

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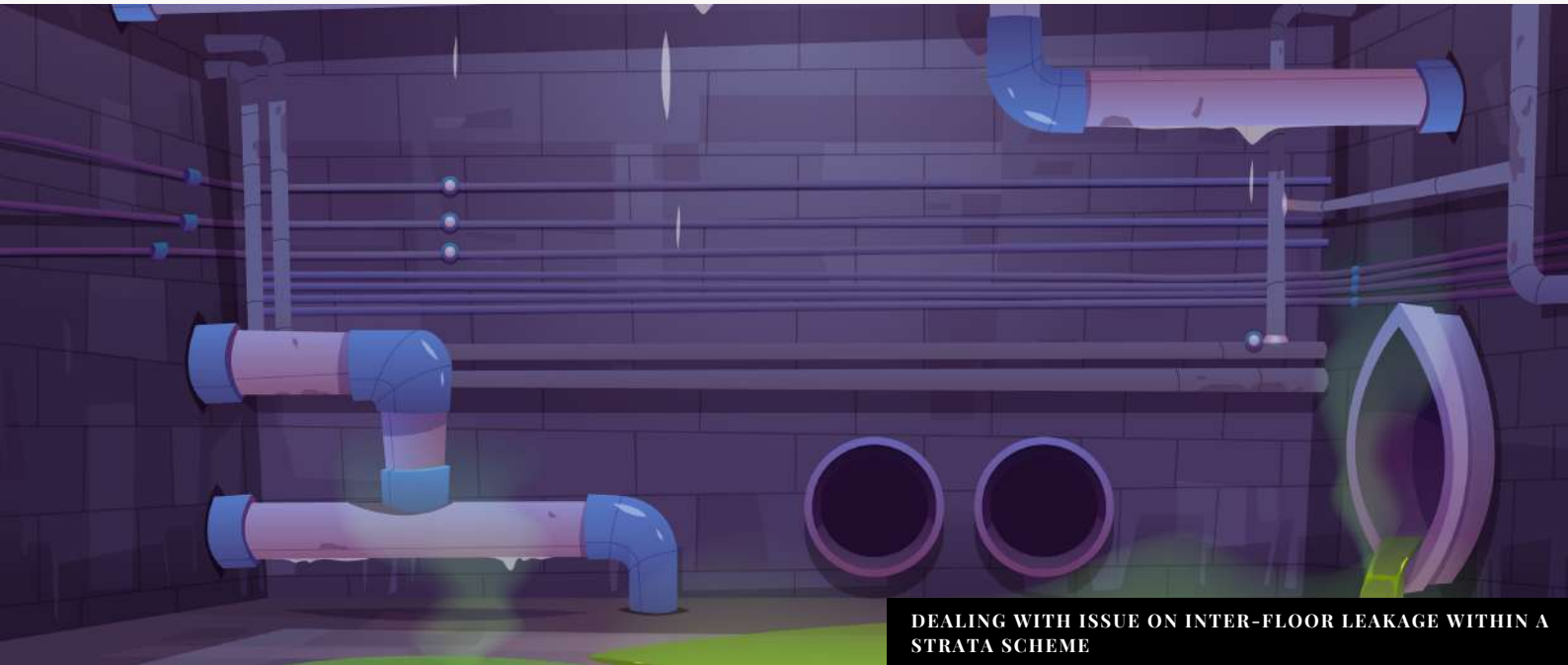

DEALING WITH ISSUE ON INTER-FLOOR LEAKAGE WITHIN A STRATA SCHEME

A PRACTICAL GUIDE: GET YOUR CONSTRUCTION DOCUMENTS UNDER CONTROL!

WRITTEN BY
LYNN FOO

INTRODUCTION

The construction industry has always involved enormous number of documents. For construction matters, most of the key facts or details are found in written records. For example: contract documents, correspondences, drawings, plans and specifications, construction site diary, progress reports, variation orders, invoices, payment records, etc.

This article provides a practical guide to documents management within the construction industry.

KEEPING RECORDS - WHY BOTHER?

So, what are the most important documents when a dispute arises in a construction dispute?

The short answer to the question above would be: **"all of them!"**

However, it is pertinent to note that, the importance of a particular document would highly depend on the nature of the claim and/or dispute. By having proper records of the documents, this would greatly assist the lawyer(s) handling the matter to assess the case properly and also, to determine which documents are required to address the issues at hand, in the event of a dispute. Often, many contractors in the construction industry would neglect the importance of keeping proper records to later find themselves at a disadvantage.

THE BEST PROTECTION AGAINST CONFLICT OR DISPUTES

A well-drafted contract is your best defense

Firstly, the written contract between the parties is very important.

It is important for the parties entering into any transaction to have the agreement recorded in a written contract. This is especially so for construction projects which are technical and complicated by nature. A construction contract would usually set out the legal rights and obligations of the parties and govern the processes or procedures by which those rights and obligations are carried out.

A well drafted contract would be a party's best defence. Hence, it is important to thoroughly review the terms of the contract to ensure that the parties involve understand, amongst others, the following:

a) The parties' respective obligations and rights under the contract; and

b) The consequences of breach of the terms and conditions of the contract.

After the parties have executed the contract, the contract should be kept safely and be retained in an electronic format.

Notices and Communication Concerning a Project

Secondly, it is important to note that the contract will most likely set out the notice requirements for communications. For example, contract variations, application for extension of time, requests for payment, variation orders, or the notice of default of the contractor or the employer.

Subject to the specific express term of the contract, in general, a party should ensure that any notice issued to the other party complies with the following:

a) The notice is dated and signed;

b) The notice is sent to the correct party and address;

c) The notice contains sufficient detail and information concerning the purpose of the notice; and

d) The proof of service of any notices is retained and kept properly (both physical and electronic copies).

It is imperative to note that the failure to provide notice as per the requirement of the contract can result in serious implications on a party's contractual rights and remedies. In this regard, compliance with the contractual notice requirements is a frequently argued/disputed issue in court and arbitration. The ability of a party to show by way of documentary evidence that the required notices were issued would then be crucial to the matter.

As such, the parties should always ensure that the copies of all the letters, correspondence, or other written notices sent to other parties are kept properly and stored electronically for record purposes. This would also prevent the loss of evidence when there is a turnover of personnel or after the completion of the construction work.

Digital Communication

Thirdly, in this digital era, communication concerning a construction project can be quickly exchanged via emails, WhatsApp and text messages. Emails and WhatsApp and text messages are extremely useful tools to coordinate the project team, informing every one of the site conditions timeously, relaying instructions and keep the project team updated and informed.

In this respect, it is undeniable that these exchanges of messages can be crucial evidence in an arbitration or litigation. The importance of such messages, especially via WhatsApp, have increased over the last 5 years as many instructions or reminders are seen to be issued via this mode of communication. Further, pictures are also often exchanged via WhatsApp especially for the purposes of defect rectification. These messages may seem trivial during the construction period but they have proven to be important when dispute arises. Hence, it is important for each construction team to keep an updated copy of all the relevant text messages of WhatsApp messages. If needed, these messages ought to be printed out after a period of time and kept separately for record purposes.

Another point to note is that, any communications done orally via telephone calls or meetings should also be recorded in writing as well, especially important tasks or instructions. By doing so, one would be able to ascertain what has transpired during a certain discussion or event and present this as solid evidence even after a considerable amount of time has passed.

continued from page 10

Apart from the above, one should also exercise caution when drafting correspondence to another party on the construction project. Drafting letters without sufficient thoughts can be counterproductive. In this regard, drafting a correspondence without understanding the actual intent behind it may ultimately lead to the content of the letter(s) being challenged. Therefore, when drafting a correspondence, one should always consider carefully what is the primary purpose or intent of the correspondence and what the correspondence may disclose.

Further, it is also prudent for one to adopt a proper and efficient system for collecting and maintaining these communications stated above. This is to avoid losing the conversation trail or records over time. One of the methods is to store all documents relating to the projects on digital cloud platforms, with proper and detailed naming of the individual files.

CONCLUSION

In short, construction document management is critical as it provides a comprehensive record of the construction project.

Therefore, it is important for construction companies to have a systematic and structured document management system in place. Not only would it help to save time and resources but proper documentation would protect the rights of the party(ies) involved.

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COURT OF APPEAL RULED THAT THE LACK OF DRIVING LICENSE, ROAD TAX AND INSURANCE COVERAGE IS IRRELEVANT IN A MOTOR VEHICLE ACCIDENT CLAIM

WRITTEN BY
MEYER THOR XIAO XIN

Ahmad Zulfendi Bin Anuar v Mohd Shahril Bin Abdul Rahman
Court of Appeal Civil Appeal Suit No. A-04(NCVC)(W)-246-05/2021

INTRODUCTION

This is a landmark decision wherein the Court of Appeal has ruled that the lack of driving license, road tax or insurance coverage should not be factored into increasing the liability of the said road user in a motor vehicle accident claim.

BACKGROUND FACTS

The subject matter of this case is in relation to a motor vehicle accident which occurred back then in 2018 where each party contended that the other party ought to be found wholly liable for the accident.

Initially, the Sessions Court upon considering the conflicting evidence given by both parties ruled that the motorcyclist was 30% liable while the car driver was 70% accountable for the crash.

However, upon appeal, the High Court while agreed that the SCJ's apportion of liability premised upon the evidence is fair, subsequently increased the liability percentage of the motorcyclist to 60% on the grounds that the motorcyclist had no driving license, road tax or insurance coverage at the time of the accident, and hence not entitled to his full entitlement to 70% liability on the part of the car driver and shall be discounted by a further 30%.

	Motorcyclist	Motorcyclist
Sessions Court	30%	70%
High Court	60%	40%

Apportion of liability by Sessions Court and High Court.

continued from page 12

COURT OF APPEAL'S DECISION

The motorcyclist who was dissatisfied with the High Court's decision then further filed an appeal to the Court of Appeal.

A. Liability

Upon hearing the case, the Court of Appeal allowed the motorcyclist's appeal on liability. The High Court's decision on liability was set aside and the Sessions Court's assessment of liabilities was reinstated:-

1) The liability in tort must be decided based on how the collision took place. The lack of driving license, road tax or insurance coverage did not make the motorcyclist more negligent and should not be factored into increasing the motorcyclist's liability, especially in the facts of this case where the motorcyclist's contribution towards his negligence has been assessed by the SCJ to be 30% liable.

2) However, the Court of Appeal emphasized that such decision does not mean that the Court is condoning the blatant breach of road traffic laws. If there had been any breach of the Road Transport Act 1987 (RTA), then the penalties under RTA could be enforced in which it shall be the duty of the public prosecutor to prosecute such a breach and the relevant court to impose the necessary punishment. In any event, the breach of RTA cannot be deemed as a reason to increase the liability for a road user's negligence in a motor vehicle accident claim.

3) It was also mentioned that the Court of Appeal while arriving at its decision did appreciate the point of public policy but undeniably, the motorcyclist is merely claiming for personal injuries sustained and is not in any way profiting from his breach of the RTA where licensing, road tax and insurance is concerned.

4) Based on the above, the Court of Appeal held that there is no good reason to interfere with the SCJ's finding and apportionment of liability. To increase the apportionment of liability by 30% or any part thereof on such ground would be to take into account an irrelevant consideration which does not affect the way the accident happened.

B. Quantum

On the other hand, the Court of Appeal dismissed the motorcyclist's appeal as to quantum and affirmed the decision of the High Court on quantum.

It was held that there is no evidence that the motorcyclist cannot return to normal work as persons with such disability and even with prosthetic legs are able to return to some semblance of normal life and work. Nevertheless, granted that the motorcyclist may need to adjust to his disability and endure some pain before returning to his new normal, the Court of Appeal awarded general damages for loss of earning capacity amounting to RM50,000.00 to the motorcyclist based on 100% liability and interest as prayed.

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COMMENTARY

This decision of the Court of Appeal serves as an important development to motor vehicle accident claims in Malaysia as it clarified that driving / riding without a license, road tax or insurance coverage shall be punished under the Road Transport Act 1987 but not to be dealt with in motor vehicle accident claims to assess a road user's liability for negligence.

CASE SUMMARY: MARITIME INTELLIGENCE SDN BHD V TAN AH GEK [2021] 4 ILR 417

WRITTEN BY
ROHAN ARASOO JEYABALAH

INTRODUCTION

The dismissal of an employee would usually be based on specific reasons bearing in mind that the dismissal must be with just cause or excuse.

Typically, the dismissal of an employee would be based on the grounds of misconduct or poor performance. For example, in the case of misconduct, an employee could be dismissed due to inter alia insubordination, absenteeism, habitually turning up late at work, misappropriation or dishonesty.

The reason(s) for the dismissal of the employee would be identified by the employer leading up to the dismissal and in most situations, the reason(s) for the dismissal would be specified in the termination notice.

An employer could however discover other reasons subsequent to the dismissal of the employee which in the eyes of the employer further justifies the termination of the employee.

For example, an employee is dismissed by an employer due to insubordination. However, based on an audit exercise carried out by the employer subsequent to the dismissal of the employee, the employer discovers that the dismissed employee had submitted several false medical leave claims. The employer then relies on these false medical leave claims submitted by the dismissed employee as further proof that the dismissal of the employee was with just cause or excuse.

The question therefore arises can an employer rely on post-dismissal discoveries as reasons justifying the dismissal of an employee in an unfair dismissal claim. This issue was considered and decided by the Federal Court recently in the case of **Maritime Intelligence Sdn Bhd v Tan Ah Gek [2021] 4 ILR 417.**

SALIENT FACTS

In this case, Tan Ah Gek (**"Employee"**) was employed as Vice President – Services & Registrar by Maritime Intelligence Sdn Bhd ("Company"). There was a petition signed by more than half of the employees of the Company alleging that the Employee had abused her power and conducted herself unethically and unprofessionally.

An independent investigation was then carried out by the Company based on the investigation carried out, the Company was convinced that the Employee had committed a misconduct and the Company therefore proceeded to issue her a show cause letter.

The Company subsequently conducted a domestic inquiry as they found the Employee's explanation in response to the show cause letter to be unacceptable. The domestic inquiry panel then found there was cogent evidence to show that the allegations of misconduct against the Employee were established. The Employee was then dismissed from her employment.

The Employee, being dissatisfied with her dismissal, lodged a representation in writing for unfair dismissal pursuant to Section 20(1) of the Industrial Relations Act 1967 which then led to a reference to the Industrial Court.

PROCEEDINGS IN THE INDUSTRIAL COURT

During the proceedings in the Industrial Court, the Company raised for the first time in its pleadings the allegation that the dismissal was justified because the Employee was never qualified for her position from the beginning as her Master's Degree was from an unaccredited university in Malaysia.

In essence, the Company sought to justify the decision to terminate the Employee by raising a new allegation in the Industrial Court, which was long after the Employee had been dismissed.

The Industrial Court found the Employee's dismissal to be unfair but rejected reinstatement. Instead, the Employee was awarded compensation in the sum of RM288,000.

PROCEEDINGS IN THE HIGH COURT

The Company filed judicial review proceedings in the High Court, challenging the decision of the Industrial Court.

The High Court dismissed the judicial review application by the Company. The High Court held that the Industrial Court did not have to consider the submissions on the Employee's lack of qualification as this was not one of the reasons for her dismissal. The High Court also found that there was no procedural impropriety, irrationality or illegality in the decision-making process of the Industrial Court.

PROCEEDINGS IN THE COURT OF APPEAL

The Company appealed to the Court of Appeal but the Company's appeal was dismissed. The Court of Appeal upheld the Industrial Court's rejection of the new allegation raised by the Company.

The Court of Appeal however held that the Industrial Court is entitled to inquire into the grounds relied on by an employer which were different from the reasons for the dismissal. In this regard, the Court of Appeal opined that if the employer raised new grounds in its pleadings to justify the dismissal of an employee, the Industrial Court had the discretion whether to consider these grounds and if it did, the Industrial Court would then have to determine the weight to be attached to such grounds.

THE DECISION BY THE FEDERAL COURT

The Company was granted leave to appeal to the Federal Court and one of the questions of law for which leave was granted and which is relevant for the purposes of this write-up is "Whether the Industrial Court has the right to enquire into reasons subsequently put up by the employer via pleading to justify the dismissal, even if such reasons were not given at the time of the dismissal."

In dealing with this question of the law, the Federal Court looked into the provisions of Section 20 of the Industrial Relations Act 1967, particularly Section 20(1) and Section 20(3). Pursuant to Section 20(1), an employee is entitled to lodge a representation in writing to the Director General of the Industrial Relations Department for unfair dismissal if he/she is of the view that the termination of his/her employment is without valid reasons. In this regard, the Federal Court was of the view that **by virtue of Section 20(3), the focus of the enquiry by the Industrial Court on the unfair dismissal complaint should be premised on matters and events which occurred at the time of the dismissal. The Industrial Court should only consider and adjudicate on the reasons, factors or events operating in the mind of the employer prior to the decision to terminate the employment of the employee.** This is because it is those reasons, factors or events which form the basis of the dismissal and it is based on those reasons, factors or events which the employee makes the representation for unfair dismissal.

The Federal Court opined that **the term 'just cause or excuse' used in Section 20(1) do not envisage an investigation of matters or reasons which the employer discovers subsequent to the dismissal or which operates in the mind of the employer post-dismissal**. In essence, natters or reasons discovered post-dismissal cannot be relied upon to justify the dismissal.

It was the Federal Court's considered view that if matters or reasons post-dismissal were to be considered when adjudicating an unfair dismissal complaint, it would then provide an employer with the opportunity to re-think and add further reasons to justify the dismissal.

In connection to the above, the Federal Court enunciated that even in cases where the employer failed to hold on inquiry prior to the dismissal of the employee or where the inquiry conducted was found to be defective, whilst the employer is at liberty to establish the reasons for dismissing the employee during the proceedings in the Industrial Court, the employer does not have liberty introduce fresh matters or events or occurrences which only came to the attention of the employer post-dismissal.

Notwithstanding the above, the Federal Court however went on to hold that **events discovered by an employer post-dismissal can be considered by the Industrial Court when determining the remedy/relief to be granted to the dismissed employee. If there are compelling new facts on the conduct of the employee during his/her employment, then the employer is open to adduce such evidence during the course of the proceedings in the Industrial Court to address the remedy/relief to be afforded to the dismissed employee.** In dealing with such evidence, the Industrial Court may conclude that reinstatement is not a suitable remedy or that no compensation in lieu of reinstatement should be awarded because of the employee's contributory conduct.

Based on the matters set forth above, the question of law on whether the Industrial Court has the right to enquire into reasons subsequently advanced by the employer via pleadings at the hearing stage of the inquiry before the Industrial Court to justify the dismissal was answered in the negative by the Federal Court.

KEY TAKEAWAYS

The following are the key takeaways of the decision by the Federal Court in this case:

1) An employer can only rely on facts, events or occurrences operating in its mind prior or at the time of the decision to terminate the employment of an employee as reasons for the dismissal.

2) An employer cannot rely on matters which are discovered post-dismissal as reason(s) to justify the termination of an employee's employment.

3) The Industrial Court can still consider compelling post-dismissal evidence adduced by an employer during the course of the proceedings of the Industrial Court when determining the remedy/relief to be afforded to the dismissed employee. Such evidence can be relied upon to counter an employee's claim for reinstatement of compensation in lieu of reinstatement.

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CONVEYANCING ON SPA & LOAN - LEVEL 1 PROGRAM

Learning has always been an integral part of Halim Hong & Quek and the firm is rolling out structured and formal training programs for its people. For our Real Estate department, our Learning and Development department (L&D) has rolled out the Conveyancing on SPA & Loan – Level 1 program targeted at new employees who have no background in dealing with real estate matters.

The program was a 9-days' program crafted with the objective to provide basic foundations for staffs and pupils in chambers who had never dealt with any real estate and conveyancing matters.

The program consists of:

1) **Basic conveyancing skills by Ms Chong Lee Hui**
2) **Format of a sale and purchase agreement by Ms Lim Jus Tine**
3) **Workflow for sale and purchase under master title by Ms Lim Jus Tine**
4) **Workflow for sale and purchase transaction under individual title by Ms Lim Yoke Wah**
5) **Loan process and documentation under master title by Ms Chong Lee Hui**
6) **Loan process and documentation under individual title by Ms Chong Lee Hui**
7) **Bills, stamp duty and real property gains tax by Ms Jacqueline Woon**
8) **Perfection of transfer and charge by Ms Jacqueline Woon**

There were 9 participants for this program which consists of 5 pupils in chamber and 4 newcomers serving in the Real Estate department. During the sessions, the facilitators explained the concepts, provide illustrations, samples and showed the documents to give a clearer picture to the participants.

All participants were required to complete the modules and to sit for the tests in order to be entitled to the certificate of completion issued by the firm. So far, all the 9 participants had completed and sat for the test and they will receive their certificates of completion accordingly. Receiving a certificate of completion is like reaping the benefits of all the hard work, time and effort put into attending the program. We appreciate the effort and time provided by the facilitators and they will also receive their certificate of appreciation as well.

Being the first formal training by HHQ, there is still room for improvement but we hope to do better for future programs.

Chinese New Year (CNY), also known as Lunar New Year is the biggest and most important annual festival for Chinese. With the Year of Tiger theme, this year CNY was celebrated on a moderate scale where HHQ and HLP gathered during lunch for CNY feast. HLP also arranged for Yee Sang tossing with all the staff to attract good fortune and positive vibes.

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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/**

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