



ADVOCATES & SOLICITORS

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Empower

Message from the Editors

Dear Readers,

The past year has been anything but ordinary. As the world began to move forward from the COVID-19 pandemic, the changes in economic conditions, climate change and governance kept all of us on our toes for what's to come.

But 2022 has also proven to be a year of resilience. You, our valued reader, have also made it through with new perspective, insight and experiences that you will one day tell your grandchildren about!

The Empower Newsletter has always been about making legal knowledge accessible to all who seek it. With a growing number of subscribers, we aim to serve you better with more valuable insights and interesting legal developments in Malaysia and around the region.

We'd like to thank you for reading along, gaining knowledge and providing us valuable feedback that helps us improve on each edition.

In this last volume of the year, we close out our newsletter with a lookback of some 2022 highlights with a tinge of nostalgia and a sense of purpose to continue our growth track for 2023.

We hope you will gain valuable insight reading this month's issue and we welcome your questions and suggestions at newsletter@hhq.com.my. As always, happy reading and we look forward to empowering you again next year in 2023!

Wishing you all a safe and healthy year ahead.

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Can a Liquidator Grant a Sanction For Commencement or Continuation Of Litigation?

BY AMY HIEW KAR YI

It has been a long-accepted practice that a liquidator, especially the Director-General of Insolvency, could grant sanction, usually by way of a letter, to a contributory or creditor of a wound-up company, to enable them to commence or continue legal proceedings on behalf of the company.

For example, in *Lai King Lung (practising as advocate and solicitor under the name and style of Messrs Chris Lai, Yap & Partners, advocates and solicitors) & Anor v Merais Sdn Bhd* [2020] 5 MLJ 614, the Federal Court decided on the questions of law on the assumption that the liquidator could grant a sanction. The Court even recognised the long-standing practice for the liquidator to impose conditions (such as indemnities and guarantees) which must be satisfied by the creditor or contributory, before the sanction is given.

The same assumption was made by the Court of Appeal in *Leopad Holdings Sdn Bhd v Asian Shield Warehousing Sdn Bhd and another appeal* [2021] 2 MLJ 424. See also, *Zaitun Marketing Sdn Bhd v Boustead Eldred Sdn Bhd* [2010] 3 CLJ 785.

But uncertainty came recently, when the High Court in *Small Medium Enterprise Development Bank Malaysia Bhd v Oren Venture Sdn Bhd & Ors and another case* [2022] 12 MLJ 247 decided that such a sanction is

invalid and inoperable as a liquidator does not have the power to delegate his statutory power to “bring or defend any action or other legal proceedings in the name and on behalf of the company” under the Companies Act 2016.

Among others, Azlan Sulaiman JC held that the sanction letter issued by the liquidator was, in effect and substance, a delegation of his powers under item (a) of the Twelfth Schedule to the contributory to prosecute and to defend the suits therein. However, such delegation of powers is not provided for under the Act. Instead, the Court took the position that the liquidator must decide whether he wishes to bring, continue with or defend the legal action on behalf of the wound-up company. If the liquidator refuses to do so, then the creditor or contributory of a wound-up company could apply to the winding-up court under section 486(2) of the Act regarding any exercise or proposed exercise of any of the powers exercisable by the liquidator in a winding up, including the power to bring an action on behalf of the wound-up company.

The decision in *Small Medium Enterprise v Oren Venture* indeed caused some uncertainty, especially to ongoing legal suits where the liquidator had granted such sanctions to creditor(s) or contributory(ies).

For instance, in *KL Landmark Development Sdn Bhd v Jalex Sdn Bhd* [2022] MLJU 2449, the defendant raised a preliminary objection that the plaintiff’s originating summons was defective on, among others, the ground that

no proper sanction had been obtained by the plaintiff. The defendant relied on the findings in **Small Medium Enterprise v Oren Venture** and contended that the sanction which was issued by the Malaysian Department of Insolvency and signed by its Director, contravenes section 486(1) and the Twelfth Schedule of the Companies Act 2016. Having received the preliminary objection letter, the plaintiff's counsel requested for an adjournment of the hearing to allow the plaintiff to regularise the sanction.

Aliza Sulaiman J decided not to postpone the hearing as Her Ladyship found that there was no justifiable reason for the plaintiff to be given the chance to regularise matters. Further, the Learned Judge found merit in some of the defendant's preliminary objections and dismissed the plaintiff's application on, among others, the following grounds:

- i. The affidavit evidence has established that it was one Tan Sri Yap (contended to be a contributory) who had applied for the sanction, but the sanction was issued to Messrs. CNL. The Learned Judge agreed that the liquidator's power under item (k) of the Twelfth Schedule, i.e., to assist the liquidator in his duties, does not extend to appointing an advocate to assist a contributory to carry out a liquidator's duties.
- ii. The Learned Judge found that the defendant had solid reasons to object to the application as the liquidator does not have the power to grant the sanction in the manner that it has been issued. As with the High Court in **Small Medium Enterprise v Oren Venture**, the Learned Judge held that the sanction was invalid as the liquidator has no power to grant such a sanction

But it is interesting to note that the High Court in **MKP Builders Sdn Bhd v Glocal Tech Engineering Sdn Bhd** [2022] MLJU 2640 decided somewhat differently. In **MKP Builders**, the defendant raised an objection that the plaintiff was incompetent to carry on with the suit pursuant to section 486(1) and the Twelfth Schedule of the Companies Act 2016, following the decision in **Small Medium Enterprise v Oren Venture**. Nevertheless, Lim Chong Fong J (now JCA) found that the facts in **Small Medium**

Enterprise v Oren Venture were distinguishable from those in **MKP Builders** by reason that the liquidator did not abdicate its responsibilities by surrendering them to a creditor or contributory, but merely allowed the plaintiff's solicitors to continue representing the wound-up plaintiff on behalf of the liquidator.

Thus, one may contend that Lim Chong Fong J (now JCA) did not actually disagree with the High Court's findings in **Small Medium Enterprise v Oren Venture**. His Lordship found the sanction to be valid as the sanction granted by the liquidator was only to allow the plaintiff's solicitors (who was already acting for the plaintiff prior to it being wound up) to carry on representing the plaintiff in the suit.

However, the High Court has, in a recent decision in **Ooi Kim Geik v Ng King Chong & Ors** (Shah Alam High Court Post-Winding Up No. BA-28PW-114-06/2022)¹ decided not to follow **Small Medium Enterprise v Oren Venture**. In this case, the liquidator granted a sanction to a contributory of a wound-up company, to appoint solicitors to commence/ initiate a civil suit on behalf of and in the name of the wound-up company. Pursuant to the sanction, the contributory commenced the civil action in the Shah Alam High Court ("Civil Suit"). The defendant in the Civil Suit then filed a striking out application on, among others, the ground that the sanction granted is invalid. The defendant likewise relied on the decision in **Small Medium Enterprise v Oren Venture**. Following thereto, the contributory made an application to the Winding Up Court for, among others, a declaration that the said sanction is proper and valid.

Having heard parties' submissions as well as having considered the findings in **Small Medium Enterprise v Oren Venture**, Azmi Bin Ariffin J allowed the contributory's application and declared the sanction to be proper and valid. Among others, His Lordship (in His Lordship's oral grounds) takes the position that the liquidator is empowered to grant the contributory the said sanction subject to the liquidator's authority to impose conditions on such sanctions, pursuant to item (l) of the Twelfth Schedule of the Companies Act 2016 which provides that the liquidator has the power to "do all such other things as are

1 There are no reported grounds as at the date of this article. The sections of this article discussing this decision is based on the oral grounds pronounced by the Learned Judge, and is therefore subject to any changes, amendments or amplifications that may be made in the written grounds

necessary for winding up the affairs of the company and distributing its assets". This decision is clearly in conflict with the High Court's decision in **Small Medium Enterprise v Oren Venture**.

Conclusion

Whilst the decision in **Small Medium Enterprise v Oren Venture** appears to be consistent with the Companies Act 2016, specifically section 486 and the Twelfth Schedule, one cannot deny that the granting of sanction by the liquidator has long been assumed to be proper and correct, and even accepted by the courts in previous cases. Further, it is pertinent to note that the Director-General of Insolvency (Malaysian Department of Insolvency) still takes the position that the sanctions granted are valid. The position is now even less certain with the High Court's decision in **Ooi Kim Geik**.

Nevertheless, the case of **Small Medium Enterprise v Oren Venture** is currently pending appeal in the Court of Appeal, which will give the Court of Appeal the opportunity to give further clarification on this issue; of whether liquidators can grant such a sanction.

But until such further decision(s), litigants and liquidators are advised to seek clarification from the winding up court before proceeding, commencing, or continuing with legal proceedings.

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Case Summary: Interpreting Section 35(1) of CIPAA 2012

BY FELICIA LAI WAI KIM

Case Summary: Lion Pacific Sdn Bhd v Pestech Technology Sdn Bhd and another appeal [2022] MLJU 2109

A fairly recent Court of Appeal's decision overturning the High Court's decision in allowing the enforcement application of the adjudication decision on the grounds of breach of 2nd rule of natural justice by the adjudicator.

Brief Background Facts

The Government accepted a tender submitted by Consortium Skypark Link Sdn Bhd – Lion Pacific Sdn Bhd [“**Consortium**”] for a construction project via a Letter of Acceptance dated 22.1.2013. Subsequently, by way of a Letter of Award dated 7.10.2013, the Consortium appointed the Lion Pacific Sdn Bhd (“**Lion Pacific**”) as a sub-contractor for the system works package parcel of the project. Pestech Technology Sdn Bhd (“**Pestech**”) was appointed as the sub-contractor by Lion Pacific by way of a sub-contract dated 24.11.2014.

Payment disputes arose between Lion Pacific and Pestech in connection with the Project and this led to Pestech initiating an adjudication proceeding pursuant to the Construction Industry Payment and Adjudication Act 2012 (“**CIPAA 2012**”), claiming for, amongst other, a sum of RM24,902,980.45 for the value of work done. Lion Pacific disputed Pestech's claim on the ground that payment for the works shall only become due from Lion Pacific to Pestech upon the certification of Secretary General of Ministry of Transport (“**MOT**”) by reason of Clause 3.1 and 4.1 of the sub-contract. The Adjudicator decided in favour of Pestech.

The High Court's finding on the main issues are briefly as follows:

1. Whether the Adjudicator had jurisdiction under CIPAA to adjudicate Pestech's claim:

Lion Pacific contended that the adjudicator had ex-

ceeded his jurisdiction under section 15(d) of CIPAA 2012 read together with section 27(1) CIPAA by deciding that Clause 4.1 of the sub-contract was subject to section 35(1) CIPAA 2012 because clause 4.1 required payment to be conditional upon MOT's certification.

The Learned High Court Judge had discussed in detail with regard to the interpretation of section 35 of CIPAA 2012 and held that (1) the sub-contract is a commercial contract which should be construed in a commercially sensible manner; (2) on a commercially sensible construction of Clause 4.1, it is clear that clause 4.1 is a 'Pay-if-Certified' provision; and (3) there is nothing in section 35(1) of CIPAA that limits its effect to the two circumstances specified in section 35(2)(a) and (b) CIPAA. Parliament has employed a wide term 'any' in section 35(1) CIPAA. Therefore, Clause 4.1 is invalidated by section 35(1) of CIPAA.

Furthermore, even if it is assumed that the adjudicator has erred in his interpretation of clause 4.1 of the sub-contract, the adjudicator's error in itself cannot be a ground for the court to set aside the adjudication decision pursuant to section 15 of CIPAA.

2. Whether the adjudicator had breached the 2nd rule of natural justice under section 15(b) and 24(c) of CIPAA:

The Leaned High Court Judge was not persuaded that the adjudicator had breached the 2nd rule because (1) it is clear from the adjudication decision that the adjudicator had considered all the defences raised by Lion Pacific at the adjudication and it is evident that the adjudicator had in fact accepted some of the defences raised by Lion Pacific and (2) before delivering the adjudication decision, the adjudicator had not deprived Lion Pacific's rights to adduce evidence and to submit on all the questions which arose in the adjudication.

Lion Pacific contended that there were “manifest errors”

or omission in the adjudication decision but this was not agreed by the Learned High Court Judge.

In any event, the Learned High Court Judge was of the view that he cannot set aside the adjudication decision premised on the alleged error and omission. In any event, such an error and omission can be remedied in the arbitration.

Dissatisfied with the High Court's decision, Lion Pacific filed an appeal to the Court of Appeal based on the following grounds:

1. CIPAA does not apply to the sub-contract as the main contract which forms part of the sub-contract, was entered into prior to the coming into force of CIPAA. As such, the adjudicator has no jurisdiction over the adjudication proceedings between the parties.
2. The learned adjudicator had acted in excess of his jurisdiction by incorporating a new contractual term into the sub-contract.
3. There are clear and/or manifest errors in the adjudication decision that warrants a stay of the adjudication decision.

Consistent with the High Court's decision, the Court of Appeal agreed that the Learned Adjudicator has jurisdiction to adjudicate Pestech's claim.

However, the Court of Appeal overruled the High Court's decision in allowing Pestech's application to enforce the adjudication decision, based on the following reasons:

1. From a plain and literal reading of the wording of section 35(1) of CIPAA, a 'Pay-If-Certified' provision as per Clause 4.1 of the sub-contract cannot be construed as a conditional payment clause as the mutual agreement of the parties was that Lion Pacific's obligation to make payment would only arise upon certification of the works done by the Project Director of the MOT failing which the works cannot be considered as having been carried out.

Notwithstanding the object of CIPAA being to facilitate prompt payment, the contractual obligations of the parties as expressly agreed upon cannot in principle be disregarded. Therefore, the Learned High Court Judge had erred in holding that Clause 4.1 of the sub-contract is invalidated by Section 35 of CIPAA as it went beyond the express intention of the contracting parties (para 36 of the judgment).

2. There was a serious breach of rules of natural justice by the adjudicator centred on his failure to give recognition and importance to the terms of the sub-contract wherein the mandatory MOT's certificate was a signif-

icant feature that had been agreed to for entitlement of payment to the contractor. Should the adjudicator give proper consideration to the certification (or lack of) by the Project Director of MOT, he would have held that no sums are payable to Pestech (paragraph 42 of the judgment).

3. In contrast with the findings of the Learned High Court Judge, the Court of Appeal held that the adjudicator in the process of arriving at his adjudication decision had demonstrably failed to carefully consider and appreciate the main substantive defences of Lion Pacific. (paragraph 44 of the judgment).

The Court of Appeal allowed Lion Pacific's appeal and the adjudication decision was set aside.

Conclusion

This case is significant as to the interpretation of section 35(1) of CIPAA 2012 and, in a way, helps to clear some of the confusion caused by different interpretation in the High Court cases of *UDA Holdings Bhd v Bisraya Construction Sdn Bhd & Anor and another case [2015] 11 MLJ 499* and *Ireka Engineering & Construction Sdn Bhd v TRI Pacific Engineering Sdn Bhd [2020] MLJU 548*.

However, based on the reasons set by the Court of Appeal in this case, it would seem that the courts would take a more restrictive approach in interpreting Section 35(1) CIPAA 2012. The effect of a more restrictive approach by the courts on the construction industry and the way parties would now draft their payment terms in construction contracts would remain to be seen.

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Power of Attorney

Power of Attorney: A Problem or a Solution?

BY NOELLE LOW PUI VOON

Introduction

A power of attorney is granted by one (donor) in favour of another (donee), to act on behalf of the donor's behalf, for instance, in respect of the donor's properties, assets, or personal affairs. The High Court in the case of *Wee Tiang Peck v Teoh Poh Tin*¹ by citing Jowitt's Dictionary of English Law (2nd Ed), defined a power of attorney as "a formal instrument by which one person empowers another to represent him or act in his stead for certain purposes". Once a power of attorney is created, the relationship of a principal and agent arises between the donor and the donee of the power². As the donor of a power of attorney, one decides the scope of power and authority to grant in favour of the appointed donee to act on one's behalf.

Is it a Valid Power of Attorney?

The validity of a power of attorney is the primary examination that one must scrutinize.

Authentication and Deposition

To create a valid power of attorney, it must be executed and authenticated in accordance with Section 3 of the

Power of Attorney Act 1949* ("**PA 1949**")^[1], duly stamped at the stamp office, and deposited in the High Court in accordance with Section 4(1) of the PA 1949. However, Section 4(1) of the PA 1949 is subject to an exception by virtue of Section 4(4) of the PA 1949 which reads:

"(4) Subsection (1) shall not apply to instruments executed and used for the sole purpose of carrying out transactions in the office of a Registrar of Titles or a Land Administrator or a Chief Inspector or Senior Inspector of Mines, provided they are attested in accordance with any law for the time being in force regarding the attestation of such instruments."

There is no time limit for deposition of the power of attorney to be done³.

Laws on Power of Attorney in Malaysia

However, the validity of a power of attorney shall not be determined by authentication and registration in accordance with the PA 1949 per se. In Malaysia, the PA 1949 governs the laws of power of attorney and is subject to other legislations and by-laws in Malaysia. This article will exemplify the circumstances to have PA 1949 be read together with the Contracts Act 1950 ("**CA 1950**") and the National Land Code (Revised 2020) ("**NLC 2020**") to serve its fullest effect.

1 [1995] 1 MLJ 446

2 *Wee Tiang Peck v. Teoh Poh Tin* [1995] 1 MLJ 446, p. 454

3 *United Malayan Banking Corporation Berhad v. The Official Receiver and Liquidator of Soon Hup Seng Sdn. Bhd. (In Liquidation) & Anor.* [1986] 1 MLJ 75, p. 81

Land Office Instrument Executed Under a Power of Attorney

Instrument executed under power of attorney fit for registration at the land office

Section 309 and Section 310 of the NLC 2020 allow registration of instrument executed under a power of attorney, where particularly, Section 309(1)(a) makes reference to Section 4(4) and Section 10 of the PA 1949 to affirm the requirement of deposition of a power of attorney at the relevant land registry/land office where such instrument shall be presented for registration at, for an instrument executed under a power of attorney be fit for registration.

With the exception provided under Section 4(4) of the PA 1949, a power of attorney shall be valid to render an instrument executed thereunder, fit for registration at the land registry/land office even if it is not registered at the High Court, so long as such power of attorney is deposited pursuant to Section 309 of the NLC 2020. This principle is affirmed in the case of *Liew Mok Poh & Anor. v Balakrishnan Muthuthamby*⁴.

Nevertheless, Section 311 of the NLC 2020 has empowered the land registrar to make enquiries on registration of any instrument, by requiring a statutory declaration, or other evidence upon oath or affirmation that such power of attorney stands valid and existing from the parties to a power of attorney. This may in a way render a power of attorney not being a practical solution to all circumstances if one is required to attend before a registrar to answer such queries when being called upon.

Void instrument executed under a power of attorney

In addition, one should always bear in mind that the PA 1949 is also subject to any law for the time being in force. That is to say, not all instrument executed under a power of attorney shall be conclusively fit for registration at the land office.

For instance, the Director General of Federal Land and Mines has set out a circular⁵ that any instrument executed vide a power of attorney to give effect to transfer, charge or lease of any alienated land under the governance of the respective state's Malay reservation enactment registered in the name of a Malay proprietor in favour of any non-Malay person shall be prohibited from registration as such instrument shall be the void and invalid.⁶

Further thereto, pursuant to Section 433F of the NLC

2020, any deed or instrument executed by a non-citizen or a foreign company under a power of attorney in respect of any alienated land or any interest therein in favour of any person or body shall be void, and, in the case of an instrument of dealing, be incapable of registration.

As such, even a power of attorney has been executed, authenticated and registered in accordance with the PA 1949, if the authority given in such power of attorney falls within the ambit of Section 433F of the NLC 2020, for instance, power is given in favour of a non-citizen for the purpose of execution of a transfer pursuant to Form 14A of the NLC 2020, such execution shall be void and the transfer shall be incapable of registration at the land registry.⁷

Revocability of a Power of Attorney

Revocation under the PA 1949

A valid power of attorney shall remain in full force until it is revoked by the donor or renounced by the donee, pursuant to Section 5 of the PA 1949, which reads as follows:

“5. Every instrument purporting to create a power of attorney of which a true copy or an office copy has been deposited in the office of the Registrar or a Senior Assistant Registrar in accordance with this Act or any law repealed by this Act whether before or after the commencement of this Act, shall, so far as the said instrument is valid and so far as may be compatible with the terms of the instrument, continue in force until notice in writing of the revocation thereof by the donor, or of the renunciation thereof by the donee, has been deposited in every office in which the office copy or true copy thereof has been so deposited, or either the donor or the donee has died or the donee has become of unsound mind, or the donor has been adjudged to be of unsound mind or a receiving order has been made against him in bankruptcy”

Irrevocable power of attorney – Can you revoke?

Under Section 6(1) of the PA 1949, if a power of attorney is given for valuable consideration and is expressed to be irrevocable in favour of a donee purchaser, such power of attorney shall not be revocable at any time, whether by the death, marriage, mental disorder, unsoundness of mind or bankruptcy of the donor, without the concurrence of the donee, whilst under Section 7, the power of attorney is irrevocable for a fixed time and can either be given with or without consideration.

4 [1990] 2 CLJ (Rep) 365, p. 366

5 Pekeliling Ketua Pengarah Tanah Dan Galian Persekutuan Bilangan 11/2021

6 Pekeliling Ketua Pengarah Tanah Dan Galian Persekutuan Bilangan 11/2021, Paragraph 4

7 Section 433F of the National Land Code (Revised 2020)

In short, the established principle is that an irrevocable Power of Attorney can only be revoked at the consent of the donee.

In protecting a donee from unlawful revocation of an irrevocable power of attorney, the CA 1950 has to be mentioned. Particularly, under Sections 158 and 159 of the CA 1950 that read respectively as follows, parties' entitlement for seeking damages for wrongful revocation of an irrevocable power of attorney was recognised:

"158. Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause."

"159. Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other."

The Court of Appeal in the case of **Sidambaram Torosamy v. Lok Bee Yeong**⁸ affirmed that a power given to a donee with an interest on the subject matter shall not be revocable by citing the Illustration (a) of Section 155 of the Contracts Act 1950[2] which relates the principle of agency. It was further held that:

"In essence, if it is a revocable power of attorney, the law to some extent recognised the fact the donor is obliged to pay compensation. However, if it is irrevocable, then any conduct of the donor to the detriment of the donee will entail the donee to seek appropriate relief from the court not just limited to compensation alone. That is to say, whether revocable or irrevocable, a wrongful act of the donor will lead to the donee having relief through the court."

Yet, in claiming that a power of attorney is irrevocable, it is vital for one to establish that such power of attorney is given for valuable consideration.⁹ Again, in **Sidambaram Torosamy v. Lok Bee Yeong**, the Court of Appeal opined that:

"A power of attorney coupled with interest to the donee will normally be referred to as irrevocable power of attorney to at least give effect to the inten-

tion of the parties which may be expressed or implied within the four corners of the terms of the power of attorney itself."

The High Court in **Hj Fauzi Hj A Majid v Kenangan Erat Sdn Bhd**¹⁰ after scrutinising Section 6(1) of the PA 1949, in setting aside the plaintiff's *ex parte originating summons* held that *"valuable consideration is an essential element in order to sustain the irrevocability of a power of attorney and that this valuable consideration must be expressly stated in specific particulars either in the power of attorney itself or the affidavit in support for the purposes of the ex parte originating summons"*. The Court further ruled that validity of power of attorney in the case shall be determined at full trial.

Thus, the intention of the parties creating a power of attorney and its practicality shall always be the primary consideration in deciding whether such powers to be delegated under such instrument shall be made irrevocable at any time or for a fixed time, and if the former, whether it has been given for valuable consideration.

Can a donor still deal with the property given that a power of attorney has been granted?

It depends on the powers granted in the power of attorney.

The High Court in **Liew Mok Poh & Anor. v Balakrishnan Muthuthamby**¹¹ held that *"Once an irrevocable power for valuable consideration has been given, the donor cannot thereafter exercise any of the powers already given without the concurrence of the donee."*

In the case of **He-Con Sdn Bhd v. Bulyah bt Ishak & Anor and Another Appeal**¹², there was an irrevocable Power of Attorney executed containing a clause that the full payment of the purchase price has been made. One of the issues tried was whether a donor of a power of attorney executed in relation to the property is subsequently prevented from dealing with the property and the Federal Court held that *"Here exhibit P2, which is an irrevocable PA was issued pursuant to D25 had evinced the fact, thereby pointing irresistibly to the knowledge on part of the first defendant that full payment had been made for the said property, thereby rendering the vendor first defendant as a bare trustee. Once a donor becomes a bare trustee, he stands in the same shoe as a vendor similarly circumstanced. Both are incapable of any further dealing with the said property, including cre-*

8 [2018] 3 CLJ 599

9 Section 6(1) of the Power of Attorney Act 1949

10 [2005] 8 CLJ 230, p 231

11 [1990] 2 CLJ (Rep) 365

12 [2020] 7 CLJ 271

ating a charge under the NLC over the said property.”

Can a donee appointed under a valid power of attorney be substituted?

The PA 1949 is silent about substitution of a donee appointed under a power of attorney. However, depending on the needs and the intention of the parties, a power of attorney may contain an express provision to allow the donee to be substituted. This principle is recognized by the Director General of Federal Land and Mines in its circular.¹³

Conclusion: Should I?

Most of the time, the common impression is that the power of attorney is the most powerful legal document for solving problems particularly situations in relation to properties. It may be and may not be. Creation of a power of attorney does provide convenience to a certain extent but sometimes, the risks may outweigh the convenience if the intention of the parties is not rigorously spelt out in a power of attorney.

In essence, one should always seek for proper legal advice when in creating or accepting a power of attorney, to firstly ensure that such power of attorney created shall be enforceable under the laws of Malaysia, and that the powers given thereunder shall be legally tailored to meet the purpose of the parties creating such power of attorney.

*The Power of Attorney Act 1949 is not applicable in Sabah and Sarawak.

[1] *“Authentication of powers of attorney*

*3(1) No instrument purporting to create a power of attorney executed after the commencement of this Act shall have any validity to create such power within **Peninsular Malaysia unless—*

*(a) if executed within *Peninsular Malaysia, the instrument is executed before, and is authenticated in the appropriate form set out in the First Schedule hereto by—*

- (i) a Magistrate;*
- (ii) a Justice of the Peace;*
- (iii) a Land Administrator;*
- (iv) a Notary Public;*
- (v) a Commissioner for Oaths;*
- (vi) an advocate and solicitor; or*
- (vii) an officer, acting in the course of his employment, of a company carrying on the business of banking in *Peninsular Malaysia and incorporated by or under any written law in force in *Peninsular Malaysia; or*

*(b) if executed outside *Peninsular Malaysia, the execution of such instrument is authenticated, in such form as may be accepted by the Registrar, by—*

- (i) a Notary Public;*
- (ii) a Commissioner for Oaths;*
- (iii) any Judge;*
- (iv) a Magistrate;*
- (v) a British Consul or Vice-Consul;*
- (vi) a representative of Her Britannic Majesty;*
- (vii) on and after Merdeka Day, any Consular Officer of Malaysia;*
- (viii) in the case of an instrument executed in the Kingdom of Saudi Arabia, the Malaysian Pilgrimage Commissioner; or*
- (ix) in the case of an instrument executed in the Republic of Singapore, an advocate and solicitor of the Supreme Court of the Republic; or an officer, acting in the course of his employment, of a company carrying on the business of banking in the Republic and incorporated by or under any written law of the Republic.*

(2) Notwithstanding anything to the contrary contained in any written law in force at the commencement of this Act, an instrument purporting to create a power of attorney duly executed and authenticated in accordance with this section shall be deemed to be properly and validly executed and attested for all or any of the purposes for which a power of attorney may be used under any such written law.”

[2] *“Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.*

ILLUSTRATIONS

(a) A gives authority to B to sell A's land, and to pay himself, out of the proceeds, the debts due to him from A. A cannot revoke this authority, nor can it be terminated by his unsoundness of mind or death.

(b) A consigns 1,000 bales of cotton to B, who has made advances to him on such cotton, and desires B to sell the cotton, and to repay himself out of the price the amount of his own advances. A cannot revoke this authority nor is it terminated by his unsoundness of mind or death.”

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13 Pekeliling Ketua Pengarah Tanah Dan Galian Persekutuan Bilangan 11/2021, Paragraph 6



How the Enactment of Torrens System Imparted Inconsistencies and Haunted Landowners for a Good 10 Years: Deferred Indefeasibility

BY **JECCY KHOR JING CHI**

Who would have ever wondered that a piece of issue document of title that is well-kept in one's possession (ie: safe box) is capable of being stolen effortlessly by another.

It is no stranger that the Malaysia practices Torrens System, in a simpler context, registration means everything. That is to say, whomever name appears on the land title, the latter shall possess the legal ownership towards the said land. It is prudent to establish the aforementioned statement as it plays a vital role in determining in whose favour the title shall be indefeasible. Although that has always been the case, but the case of **Adorna Properties Sdn Bhd v Boonsom Boonyanit [2001] 1 MLJ 241** have comprehensively reflected the technical-flaws of our very own National Land Code. In this very case that has garnered countless of criticism, the court ruled that the indefeasibility enacted under our Code is to be perceived as what we call the immediate indefeasibility.

To contextualise, immediate indefeasibility means that the immediate purchaser of title/interest would be conferred indefeasibility pertaining the acquisition of title/interest notwithstanding that preceding acquisition, the title/interest was obtained pursuant to vitiating circumstances stipulated under **Section 340(2) of National Land Code**.

Inversely, deferred indefeasibility means that only subsequent purchasers of land acquired by means of vitiating circumstances under **Section 340(2) of National Land Code**, are able to avail themselves to be afforded indefeasibility provided that they are found to be acting in good faith and have provided valuable consideration for the purchase of the disputed land.

Having said that, the crux of **Adorna's Properties** is that since the name that appears on the land title is Adorna Properties, they have acquired an indefeasible title towards the land. This is further substantiated by the fact that, even if the land is acquired through vitiating circumstances as provided under **Section 340(2) of the Code**, the purchasers are saved by the **proviso** of good faith and valuable consideration under **Subsection 3 of Section 340**. The decision laid down by the court in allowing the purchasers to avail themselves to the proviso is gist that sparks the controversy.

Landowners were haunted for almost a decade, until the **Adorna's Properties** being the precedent to disputes of indefeasibility was overturned. In the case of **Tan Ying Hong v Tan Sian San & Ors [2010] 2 MLJ 1**, the court was given a crucial opportunity to review the decision in **Adorna's case**. The court opines that the **Adorna's Properties** was incorrectly decided, as the proviso immediately after **Section 340(3) of the Code** was directed and meant only for **subsection (3)** and is not supposed to be applied in the earlier subsections. Therefore, Adorna Properties could not rely on the proviso to claim that their title should remain indefeasible even though they acquired through good faith and have provided valuable consideration for it, as the proviso boils down to one thing, the subsequent purchaser. As quoted by Zaki Azmin CJ in **Tan Ying Hong**, since **Adorna Properties** were never the subsequent purchasers to begin with, they could not possibly avail themselves to the proviso to prevent their title being impeached.

It goes without saying, the decision in **Tan Ying Hong** certainly brings relief to landowners who face the risk of losing their lands by reiterating the correct position of law in to attain its inherent purpose which is to prevent

land conveyance that are exercised through vitiating actors stipulated under **Section 340(2) of the Code**. Nonetheless, it is to be borne in mind that landowners are highly unlikely to recover their lands once the transaction involves subsequent purchasers as per established previously.

To encapsulate, it is undeniable that the decision in **Adorna Properties** have rendered irreparable frauds and forgeries within the 10-year period before **Tan Ying Hong** was decided, not to mention that the damages done succeeding the decision of **Adorna Properties**.

On the positive spectrum, landowners are now better protected by the Code as it should, while the law is now clearer and reasonable to conclude that one should not be faulted for the sole reason that protection enacted under the legislation is equivocal.

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Section 75A Directors, Do You Know Your Liabilities?

BY **DESMOND LIEW**

Director's liability under Section 75A of the Income Tax Act 1967 has always been under the close scrutiny of the Inland Revenue Board of Malaysia ("IRB"). Many directors do not appear to know that they are being exposed to such liability until they are being slapped with a notice of assessment and/or being named as one of the defendants.

Shareholders' dispute, sleeping partners, the operation-focus-only director and the 'on-paper' directors and shareholders, poor corporate governance are, amongst others, the factors that often contributed towards the exposure to such liability, let alone exposure to other liabilities.

Director under Section 75A of the Income Tax Act 1967 means any person who:

- (a) is occupying the position of director (by whatever name called), including any person who is concerned in the management of the company's business; **and**
- (b) is, either on his own or with one or more associates within the meaning of subsection 139(7), the owner of, or able directly or through the medium of other companies or by any other indirect means to control, not less than **twenty per cent** of the ordinary share capital of the company ("ordinary share capital" here having the same meaning as in the definition of "director" in section 2).

(hereinafter referred to as "Section 75A Director").

Given the straight forward definition of Section 75A Director, it renders rather easy for the IRB to identify Section 75A Director and to recover outstanding taxes from the Section 75A Director and the companies.

In 2021 alone, there were seven reported cases on Section 75A of the Income Tax Act 1967 and this year, hitherto, there are three reported cases on this section, namely:

1. ***Kerajaan Malaysia v. Sayyid Shah Abdullah [2022] 1 LNS 1501***
2. ***Kerajaan Malaysia lwn. Terus Beruntung Spn Bhp & Satu Lagi [2022] 1 LNS 2229***
3. ***Lembaga Hasil Dalam Negeri (LHDN) lwn. Perkhidmatan Alam Indah Sdn Bhd & Yang Lain [2022] 1 SMC 223***

The summary of all these three cases above is as follows:

- (a) After an assessment is served on the taxpayer, the tax payable under the assessment becomes due and payable, whether or not that person appeals against the assessment;
- (b) Any plea that the tax sought to be recovered is excessive, incorrectly assessed, under appeal or incorrectly increase shall not be entertained;
- (c) The production of a certificate signed by the Director

General of the Inland Revenue shall be sufficient evidence of the amount so due and sufficient authority for the court to give judgement for that amount;

- (d) The service of the assessment via ordinary post is valid so long it is being served to the registered office's address, last known address or to any person authorized by it to accept service of process; and
- (e) A pending tax appeal before the Special Commissioners of Income tax does nothing to affect the IRB's application for summary judgment.

Commentary

These cases merely reiterate the current state of laws and there is no new development in relation to Section 75A of the Income Tax Act 1967 as of now. That said, many Section 75A Directors remain unaware of such liability.

What can be seen from these cases is that the IRB is closely monitoring the Section 75A Directors with the objective to hold the directors jointly liable for the companies' tax liabilities. The legal actions taken by the IRB are no longer confined to commencing civil recovery proceedings and imposing travel restriction. In **Sayyid Shah Abdullah** (*supra*), the IRB lodged a caveat against the director's private property (i.e. a land).

As such, Section 75A Directors are advised to conduct a review of their direct and indirect shareholdings in the companies and group of companies in a periodical manner. Further, no directors should turn a blind eye to the tax affairs of a company as ultimately, the directors could eventually be held liable for the company's tax liabilities.

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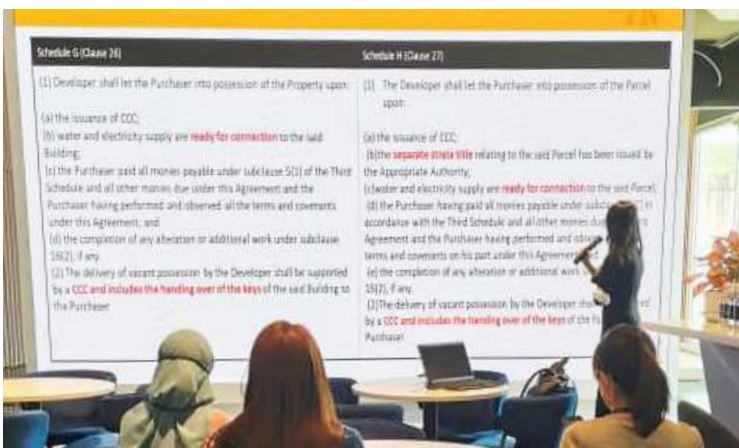
Merry Christmas, HHQ!

HHQ celebrated the Christmas festivities this year appreciating all our staff members with a Christmas feast, gift exchange, amazing lucky draw prizes and very special rewards for 4 members of our staff who achieved the all-inspiring long service award!



Let the Good Times Roll

HHQ Sports Club organised yet another fun bowling session at Ampang Superbowl this month! Our players seem to be getting more competitive each time we play. We're looking forward to producing more HHQ competitive bowlers in 2023!



Real Estate Seminar

We conducted a seminar for NCT Group Of Companies, where our lawyers spoke about strata management and foreign acquisition matters focusing on the formation of joint management bodies and management corporations, the developer's duties upon the delivery of vacant possessions and foreign acquisitions of properties.

We are planning to have more knowledge sharing sessions like this with all of our clients in 2023, so stay tuned!

HHQ Year In Review 2022



Impact

Fundraising Campaign for Ukraine

In collaboration with Andersen in Poland, we helped raise funds for Ukrainian refugees who fled to Poland seeking shelter and protection from the ongoing conflict.

We raised a total of USD 5,000 through our fundraising efforts to help the vulnerable and innocent victims of the war.

Bento of Love Campaign

In doing our part for the environment and to express our love and compassion for animals, HHQ supported Tzu Chi Foundation Malaysia's Bento of Love Campaign.

With over 30 staff and lawyers supporting this campaign each month, we not only lived healthier, but also helped support the cause of vegetarianism locally.



Events & Knowledge Sharing

Andersen Global Events

As a collaborating firm of Andersen Global, we attended regional and global events in Delhi and Miami, on top of virtual monthly meetings to strengthen our worldwide partnerships with the Andersen network.

Empower Everybody with Law

Further to our mission to 'Empower Everybody with Law', we've organised a total of 5 webinars and 6 physical seminars for our clients and the public at large. On top of that, our monthly newsletters have reached over 12,000 subscribers over the course the year and we've discussed more than 50 legal topics in our publications.

We look forward to bringing more value to you through our 'Empower' series in 2023!

HHQ Year In Review 2022



Inaugural Joint Conference

On 29th September, HHQ and HLP held our first joint conference that was attended by clients from both firms with over 120 participants. Our clients enjoyed knowledge sharing sessions by our lawyers and subject matter experts on topics such as tax, real estate, employment and construction.



HHQ x HLP Alliance

Get-togethers with HLP

Surprise! Lawyers can have fun together, too! This year, we've enriched our team spirit and camaraderie through social gatherings and sports such as badminton, bowling and even triathlons!

We're looking forward to more fun and games with HLP as we believe that it enhances our working partnership and collaborative efforts.



Talent Development

Young Talents of HHQ

At HHQ, we strongly believe in nurturing young talents and empower lawyers to develop to their full potential within the firm.

This year, we are proud to have developed and retained 5 pupils who became associates of the firm. We also received 9 interns through our structured internship programme.

In strengthening our practice groups, we have also promoted and inducted 2 young and dynamic partners to the fore.

HLP Year In Review 2022



HLP Chinese New Year Celebration

Dinner & Drinks with HHQ



HHQ-HLP KPUM Internship Programme



Birthday Celebrations



HLP Year In Review 2022



HLP Firm Lunch

**Sports Sessions
with HHQ**



**Litigation Unit Trip
to Pulau Tioman**



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