HLP

ADVOCATES & SOLICITORS

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Editor's Note

Dear Readers,

Wishing you a happy and blessed Ramadan, especially to all Muslim readers.

Welcome to the March edition of our monthly legal newsletter. As always, we are pleased to bring you the latest legal developments and insights from Malaysia and the region.

In this edition of Empower, we cover a range of topics that we believe will be of interest to our readers. We start with an update from **IMC, a Member Firm of Andersen Global,** on discovering the abundance of opportunities in Singapore through a cross border advisory firm like IMC.

Next, we turn our attention to local legal updates, where we examine the **requirements for non-citizens and foreign companies in acquiring properties in Malaysia**.

We also feature an article on employment law, where the author discusses how Malaysian courts conduct a b**alancing exercise when interpreting statutory legislation for contractual relationships between employers and employees.**

The limitation of Section 53A of the Income Tax Act 1967 - In this write-up, we highlight a High Court case where the section is only applicable to the transactions between members of a club and cannot be extended to transactions with a non-member, further cementing the importance of obtaining quality tax advice.

Our third article presents a case summary on **liquidated ascertained damages** filed by a purchaser on a unit in a property development known as “Sentral Residences”.

The process of enforcing foreign judgments in Malaysia can be complicated. In this article, our litigation partner discusses the general principles of enforcement and a case summary on the need to discharge burden of proof under the Evidence Act 1950.

We hope you find this edition informative and useful. We also welcome your suggestions at newsletter@hhq.com.my.

As always, please do not hesitate to contact us if you have any questions or require legal advice.

Discovering Opportunities in Singapore with IMC, a Member Firm of Andersen Global

From Setup to Success: IMC's Comprehensive Support for Singapore Company Set Up and Compliances

Singapore has emerged as a preferred destination for foreign companies looking to set up a subsidiary in Southeast Asia. It is regarded as an ideal place to facilitate 'new-business building'. Its strategic location, business-friendly environment, developed infrastructure, low tax rates and highly skilled workforce make it an ideal place for companies to establish their regional presence. IMC provides end-to-end services to foreign companies looking to establish their subsidiary in Singapore and supports them with ongoing compliance requirements.

Singapore Company Incorporation:
IMC can assist foreign companies with Singapore company incorporation, which involves registering the company with the Accounting and Corporate Regulatory Authority (ACRA). IMC can help foreign companies set up different entities such as private limited companies, branch offices, representative offices, single-family office etc.

Corporate Secretarial Services:
IMC provides corporate secretarial services to help foreign companies comply with regulatory requirements related to statutory registers, the appointment of officers, board resolutions, annual general meetings (AGMs), filing of annual returns and other corporate secretarial matters.

Accounting and Bookkeeping:
IMC can assist foreign companies with bookkeeping and accounting services. This includes preparing financial statements, management accounts, and tax computation.

GST Registration and Quarterly GST Filing Compliance:
Goods and Services Tax (GST) is a consumption tax levied on goods and services sold in Singapore. Foreign companies may be required to register for GST if they exceed a certain threshold. IMC can assist with GST registration and quarterly GST filing compliance.

Tax Compliance and Advisory:
IMC provides tax compliance and advisory services to foreign companies. This includes tax filings and advising on tax planning, compliance with tax regulations, and handling tax disputes with tax authorities.

Payroll Processing and Related Compliances:
IMC can assist with payroll processing and related compliances such as preparing monthly payroll, calculating taxes, CPF filings, IR8A and IR21 submissions etc.

Immigration Services:
IMC provides immigration services to assist foreign companies with employee work passes. This includes Employment Pass (EP), Entrepreneur Pass (EntrePass), Tech-Pass, and Personalised Employment Pass (PEP) applications. IMC can also assist with visa applications for family members of employees.

Conclusion:
IMC provides end-to-end services to foreign companies looking to set up their subsidiary in Singapore and support them with ongoing compliance requirements.
IMC's services include Singapore company incorporation, corporate secretarial services, accounts, GST registration and quarterly GST filing compliance, tax compliance and advisory, payroll processing and related compliances, and immigration services. With IMC's expertise, foreign companies can focus on their core business operations while leaving the compliance requirements to IMC.

Contact us:-
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Acquisition of Property by Non-Citizen & Foreign Companies in Malaysia

BY HILARY LIM CHIAO HANN

INTRODUCTION

Generally, the acquisition of property by non-citizen and foreign companies are subject to the requirements as set out in the (i) National Land Code (revised 2020) (Act 828) ("**NLC**"), (ii) Economic Planning Unit (EPU) and (iii) relevant rules and regulations imposed by the State Authority.

DEFINITION OF "NON-CITIZEN" AND A "FOREIGN COMPANY" UNDER THE MALAYSIAN LAW

In summary, the definition of foreign interest as provided under **Section 433A of NLC** is as follows:-

a. Non-citizen: an individual who is not a citizen of Malaysia; and
b. Foreign company: a foreign company incorporated in Malaysia under Companies Act 2016, or a company incorporated in Malaysia with 50% or more of its voting shares held by a non-citizen.

Under **Section 2 of the Companies Act**, foreign company is defined as a company, corporation, society, association or other body incorporated outside Malaysia or an unincorporated society, association which under the law of its place of origin may sue or be sued which does not have its head office or principal place of business in Malaysia.

REQUIREMENTS AND LIMITATIONS

In acquiring properties in Malaysia, non-citizen and foreign companies shall take note and comply with the following requirements:-

a. Acquisition Approval under NLC;
b. Minimum Threshold on the Property Purchase Price & Types of Properties as determined by the State Authority; and
c. Guideline on the Acquisition of Properties issued by EPU.

I) ACQUISITION APPROVAL UNDER NLC

As prescribed under **Section 433E of the NLC**, a non-citizen or a foreign company that intends to acquire a property in Malaysia shall submit for an application in writing to the relevant State Authority to seek for an approval by the State Authority. Upon the approval from the State Authority, such approval may subject to such terms and conditions as may be specified by the State Authority and to the payment of levy fees as may be prescribed. Any prescribed levy fees payable to the State Authority shall be in accordance with the directions of the National Land Council.

II) MINIMUM THRESHOLD ON PROPERTY PURCHASE PRICE & TYPES OF PROPERTIES

Non-citizen and foreign company shall also take note on the minimum threshold on the property purchase price as may be determined by the State Authority and the types of properties allowed to be acquired in each State in Malaysia.

In this article, we will only discuss the minimum threshold, the types of properties allowed to be acquired by a non-citizen and a foreign company and whether levy fees will be imposed on a non-citizen and a foreign company in

the acquisition of property in Wilayah Persekutuan Kuala Lumpur, Selangor, Pahang, Penang and Johor, as follows:-

State	Minimum Threshold and Types of Properties	Levy Fees
Wilayah Persekutuan Kuala Lumpur	**RM1million and above** Residential properties, commercial properties, industrial lands, agriculture lands not less than 5 acres can be considered by the State Authority[1].	×
Selangor **Zon 1** District of Petaling, Gombak, Hulu Langat, Sepang, Klang **Zon 2** District of Kuala Selangor and Kuala Langat **Zon 3** District of Hulu Selangor and Sabak Bernam	**Zon 1** Residential properties: **RM2million** Commercial properties: **RM3million** Industrial properties: **RM3million** **Zon 2** Residential properties: **RM2million** Commercial properties: **RM3million** Industrial properties: **RM3million** **Zon 3** Residential properties: **RM1million** Commercial properties: **RM3million** Industrial properties: **RM3million** **Remarks:** Residential (strata properties only, which include landed strata properties)[2].	×
Pahang	**RM1million** Residential properties, commercial properties, industrial properties and agriculture lands not less than 5 acres.	√
Penang	**Properties Acquired from Direct Developers[3].** **Landed Properties (including landed strata):** (i) Seberang Perai area – **RM750k**; and (ii) Penang island area – **RM1.5million**. **Strata Properties** (i) Seberang Perai area – **RM400k**; and (ii) Penang island area – **RM700k**. **Remarks:** The above threshold is only applicable for SPA executed in between **1 January 2023 to 31 December 2023.** **Subsales Properties** **Landed Properties (including landed strata):** (i) Seberang Perai area – **RM1million; and** (ii) Penang island area – **RM3million.**	**Remarks:** Levy fees are exempted for properties acquired under the Home Ownership Campaign (HOC 3.0). However, the acquisition of subsales properties are still subject to levy fees.

1 Garis Panduan Perolehan Hartanah issued by Economic Planning Unit (EPU) effective from 1 March 2014 which is referred to in Paragraph 4 of Pekeliling Ketua Pengarah Tanah dan Galian Persekutuan Bilangan 10/2020

2 Pekeliling Ketua Pengarah Tanah dan Galian Selangor Bilangan 1/2014

3 Notification of the extension of the Home Ownership Campaign 3.0 dated 13 December 2023 issued by Pejabat Tanah Dan Galian Negeri Pulau Pinang to Penang Bar Committee and REHDA Penang informing an extension from 1 January 2023 to 31 December 2023 for properties acquired by non-citizens and foreign companies from direct developers in Malaysia

State	Minimum Threshold and Types of Properties	Levy Fees
	Strata Properties (i) Seberang Perai area – **RM500k** (for non-citizen only); (ii) Seberang Perai area – **RM1million** (for foreign company only); and (iii) Penang island area – **RM1million**. Residential properties (from direct developer or subsales), commercial properties, commercial lands for the purpose of developing into a private hospital, private school and hotels. Acquisition of agriculture lands not less than 5 acres can be considered by the State Authority[4].	
Johor	**RM1million** Properties acquired from direct developers such as: (i) residential properties; (ii) commercial properties; and (iii) industrial properties. However, the acquisition of residential properties and commercial properties shall subject to the quota determined by the State Authority based on the types of properties. However, industrial properties are not subject to any quota.	√
State	**Minimum Threshold and Types of Properties**	Levy Fees
	Properties acquired from the subsales market: (i) residential properties; (ii) commercial properties; and (iii) industrial properties. The acquisition of the residential, commercial and industrial properties are not subject to any quota determined by the State Authority[5].	

(III) GUIDELINE ON THE ACQUISITION OF PROPERTIES ISSUED BY EPU

Effective from 1 March 2014, a non-citizen or a foreign company are required to obtain a prior written approval from EPU in the event that:

a. any acquisition of property where the acquisition price is **above RM20million** and such acquisition would result in diluting Bumiputra ownership of the property held by Bumiputra interest and/or Government agency; and

b. any indirect acquisition of property by other than Bumiputera interest through the acquisition of shares, resulting in a change of control of the company owned by the Bumiputera interest and/or Government agency, having property more than 50% of its total assets, and its property asset being valued at more than RM20 million.

Additionally, foreign companies shall take note that EPU has imposed restrictions on foreign companies in the acquisition of properties in Malaysia such as the foreign company shall have at least 30% Bumiputra interest shareholdings and the paid-up capital of local companies owned by foreign interest shall be at least RM250,000.

However, the acquisition of the properties by foreign interest as set out below do not require the approval of the EPU but fall under the purview of the relevant ministries and/or government departments in Malaysia:

4 Garis Panduan Perolehan Hartanah Oleh Warganegara Asing Atau Syarikat Asing Bagi Negeri Pulau Pinang

5 https://ptj.johor.gov.my/pendaftaran/perolehan-hartanah-oleh-kepentingan-asing/

a. any acquisition of a unit of residential property valued at RM1million and above
b. any acquisition of commercial unit valued at RM1million and above;
c. any acquisition of industrial land valued at RM1million and above; and
d. any acquisition of agricultural land valued at RM1million and above or at least five (5) acres in area for the following purposes:
    i. to undertake agricultural activities on a commercial scale using modern or high technology;
    ii. to undertake agro-tourism projects; or
    iii. to undertake agricultural or agro-based industrial activities for the production of goods for export.

In addition to the above, EPU has imposed restrictions on non-citizens and foreign companies in acquiring the following types of property in Malaysia, such as:-

a. value of the property less than RM1,000,000 per unit;
b. residential units under the category of low and low-medium cost as determined by State Authority;
c. properties built on Malay Reserved Land; and
d. properties allocated to Bumiputera interest in any property development project as determined by the State Authority.

CONCLUSION

In acquiring properties in Malaysia, non-citizens and foreign companies should be aware of the requirements as set out above and it is always important to take note of any latest requirements as may be announced by the Government of Malaysia which may be applicable.

Nevertheless, it is advisable for non-citizens and foreign companies to seek for professional advice on the procedures and costs involved to manage his/its expectation before acquiring a property in Malaysia.

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Case Summary: Poosai Pandian Gunasekaran & 47 Ors v AJN Energy (M) Sdn Bhd [2023] MLJU 302

BY TEOH YEN YEE

Malaysian Court of Appeal
Lee Swee Seng, Mariana Yahya and Lim Chong Fong JJCA
8th February 2023

INTRODUCTION

The law recognises that there exists unequal bargaining of power in some contractual relationships between parties. There are certain statutory legislations enacted by Parliament with the intent to provide protection for the weaker class of persons against the stronger class of persons. One of those legislations is the Employment Act 1955. In this case, the Court of Appeal demonstrates how the courts of Malaysia conduct a balancing exercise when interpreting statutory legislation.

SALIENT FACTS

In this case, a total of 48 Indian nationals ("**Appellants**") employed by the Respondent Company lodged a complaint to the Department of Labour at Bentong, claiming for unpaid wages for the months of September and October, 2018 ("**Complaints**"). During the hearing at the Labour Court, some of the Appellants stated that they intended to return to their home country and forego their respective Complaints.

After the inquiry by the Presiding Officer under Section 69 of the Employment Act 1955 ("**EA**"), the Respondent was ordered to pay a total sum of RM95,617.00 to all 48 Appellants.

The Respondent being dissatisfied, appealed to the High Court of Temerloh. On 6.11.2019, the High Court allowed the Respondent's appeal.

The Appellants, being dissatisfied, sought leave to appeal to the Court of Appeal against the decisions of the High Court. Leave was granted on 25.2.2021 in respect of the following questions:

i. Whether Section 69 of the EA confers full discretion to the Presiding Officer of the Labour Department and/or Labour Court to further investigate and decide on a complaint despite the Complainant's intention to withdraw the Complaint in the course of proceedings; and
ii. Whether the Presiding Officer of the Labour Department and/or Labour Court is right in deciding that the Respondent has a duty to pay wages to the Appellants under the Employment Contract and EA, regardless of the intention of the Appellants to withdraw the complaint.

THE DECISION BY THE COURT OF APPEAL

Section 69 of the EA provides as follows:

Section 69. Director General's power to inquire into complaints.

1. *The Director General may inquire into and decide any dispute between an employee and his employer in respect of wages or any other payments in cash due to such employee under—*
   a. *any term of the contract of service between such employee and his employer;*
   b. *any of the provisions of this Act or any subsidiary legislation made thereunder; or*
   c. *the provisions of the Wages Councils Act 1947*

[Act 195] or any order made thereunder, and, in pursuance of such decision, may make an order in the prescribed form for the payment by the employer of such sum of money as he deems just without limitation of the amount thereof.

2. *The powers of the Director General under subsection (1) shall include the power to hear and decide, in accordance with the procedure laid down in this Part, any claim by—*
   i. *an employee against any person liable under section 33;*
   ii. *a contractor for labour against a principal contractor or sub- contractor for any sum which the contractor for labour claims to be due to him in respect of any labour provided by him under his contract with the contractor or sub-contractor; or*
   iii. *an employer against his employee in respect of indemnity due to such employer under subsection 13(1), and to make such consequential orders as may be necessary to give effect to his decision.*

3. *(3)In addition to the powers conferred by subsections (1) and (2), the Director General may inquire into and confirm or set aside any decision made by an employer under subsection 14(1) and the Director General may make such consequential orders as may be necessary to give effect to his decision:*
   Provided that if the decision of the employer under paragraph 14(1)(a) is set aside, the consequential order of the Director General against such employer shall be confined to payment of indemnity in lieu of notice and other payments that the employee is entitled to as if no misconduct was committed by the employee:
   Provided further that the Director General shall not set aside any decision made by an employer under paragraph 14(1)(c) if such decision has not resulted in any loss in wages or other payments payable to the employee under his contract of service:
   And provided further that the Director General shall not exercise the power conferred by this subsection unless the employee has made a complaint to him under the provisions of this Part within sixty days from the date on which the decision under section 14 is communicated to him either orally or in writing by his employer…

In dealing with these questions, the Court of Appeal referred to the decision in ***PJD Regency Sdn Bhd v Tribunal Tuntutan Pembeli Rumah & Anor and Other Appeals*** **[2021] 2 CLJ 441**, which held that a social legislation has been passed by the Parliament for the purpose of protecting the weaker party against the stronger party in the relationship:

> *[31] All legislation is social in nature as they are made by a publicly elected body. That said, not all legislation is "social legislation". **A social legislation is a legal term for a specific set of laws passed by the Legislature for the purpose of regulating the relationship between a weaker class of persons and a stronger class of persons. Given that one side always has the upper hand against the other due to the inequality of bargaining power, the State is compelled to intervene to balance the scales of justice by providing certain statutory safeguards for that weaker class. A clear and analogous example is how this court interpreted the Industrial Relations Act 1967** in Hoh Kiang Ngan v. Mahkamah Perusahaan Malaysia & Anor [1996] 4 CLJ 687; [1995] 3 MLJ 369 ("Hoh Kiang Ngan ").*

Similar to the Industrial Relations Act 1967, the EA is also a social legislation as held by the Court of Appeal in ***Barat Estates Sdn Bhd & Anor v Parawakan Subramanian & Ors [2000]*** **3 CLJ 625 CA** where Gopal Sri Ram JCA (later FCJ) held as follows:

> *"**The scheme of the Act thus when viewed as a whole, is to afford protection to persons employed under a contract of service. Hence the Act is designed to afford a degree of security of tenure that is not available to a servant at common law. It is therefore plain that the Act is a piece of beneficent social legislation**. As such, its provisions must, in accordance with well-settled principles, receive a broad and liberal interpretation that enhances its avowed object. It is what Lord Simon in Stock v. Frank Jones (Tipton) Ltd [1978] 1 WLR 231, 236 referred to as the "functional construction of a statute."*

In conducting the balancing exercise, the Court of Appeal refers to Sections 69 and 70 of the EA and held that the Presiding Officer has wide discretion to inquire and examine persons summoned on the material matters in issue. In this case, the Presiding Officer was found to have correctly exercised his jurisdiction and powers conferred by the EA to carry out the inquiry and ultimately made his decision notwithstanding that some of the Appellants had testified that they intended to withdraw their claims against the Respondent as long as they were able to return to

their home country. That is so despite the Respondent contending that the Appellants should be deemed to have already withdrawn their Complaints during the hearing and that the Presiding Officer no longer having the jurisdiction to continue to inquire and decide the Complaints.

THE COURT'S FINDINGS:

The Court of Appeal found that:

First, not each and every one of the 48 Appellants stated that they wish to withdraw their Complaints during the hearing;

Second, having carefully reviewed the statements, the Appellants' priority was to return to their home country rather than being bogged down in the Labour Court Inquiry. This is however not an unequivocal expression of waiver of their rights to be paid their unpaid wages by the Respondent; and

Third, EA is a social legislation which be interpreted liberally and equivocally in favour of the weaker party who are the poor and likely illiterate Appellants.

Fourth, the Presiding Officer's jurisdiction and power to continue to conduct the inquiry into the Complaints are only forfeited if there is a negotiated settlement or prior payment of the unpaid wages.

Based on the matters set forth above, the question of law on whether the Presiding Officer of the Labour Department and/or Labour Court had the jurisdiction and power to continue to conduct the inquiry into the Complaints until the issuance of the decision was answered in the **affirmative** by the Court of Appeal. It follows therefore that the Respondent was rightly found to have a duty to pay the wages to the Appellants under the EA regardless of statements made by some of the Appellants that they wanted to withdraw the Complaints.

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Section 53A of the Income Tax Act 1967 - Transactions between Members Only

BY DESMOND LIEW ZHI HONG

The High Court in ***New Club Taiping v Ketua Pengarah Hasil Dalam Negeri*** **(WA-14-38-07/2020)** held that Section 53A of the Income Tax Act 1967 ("**ITA**") is only applicable to the transactions between members of a club and cannot be extended to transactions with a non-member.

The salient facts of **New Club Taiping** ***(supra)*** are as follows:

a. The Taxpayer is a recreational club registered in Malaysia with the Register of Societies and has obtained license from the Ministry of Finance to operate slot machines within the premises of the club.
b. The slot machines located in a room within the club and only accessible by the club's members.
c. The Taxpayer entered into an agreement with TT Digital Sdn Bhd ("**TTD**") where TTD will be granted the right to operate and manage the Taxpayer's slot machines ("**Agreement**") where TTD will deposit all monies collected from the members into the Taxpayer's bank account.
d. Under the Agreement, the Taxpayer is entitled to take first bite of the cherry of RM18,000.00 per month from the monies collected ("**Income**") and the excess monies will be TTD's service fees.
e. Pursuant to a tax audit, the Inland Revenue Board of Malaysia ("**IRB**"), in February 2013, issued notices of additional assessment ("**Forms JA**") for the years of assessment ("**YAs**") 2006 to 2010 on the basis that the Taxpayer failed to declare the Income received from TTD in its tax returns.
f. The Special Commissioners of Income Tax ("**SCIT**") ruled in favour of the IRB and the Taxpayer appealed against the SCIT's decision before the High Court.

In dismissing the Taxpayer's appeal, the High Court held that, amongst others:

a. The Taxpayer had committed negligence as the Taxpayer failed to obtain advice from tax agent or IRB and subsequently failed to declare the Income received from TTD in its tax returns.
b. The Taxpayer's negligence only discovered by the IRB after the tax audit and thus the issuance of the Forms JA by the IRB is valid and not time barred.
c. Under the Agreement, the Taxpayer received monthly net income from TTD, which is not a member of the club and thus Section 53A of the ITA does not apply on the Income received from TTD.
d. The source of Income received by the Taxpayer was from TTD and not from contributions of the club members.

COMMENTS

This case is probably the first case which addressed the application and limitation of Section 53A of the ITA. The High Court in **New Club Taiping** ***(supra)*** made it very clear that Section 53A of the ITA only applicable to the transactions between members of a club and cannot be extended to transactions with a non-member.

It is not uncommon for club or association to outsource certain activities of the club or association to a third party as it makes perfect commercial sense to resort to the outsourcing approach. However, the club or association must make sure that they control the transactions with their members at all material times. The outcome of **New Club Taiping** ***(supra)*** would be drastically different if the Taxpayer operates the slot machines itself but paid service fees to TTD in managing the slot machines. The importance of tax advice and tax planning.

Another key takeaway from **New Club Taiping** ***(supra)*** is that the High Court appears to be suggesting that a taxpayer may not be committing negligence if the taxpayer had obtained advice from or consulted tax agent or the IRB on a tax issue during the preparation of their tax returns. Here, we can see again, the importance of getting a tax advice.

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Case Summary: Vignesh Naidu Kuppusamy Naidu v Prema Bonanza Sdn Bhd [2023] 1 LNS 162

BY PAN YAN TENG & PANG YI QING

BRIEF FACTS

The appellant is the owner of a unit in a property development known as "Sentral Residences" which was purchased from the respondent company who is the developer of the project. A Sale and Purchase Agreement ("**SPA**") was entered into on 18 July 2012.

Under the Housing Development (Control and Licensing) Regulations 1989 ("**Regulations 1989**"), specifically in relation to Schedule H of the Regulations 1989, the respondent as the developer is required to deliver vacant possession of the parcels and to complete the common facilities of the residential development within 36 months. Failure by the developer will entitle the purchasers to LAD.

Some 18 months prior to the execution of the SPA, the respondent has obtained an extension of time ("**EOT**") to complete the project. This EOT was granted by the Housing Controller of the Ministry of Urban Wellbeing, Housing & Local Government under Regulation 11(3) of the Regulations 1989, to an extended period of 54 months. This was also reflected in Clauses 25 and 27 of the SPA. The vacant possession was delivered on 8 February 2017.

Three years after vacant possession was delivered, the appellant filed a suit to claim for LAD. The appellant alleged that the delivery of vacant possession should have been 17 July 2015, which is the original completion date (based on the original completion period of 36 months).

The appellant applied for a summary judgment. However, the application was rejected by the High Court and the appellant's suit was struck out. The appellant thus filed an appeal.

COURT OF APPEAL'S FINDINGS

1. Taking into account the Federal Court's decision in ***Ang Ming Lee v Menteri Kesejahteraan Bandar, Perumahan & Kerajaan Tempatan*** **[2020] 1 CLJ 162**, the Court of Appeal held that the EOT obtained by the respondent is void.

2. Regulations 1989, which was made pursuant to the Housing Development (Control and Licensing) Act 1966 ("**HDA 1966**"), is a social legislation designed to protect the house buyers, the interests of the purchasers shall be the paramount consideration against the developer.

3. Regulation 11(3) of the Regulations 1989 which confers the Housing Controller (here being the respondent developer) the powers to waive or modify any provisions in the statutory contract in Schedule H to the Regulations is indeed ultra vires to its enabling legislation, HDA 1966. The respondent thus has no power to waive or modify the 36-months period stipulated in the SPA.

4. Moreover, where two different interpretations of the statute are possible, it is the one which favours the interest of the community over the interest of the individual that will be preferred.

5. Despite the fact that the application for extension of time was applied prior to the entry of the SPA, the Housing Controller still cannot amend the statutory contract. It is wholly inconsequential whether the extension was obtained before or after the execution of the SPA.

6. Further, the Court has also made the following findings:

    a. *Estoppel* – The respondent alleged that certain LAD was paid to the appellant, and a letter was

signed to waive any further claims against the respondent. Thus, appellant was therefore estopped from bringing an action for LAD again. However, the court held that an *ultra vires* act cannot be legitimised through estoppel, waiver or agreement between the parties. Estoppel, as an equitable principle, cannot defeat clear statutory provisions of law.

b. *Limitation* – For a claim of LAD, the cause of action accrues on the date the purchaser accepted delivery of vacant possession, and not on date of the execution of SPA. In fact, no LAD would arise at such early stage as one could not ascertain LAD before delivery of vacant possession. Thus, pursuant to section 6(1)(a) of the Limitation Act 1953, the appellant's action was not barred by limitation.

c. *Mode of commencement* – A writ action is a correct mode to commence proceedings in determining the validity of extension of time.

d. *The effect of Ang Ming Lee* – The ruling in *Ang Ming Lee* shall have a retrospective effect. The same approach shall be adopted, as long as the verdict on fresh interpretation of the law does not contain any declaration of it having a prospective effect.

COMMENTS

7. The court's interpretation on Regulation 11(3) was in favour of protecting the interest of the public, where house purchaser's interest are safeguarded. Moreover, the intention of the Parliament was well-executed and applied.

8. The same approach was also adopted by the Federal Court in ***Innab Salil & Ors v Verve Suites Mont Kiara Management Corporation*** **[2020] 10 CLJ 285**, which held that both Strata Management Act 2013 and HDA 1966 are social legislations as well. A statute is categorised as a social legislation if its main purpose was to benefit, ease, facilitate the affairs, or to protect a certain group of people.

9. This interpretation was applied by the Court of Appeal in the case of ***UE E&C Sanjia (M) Sdn Bhd v Lee Jeng Yuh & Anor and another appeal*** **[2021] 6 MLJ 864**, where the court was already in the view that whether the approval for EOT is obtained before or after execution of SPA is irrelevant, as housing controller has no power whatsoever to waive and modify the terms and conditions of the scheduled agreement in the first place.

10. Hence, developers shall be aware that an EOT in the delivery of vacant possession is not valid despite being validly granted by relevant authorities. It is pertinent for housing developers to strictly comply with the period of delivery for vacant possession as stipulated under the Regulations.

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Overview: Enforcement of Foreign Judgment in Malaysia

BY LUM MAN CHAN

In Malaysia, a foreign judgment cannot be directly enforced and must be first recognized by a Malaysian court. In instances where a foreign judgment is obtained in countries stipulated under the First Schedule of Reciprocal Enforcement of Judgment Act 1958 (REJA) ("reciprocating country"), the judgment creditor may commence enforcement proceeding by first registering the same under section 4(1) of REJA. The judgment must be for a fixed sum, final and conclusive, and issued by a foreign court with competent jurisdiction. The Court may set aside registration of the foreign judgment for various grounds such as lack of jurisdiction, fraud or contrary to public policy in Malaysia. Upon successful registration, the foreign judgment will have the same force and effect as a Malaysian judgment. On the other hand, foreign judgments obtained in countries outside of REJA may still be enforced in Malaysia but by way of common law action. This is because an unsatisfied foreign judgment is actionable per se.

The Federal Court in the case of ***Pembinaan SPK Sdn Bhd v Conaire Engineering Sdn Bhd*** **[2023] 2 MLJ 324** has discussed on the need to discharge burden of proof under the Evidence Act 1950.

BRIEF FACTS

In March 2015, the Respondent had obtained a judgment in default in the sum of AED20,718,958.25 against the Appellants in Abu Dhabi's Court of First Instance (Commercial). Since United Arab Emirates (UAE) was not a reciprocating country under REJA, the Respondent commenced common law action in the High Court here for enforcement of the Abu Dhabi judgment.

In High Court, the Respondent has tendered English translations of the Abu Dhabi judgment which was entirely in the Arabic script but did not annex its original or certified true copy. The Respondent's claims were allowed and subsequently affirmed by the Court of Appeal. Nonetheless, the Appellant was granted leave to appeal and the Federal Court in allowing the appeal proper, answered in **negative** for the following questions of law:-

a. Whether a foreign judgment is enforceable by a common law action in Malaysia (where the foreign country is not a reciprocating country) if the judgment is not proved as a foreign judgment or order in accordance with the Evidence Act 1950 (EA1950)?

b. In a common law action to enforce a foreign judgment, without the foreign judgment being proved in accordance with Chapter V of the EA 1950, whether there is a sustainable cause of action for other evidence to be admitted and weighed?

The Federal Court highlighted the importance of fulfilling the requirements under the EA 1950 to support the enforcement of foreign judgments. Additionally, any inconsistencies or discrepancies can undermine the credibility of the evidence and lead to an unsuccessful enforcement. This is especially important for foreign judgments obtained in non-reciprocating countries.

THE NEED TO DISCHARGE BURDEN OF PROOF UNDER EA 1950: NO EXCEPTION

In this case, the Respondent tendered a copy of the Abu Dhabi judgment, which comes in various translations, discrepancies, and also did not comply with the certification requirements. The Federal Court had highlighted that the need of tendering the original Abu Dhabi judgment (primary evidence) in accordance with Section 62 or a copy of the same (secondary evidence) in accordance

with Section 78 and 86 of EA 1950. The Respondent's failure to sufficiently prove the Abu Dhabi judgment has rendered its claim unproven and warrants a dismissal on this reason alone.

The Federal Court also emphasised that inadmissible evidence is inadmissible, even though the parties did not raise any objections. Even if such evidence was erroneously allowed to be admitted, as they were in the earlier Courts, it remains inadmissible because it does not meet the requirements set out in the Evidence Act 1950. The admission of a translation of the foreign judgment does not automatically mean that the original judgment is admissible, especially if it has not been certified, verified or authenticated. In addition, the testimony of a witness cannot replace primary evidence, especially when it comes to critical documents such as a court judgment.

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Real Estate Law Review - Malaysia Chapter

HHQ lawyers, Leon Gan, Goh Li Fei and Hee Sue Ann authored the Malaysian Chapter for the 12th Edition of The Law Review's "The Real Estate Law Review", which provides an in-depth overview of the Malaysian real estate legal framework and market. The review was published by Law Business Research in March 2023.

Please click here to read the chapter.

Stay Awake With Coffee & Law

A coffee talk sharing session co-organised by Halim Hong & Quek, Harold & Lam Partnership and Zen, Chyuan & Farliza discussing on Corporate Governance, Employment Law and Trademark Registration at Golden Egg Cafe & Restaurant, Georgetown, Pulau Pinang.

It was an interactive learning session where we stayed awake with coffee, law and more!

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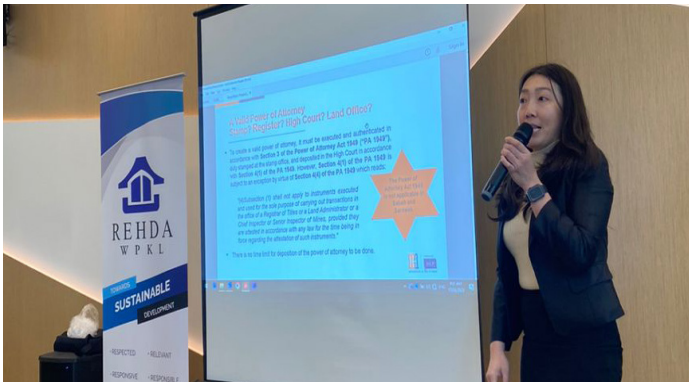

Legal Talk Series #1/2023 by REHDA WPKL

HHQ Partners, Dato' Quek Ngee Meng, Lim Yoke Wah and Noelle Low presented on land matters and issues in real estate developments for the legal talk organised by REHDA WPKL.

Special thanks to REHDA for organising the event and for the invitation to impart knowledge to its members.

Archery - Let's Aim & Shoot!

HHQ Sports Committee has organised an archery session on 17 March 2023. 14 HHQ lawyers and staff participated in this session which was held at Star Archery, Berjaya Times Square, Kuala Lumpur.

Share your thoughts!

HLP
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