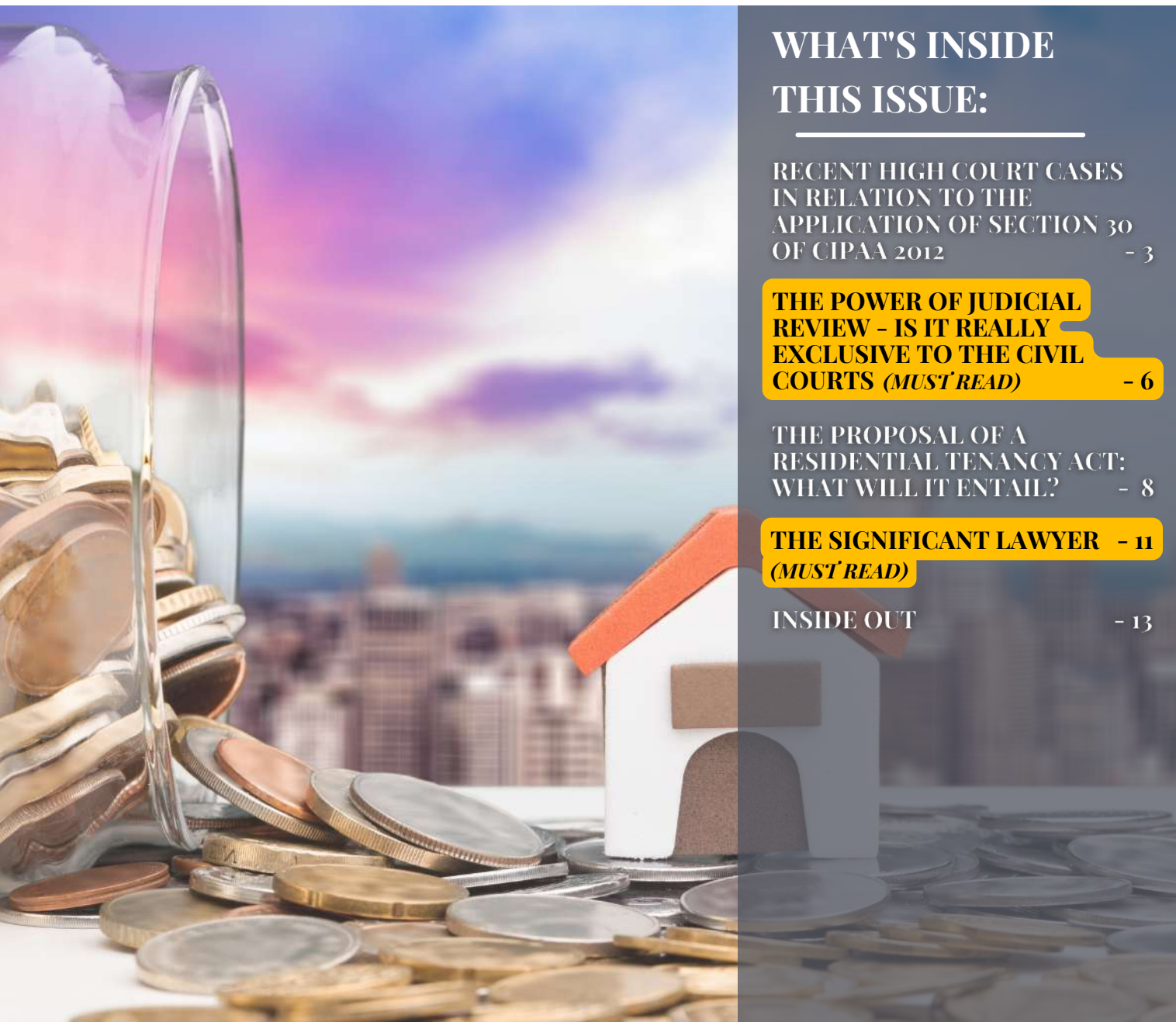


Empower



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Note from the Editorial Team

Dear Readers,

As we enter into the halfway mark of the Year 2022, we hope that all of you have some time to step back and evaluate your year so far as against your goals and objectives. It's a great opportunity to do some hard thinking over some of the decisions you have made along the year and the impact it has caused in your year. Where necessary, recalibrate your bearings to get back on track and consider as well, aspects of your life that you might want to improve upon.

In this month's edition of the newsletter, we have some particularly interesting articles to share with you. Our first article evaluates two recent High Court decisions in Malaysia wherein the interpretation of 'due and payable' under Section 30(5) of CIPAA 2012 and the payment of 'adjudicated amount' under Section 30(1) of CIPAA 2012 is dealt with. This is an article that all of our clients in the construction industry would be able to appreciate as it sets out clarity of the law.

Our second article is authored by Mr. Harold Tan of HLP. It discusses in detail the power of judicial review and considers whether it is fully exclusive to the civil courts in light of a recent decision of the Federal Court.

Our third article discusses the recent proposals in Malaysia for the introduction of a 'Residential Tenancy Act' in line with many other jurisdictions across the world. Read the article to understand what the Act would entail if it were to come into fruition and how it would achieve its underlying aim of protecting property owners and tenants.

Our fourth article titled "The Significant Lawyer" is written by Dato' Quek Ngee Meng of HHQ. This article is a must read for all aspiring lawyers as Dato' reviews an interesting book he recently read, and what his take-home message is from the book.

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.

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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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RECENT HIGH COURT CASES IN RELATION TO THE APPLICATION OF SECTION 30 OF CIPAA 2012

WRITTEN BY
FELICIA LAI WAI KIM & YIP XIAOHENG

Two recent High Court cases maintained the literal approach in dealing with the interpretation of 'due or payable' under Section 30(5) of CIPAA 2012 and the payment of 'adjudicated amount' under Section 30(1) of CIPAA 2012.

CASE 1: ZETA LETRIK SDN BHD V JAKS ISLAND CIRCLE SDN BHD [2022] MLJU 392

BRIEF BACKGROUND FACTS:

JAKS Island Circle Sdn Bhd ("the Employer") appointed JAKS Sdn Bhd ("**Main Contractor**") as the Main Contractor for the Project. The Main Contractor then subcontracted the works to Zeta Letrik Sdn Bhd ("**Subcontractor**").

Payment disputes arose between the Main Contractor and the Subcontractor in connection with the Project and this led to the Subcontractor initiating an adjudication proceeding against the Main Contractor pursuant to the Construction Industry Payment And Adjudication Act 2012 ("**CIPAA 2012**"), claiming for amongst others, unpaid certified amount, uncertified work, retention sum, materials on site and additional variation works. The Adjudicator decided in favour of the Subcontractor.

On 30.11.2021, the High Court allowed the Subcontractor's application to enforce the Adjudication Decision pursuant to Section 28 of CIPAA 2012 and dismissed the Main Contractor's applications to set aside and stay the Adjudication Decision pursuant to Section 15(b) and/or 15(d) and Section 16 CIPAA 2012.

Notwithstanding that, the Main Contractor failed to make any payment to the Subcontractor pursuant to the court order.

Thereafter the Subcontractor, issued a request seeking for direct payment from the Employer as the principal of the Main Contractor for the sums awarded to the Subcontractor in the Adjudication Decision pursuant to Section 30 of CIPAA 2012. There was no response from the Employer and hence the Subcontractor commenced an action in court for direct payment pursuant to S. 30 CIPAA 2012.

The main issues that were before the Court were: -

A) WHETHER THERE WAS MONEY DUE OR PAYABLE BY THE EMPLOYER TO THE MAIN CONTRACTOR?

In this case, the Employer did not serve the requisite notice in writing to the Main Contractor under Section 30(2) of CIPAA 2012 and the court found no reasons were forthcoming from the Employer for such failure. The Employer's failure to issue the written notice to the Main Contractor as mandated by Section 30(2) of CIPAA 2012 is fatal to the defence that there is no money due or payable by the Employer to the Main Contractor at the time of the receipt of the request.

In deciding this issue, the Court clarified the meaning of the phrase "due or payable".

Based on decided cases or precedents, the High Court found that the words 'due or payable' are to be interpreted literally, according to their ordinary meaning. In this case, the Employer's contention that the monies are only payable if it is due to the Main Contractor, and not when it is merely payable, is contrary to the express words, and the cases decided to date on the interpretation of, the said provision.

The High Court further held that any amount that is paid under Section 30(3) CIPAA 2012 is recoverable by the Employer as a debt or set off from any money that is due or payable by the Employer to the Main Contractor.

B) THE 'ADJUDICATED AMOUNT' IN SECTION 30 OF CIPAA 2012:

In a separate issue, the High Court Judge also decided that that the words 'adjudicated amount' in Sections 30(1) and 30(3) CIPAA 2012 do not include interest on the adjudicated amount and the adjudication costs.



CASE 2: BOND M&E SDN BHD V PALI PTP SDN BHD [2022] MLJU 364

BRIEF BACKGROUND FACTS:

Pursuant to a Letter of Award dated 14.2.2017, Pali PTP Sdn Bhd as the Employer ("the Employer") appointed Jeks Engineering Sdn Bhd as the main contractor for this Project ("Main Contractor"). Subsequently, Bond M&E Sdn Bhd was appointed as the Subcontractor ("Subcontractor") for the Works in respect of the Project.

Payment disputes arose between the Main Contractor and the Subcontractor in connection with the Project whereby parties have referred the disputes to adjudication proceeding. Part of the Adjudication Decision was set aside and the remaining part of the Adjudication Decision was enforced by the High Court.

Following the Main Contractor's failure to pay the amounts due and owing to the Subcontractor, the Subcontractor commenced a Section 30 CIPAA 2012 proceeding against the Employer

Similar issues were raised before the High Court, namely:

A) WHETHER THERE WAS MONEY DUE OR PAYABLE BY THE EMPLOYER TO THE MAIN CONTRACTOR AT THE TIME OF RECEIPT OF THE NOTICE?

The Employer took the position that the money which is due or payable under Section 30(5) CIPAA 2012 should be the amount that is payable pursuant to the construction contract between the parties and should not extend to an adjudication decision between the Main Contractor and the Subcontractor or disputes referred to an arbitration proceeding. However, this argument was not accepted by the Learned High Court Judge because the Employer is a 'principal' within the meaning of Section 4 of CIPAA 2012 and that there was money payable by the Employer to the Subcontractor at the time when the Employer received the notice under Section 30(1) of CIPAA 2012. Further, the court was of the view that essentially, monies are due or payable under the chain of construction contracts and this is fortified by the findings and conclusion of the Adjudicator.

B) WHETHER THE TERM 'ADJUDICATED AMOUNT' IN SECTION 30 OF CIPAA 2012 INCLUDES INTEREST AND COSTS AS AWARDED UNDER THE ADJUDICATION DECISION?

The High Court held that the expression 'adjudicated amount' in Section 30(1) and Section 30(3) CIPAA 2012 does not include interest and adjudication costs. If Parliament had intended for a principal to pay the adjudicated amount, interest and costs pursuant to these provisions, this would have been expressly stated so.

CONCLUSION

The clarification by the High Court on the meaning and extend of the phrase “due or payable” pursuant to Section 30(5) CIPAA 2012 is very much welcomed as it also further enhances the objective of CIPAA 2012. Employers or the Principal in a construction contract must be alert in issuing out the relevant notices as required by the Act and to take note that the definition of due or payable is different from “due and payable”, and this also extends to adjudication decisions that are not satisfied by the principal.

Apart from that, it is also pertinent to take note that the sum claimable under Section 30 of CIPAA 2012 is only confined to the ‘adjudicated amount’ awarded to the subcontractor (i.e. the party who obtained the adjudication decision in his favour) excluding the interest and/or costs of adjudication.



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THE POWER OF JUDICIAL REVIEW - IS IT REALLY EXCLUSIVE TO THE CIVIL COURTS?

WRITTEN BY
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In the recently issued Federal Court case of ***SIS Forum (Malaysia) v Kerajaan Negeri Selangor & Anor***, the apex court with a full quorum of 9 judges had the occasion to exercise its original jurisdiction to determine a constitutional challenge brought by the petitioner, SIS Forum (Malaysia) to strike down section 66A of the Administration of the Religion of Islam (State of Selangor) Enactment 2003 ("**ARIE 2003**") enacted by the Selangor State Legislative Assembly ("**SSLA**").

Section 66A of the ARIE 2003, which essentially sought to confer on the Syariah High Court the power of judicial review, stipulates: -

"The Syariah High Court, may, in the interest of justice, on the application of any person, have the jurisdiction to grant permission and hear the application for judicial review on the decision made by the Majlis or committees carrying out the functions under this Enactment."

The 'Majlis' whose decision is intended to be subject to judicial review by the Syariah High Court is the Majlis Agama Islam Selangor, a body established by the ARIE 2003.

The Federal Court in finding for the petitioner unanimously ruled that section 66A of the ARIE 2003 is invalid on the ground that it makes provision with respect to a matter to which the Legislature of the State of Selangor has no power to make, and as such, the said provision is unconstitutional, null and void.

BACKGROUND FACTS

The petition arose out of a decision of the Civil High Court in an application for judicial review wherein the petitioner (the applicant therein) sought to challenge the validity of a fatwa gazetted on 31.7.2014 that *inter alia* provides for offences of any publications, both printed and that published on social media, that promote liberalism and pluralism of religion.

HIGH COURT PROCEEDINGS

The judicial review application was dismissed by the Civil High Court on the ground that the High Court was dispossessed of any jurisdiction to consider the validity of the fatwa, and that the question should instead be posed and determined by the Syariah High Court in accordance with section 66A of the ARIE 2003. This finding led to the petitioner applying for leave, which was duly granted, to bring its petition before the Federal Court to challenge the validity of the impugned legislation.

FEDERAL COURT FINDINGS

In its judgment, the Federal Court made it clear that the petition only concerns the question of whether the SSLA was empowered to enact section 66A of the ARIE 2003, and that the court is not concerned with the procedural or substantive validity of the fatwa.

It is in this context that the Federal Court went on to examine the concept of judicial review, which according to the Federal Court constitutes a fundamental aspect of judicial power of the Federation that remains reposed solely in the Civil Courts.

In this regard, the Federal Court opined that the jurisdiction for constitutional judicial review was intended to be conferred on the Civil Superior Courts by way of the general empowering provision in clause (1) of Article 4 of the Federal Constitution ("FC"). Constitutional judicial review is said to be ingrained within clause (1) of Article 4 of the FC, which stipulates that the FC being supreme, any law inconsistent with it is void to the extent of the inconsistency.

Corollary to this is that the Civil Federal Judiciary being the final interpreter and independent protector of the FC with the concomitant power to review execution action, is the only body capable of exercising review powers over the constitutional validity of laws.

The Federal Court found that section 66A of the ARIE 2003, in its current form, that allows the Syariah High Court to possess powers of judicial review, when such powers are exclusive to the Civil Superior Courts that cannot be abrogated or delegated away, is unconstitutional.

The Federal Court further rejected the respondent's arguments that judicial review within the context of section 66A of the ARIE 2003 refers only to Syariah law and the Syariah Court's supervisory powers on that subject matter alone.

CONCLUSION

In the upshot, the Federal Court reiterated that judicial review is not merely procedural but a substantive and immutable component of judicial power exclusive to the Civil Superior Courts, and proceeded to strike down section 66A of the ARIE 2003.

However, the lingering question of whether a similar legislation that seeks to confer judicial review powers on the Syariah Courts to cover matters of Islamic law only, and not matters within the realm of public law or public law powers like what section 66A was found to do, is constitutional or otherwise remains open.



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THE PROPOSAL OF A RESIDENTIAL ACT: WHAT WILL IT ENTAIL?

WRITTEN BY
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INTRODUCTION

Recently, the Proposed Residential Tenancy Act (Proposed Act) has been mooted as Action Plan 2.3.1 of the National Housing Policy (2018-2025) which seeks to introduce a comprehensive law to safeguard the rights and interests of landlords and tenants. Similar legislation has been implemented in countries such as the United Kingdom, Australia, New Zealand, and Canada to ensure that both parties are protected and minimise housing discrimination. However, Malaysia is long overdue for its own version of a residential tenancy act which could specifically protect the property owners and tenants as existing regulations are insufficient and current processes to seek for remedy are impractical. Current legislations available for tenancy matters in Malaysia include Contracts Act 1950, Civil Law Act 1956, Distress Act 1951, Specific Relief Act 1950 and Case Law/Common Law. The processes to seek for remedy are lengthy and cost far more than the value of security deposits, limiting access to justice in the event of disputes, eviction or breaches of agreement between landlords and tenants.



Lately, The Ministry of Housing and Local Government (KPKT) has conducted engagement leading to the Regulatory Impact Statement (RIS) on the Proposed Research and Drafting of the Residential Tenancies Act. According to the RIS, the Proposed Act is based on the Residential Tenancies Act 2010 of New South Wales, Australia and is subject to the Malaysian legal system and local requirements. The Proposed Act will apply only to Peninsular Malaysia. Earlier, KPKT has been collecting feedback from the public and stakeholders on the proposed enactment of the Proposed Act via the Malaysian Productivity Corp's website. The Proposed Act will be submitted to the Parliament in July 2022 and if it is passed, the Act will come into force in August 2023. A review will be conducted within 12 months before February 2028 to determine whether the Act is to be amended.

PROPOSED RESIDENTIAL TENANCY ACT

According to the RIS, a 'residential property' refers to 'any premises used or intended for use solely for residential purposes and which is not used for trade, business, manufacturing or industrial purposes and such other type of accommodation as may be prescribed by the Minister from time to time to be a residential premise.' The Proposed Act will exclude certain premises and agreements from its purview such as student hostels, worker accommodation provided by an employer as well as short-term rental agreements. However, the Proposed Act does not state whether it will apply to a Small Office Home Office (SOHO) and Rent-to-Own Schemes properties.

STANDARD TENANCY AGREEMENT

The Proposed Act aims to ensure specific clauses to protect the rights of landlords and tenants from gaps in existing laws to reduce unfair terms and conditions in the best interest of all involved by providing a standard tenancy agreement.

For example, property owners must ensure that:

- i) the premises must be suitable for rental;
- ii) the tenancy agreement must comply with the standard tenancy agreement given in the Proposed Act; and
- iii) the notice must be given to the tenants the tenancy according to the notice period

Whereas tenants must ensure that:

- i) the premises shall not be sublet without the prior consent of the property owner;
- ii) the notice must be given before vacation; and
- iii) it is a statutory offence changing the keys of the rented premises without the consent of the property owner or without reasonable cause.

The Proposed Act also provides processes for administering and regulating small rentals, transfers of rentals to third parties and determination of the rental period if the premises are involved in an auction, sold by the property owner to the others or in the event of death of any party.

SECURITY DEPOSIT

Furthermore, the Proposed Act provides the amount of security deposits comprising rental deposit and utilities deposit in respect of a tenancy of a residential property. It provides the amount for rental deposit which will be equal to two-months rents while utilities deposit will be equal to one-month rents. It also proposed that the property owners will be required to place the security deposits in an account established by the Controller. The security deposits will be returned to the tenant upon termination of the tenancy agreement if there are nothing to be set-off against the deposits. Therefore, security deposits are no longer in the property owners' hands as both parties would have to go through the Controller which acts as an intermediary or mediator for claims or refunds.



SPECIAL TRIBUNALS AND STATUTORY OFFENCES

The Proposed Act also aims to establish special Tribunal to resource any disputes arising in relation to the residential tenancy agreement in an expeditious and cost-efficient manner. This special Tribunal will handle such disputes with a maximum sum of not more than RM250,000 and as seen with the Strata Management Tribunal. Furthermore, the Proposed Act also introduces some statutory offences which may overcome the problems that often encountered between property owners and tenants. For example, failing to provide a receipt upon receipt of the rent to the tenants, failing to provide duplicate copy of tenancy agreement to the tenant as soon as possible after the execution of both parties, vacating the premises in an unclean condition and so on. This will allow consistency of provisions in other statutes in force and avoid ambiguity as well as overlapping between provisions that require consequential amendment to other acts.

SIGNIFICANT CHANGES

Interestingly, the Proposed Act seems to provide a provision that allows those with superior title to initiate proceedings for the recovery of the rented premises. Besides, the freedom of the property owner in entering tenancy agreement will be prejudiced as the property owners will not be allowed to choose their preference on the tenants, the tenants will all have an equal chance to rent an accommodation and not be prejudiced due to certain characteristics like one's race, employment status, and gender orientation. Furthermore, a residential rental database will be created to collect and research relevant data (big data). Big data will assist the government to study the rental sector trends residence in Malaysia to amend, enhance and improve the policymaking and law enforcement in the future.

CONCLUSION

In conclusion, the Proposed Act is a necessary step forward. It appears that it will drastically reduce the ambiguity in the law against residential tenancies as the property owners and tenants will have a specific legislation to refer before both parties enter into a tenancy agreement. The establishment of a special Tribunal will also save more cost and time for the parties who would like to seek for the remedies in the event of disputes regarding residential tenancies matters. The Proposed Act seems to be a comprehensive legislation which would overcome most of the problems that the property owners and tenants have been dealing with along these years. However, it is opined that the Proposed Act might limit the property owners' legal and economic rights to manage or rent his property. Furthermore, the infringement by the government in the rental fee of residential properties which are essentially commercial matters driven largely by market forces might prejudice the free market and causing a huge impact on the society in the future. It is opined that the Proposed Act should aim to strike a balance between the freedom of contract and the protection of rights and interests of the property owners and tenants by providing minimum legal statutory standards and voiding highly unfair terms and conditions in the tenancy agreement.



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THE SIGNIFICANT LAWYER

WRITTEN BY
DATO' QUEK NGEE MENG

I recently read a book titled “The Significant Lawyer – The Pursuit of Purpose and Professionalism” authored by William S Duffey Jr, a retired District Judge of the United States District Court for the Northern District of Georgia. Prior to his appointment as a District Judge, Duffey was a partner in King & Spalding in Atlanta, an international law firm with over 1200 lawyers in their 23 offices worldwide.

Having experience of both perspectives from the Bar and Bench, the book is essentially a product of the author’s personal experiences on the culture and challenges within the legal profession. The author opines that it takes dedication, determination and commitment for a lawyer to live by the oath taken when admitted to practice. The author also takes the view that right priorities must be adopted by lawyers from the outset. By choosing this career-path, a lawyer embraces the practice of law as a profession and commits to serve others with integrity, competence and compassion. The outcome of this is a lawyer who discovers fulfilment and significance in the practice of his/her profession and the profession will ultimately stand to gain from it.

The historical reality of the profession is however somewhat different. Many young lawyers entering the world of legal practice often believe in the high ideals of the profession and try to merge their respective personal values with these ideals. However, these ideals and values often start eroding after some time to make way for the solitary practical priority in private legal practice – profit.

In the mid-80s, lawyers begun to measure success solely by the profits they generated as that is how the top management of firms measured one’s accomplishment of success. This resulted in the law becoming more of a business instead of a profession. The cornerstone of the industry: integrity, efficiency, and strong client relationships started disintegrating and falling apart. Lawyers often found themselves professionally unfulfilled and their commitment to justice, fair play, and respect to the profession started to lose its meaning, slowly but surely. As a result, the logical conclusion that the author observed was that many lawyers found legal practice to be different from what they envisaged it to be as they were unable to strike a balance between their personal values and the harsh monetary demands that were required to be met by the industry.

ALIGNING PERSONAL AND PROFESSIONAL VALUES

I am the managing partner of my firm – Halim Hong & Quek and thus, to ensure the sustainability of the firm, enlarging both revenue and the growth of the firm is my priority. However, upon self-reflection, pursuit of profit is not the only priority because not all lawyers can align with this sole value in their practice life. This is the challenge that I face! How should I balance and align the personal and professional values of all lawyers in this journey of growth?

At HHQ, we value integrity, quality, speed, transparency, participation, stewardship and growing together. With these core values, how should HHQ lawyers align their personal values with the firm.





Personal values govern one's life. These consist of family life and spiritual commitment. Personal values can include a commitment to public and community service. Other personal values may include creative processes, teamwork, collaboration and work autonomy.

How can these personal values align with professional values? There are various ways one can achieve this. For example, if you enjoy business, you may choose to enter the realm of corporate and commercial practice. If you value honesty, then you would have expectations for your clients to be honest with you. Only when these two sets of personal and professional values align, you will find fulfilment in your practice.

How do I align my personal and professional values? Personally, I believe in using legal knowledge and skills that I learned from my education and practice to help and serve people. I also believe that legal systems were designed for people to seek justice and it is incumbent upon lawyers to achieve justice and fairness for our clients. I hold the value that clients could only be best served with timely and practical quality legal services. I believe in working hard while continuously ensuring that I put in my best efforts to upgrade my skills and knowledge. I feel relieved when I can bring out the best of my teammates and colleagues and thus, I believe in stewardship to cultivate future partners and employees of HHQ.

DUTY BEFORE PROFIT

For as long as I am in legal practice, I must ensure that I do all I can to uphold my duty to the judiciary which is to give due respect and to avoid any conduct that undermines the integrity of the adjudicative process. I must achieve that whilst maintaining my duty to my clients which I aim to achieve by acting in good faith and in their best interest at all times. Emphasising profit per partner and revenue for the firm must come after this priority. Legal practice is an admission to a noble profession and it must be given its due appreciation. All these should be the shared values of all lawyers, and the foundation of lawyers' conduct and service to others.

Being a key management member of my firm, I must always stick to the practice of treating all my lawyers fairly and everyone must be given a fair shot. If lawyers disagree with the values the firm seeks to cultivate, their input in that regard would be listened and appreciated. However, it is important to ensure that lawyers do not make demands to the extent of trying to recalibrate the firm's values as per his or her own personal views. This of course is a challenge to lawyers in determining their values and align their conduct accordingly. Once lawyers take position of their value, they must commit to learning, growing, and becoming the most aligned lawyers as they can.

Aligning conduct and career with personal values, passion, and interest in work that one loves is important as it will allow lawyers to align their own values and priorities with the shared values of the profession. I am in full agreement with the author that this is the best way to achieve professional satisfaction and gratification as when purpose meets professionalism, one would be en-route to being a significant lawyer.



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Lawyers from both HHQ and HLP gathered at Netverk at Oval Damansara on 13th May 2022 for dinner and drinks (and some karaoke). It was a night of celebration as we celebrated HLP's 7th birthday, the birthdays of Dato' Quek, Mr. Harold Tan & Ms. Serene Hiew and also a timely reward to the firms' lawyers who committed to staying fit (running 3km-10km every day) whilst working from home during the pandemic restrictions.





AFTER 2 YEARS OF PANDEMIC, HHQ HAS FINALLY ORGANIZED A HARI RAYA DINNER EVENT OUTSIDE OF OUR OFFICE!

On 20th May 2022, the event was held at EQ Kuala Lumpur with a total participation of 100 lawyers and staffs from both alliance firms. Besides having a fulfilling meal served in a buffet style, there were also other activities successfully conducted such as few rounds of lucky draw sessions, Raya quiz and a fashion show. It was an enjoyable and fun event after two years break due to pandemic.



CONGRATULATION!

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