Shearn Delamore &co.

NEWSLETTER

▪ Vol 15 No 1 ▪ Mar 2016 KDN NO. PP 12544/10/2012 (030886)

CORPORATE LAW

Nominee Directors' Dilemma: To Whom do They owe Loyalties to? A case of Competing Allegiances.

IN THIS ARTICLE, LAI ZHEN PIK EXAMINES THE DILEMMA NOMINEE DIRECTORS FACE WHEN THERE IS A CONFLICT OF INTEREST.

Introduction

It is trite law that the business and affairs of a company must be managed by, or under the direction of, the board of directors[1]. Directors of a company hold fiduciary offices and are under a duty to exercise their discretions for a proper purpose, in good faith and at all times to act in the best interests of the company as a whole[2].

Nominee directors

Directors are expected to discharge their duties with utmost loyalty to the company on whose board they serve. However, such expectation is difficult to manage in the context of nominee directors who are appointed by stakeholders, such as shareholders, creditors or other interested parties, to protect their interests in a company (referred to as the "nominating parties").

The appointment of nominee directors is especially common in joint venture arrangements where different companies come together to leverage each other's expertise by incorporating a joint venture company under which business is carried out. More often than not, joint venture agreements entered into between parties would specify the agreed shareholding proportion and the number of nominee directors each party is entitled to appoint.

These nominee directors are often members of senior management of the nominating parties and their main purpose of appointment onto the board of the company is to be the eyes, ears and mouthpieces of the nominating parties.

Section 132(1E), Companies Act ("CA 1965")

While the appointment of nominee directors is maybe common practice, Malaysian company law does not differentiate between the fiduciary duties owed by nominee directors and other directors.

Like any director, a nominee director owes fiduciary duties to act in the best interests of the company whose board he sits on, even though the interests of the company may come in conflict with his nominating party's interests.

▪ In This Issue ▪

PUBLISHER
Shearn Delamore Corporate Services Sdn. Bhd. (557186 x)
Suite 10.05, 10th Floor
Wisma Hamzah-Kwong Hing
No. 1 Leboh Ampang
50100 Kuala Lumpur
Tel 603 2027 2727
Fax 603 2078 5625

The above is encapsulated in section 132(1E), CA 1965 which stipulates that a nominee director shall act in the best interests of the company and, in the event of any conflict between his duty to act in the best interests of the company and his duty to his nominating party, he shall not subordinate his duty to act in the best interests of the company to his duty to his nominating party.

To put it simply, nominee directors may take into consideration the interests of their nominating parties. However, in the event the interests of their nominating parties and the company are at variance, the nominee directors would need to prioritise the interests of the company over that of their nominating parties.

A discord between the law and commercial reality

All is well when the interests of the nominating parties and the company are aligned. However, in reality this may not always be the case. In a joint venture arrangement, the right of each venture partner to appoint nominee directors is often agreed from the outset with the very purpose of safeguarding the interests of each joint venture partner; however, it is often not realised that where a dichotomy lies between the interests of a shareholder and that company, the nominee director in that instance would be constrained from acting solely to protect the interests of the nominating parties.

An area where the conflict may be apparent is as regards the disclosure of information and the question of whether a nominee director is free to flow any information obtained in his capacity qua director to his nominating shareholder.

Duties of nominee directors

Under current Malaysian company law, nominee directors have heavy fiduciary duties to exercise their best judgment in the interests of the company they serve, and not in accordance with the wishes of their nominating parties. This is aptly put by Winslow J in **Raffles Hotel Ltd v L Rayner**[3]:

> "*It would seem well-established on the authority of Bouling v Association of Cinematograph, Television and Allied Technicians [1963] 2 QB 606 that a company is entitled to the undivided loyalty of its directors. A director who is a nominee of someone else should be left free to exercise his best judgment in the interests of the company he serves and not in accordance with the directions of his patron.*"

The nominee directors would have to be mindful of the roles undertaken by them, both as employees or officers of their nominating party and as directors of the company. In discharging duties owed to the company, a nominee director would have to abstain from participating in decision-making process where the interests of his nominating party and the company conflict. Where such conflict cannot be avoided, nominee directors need to exercise their best judgment to act in the best interests of the company and not to subordinate the interests of the company to that of their nominating parties, failing which such nominee directors would be subject to penalties under the CA 1965.

Good corporate governance

Given the potential for conflict, companies should take precautions by devising clear guidelines to define the duties of nominee directors, when such nominee directors are able to take into consideration the interests of their nominating parties and when information should be withheld or disclosed to their nominating parties.

In the context of joint venture arrangements, joint venture partners should agree beforehand the mechanism and steps to be undertaken in the event a conflict arises. It is a constant balancing act for nominee directors to harmonise the interests of their nominating parties and the company.

Conclusion

Malaysian company law has recognised the conflicting allegiances owed by nominee directors and requires nominee directors to act in the best interests of the company. Nominee directors are obliged to discharge their fiduciary duties and to always act in the best interests of the company.

LAI ZHEN PIK
CORPORATE LAW PRACTICE GROUP

For further information regarding company law matters, please contact

Datin Grace C G Yeoh
gcgyeoh@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

[1] Section 131B(1), Companies Act 1965.

[2] Section 132(1), Companies Act 1965.

[3] [1965] 1 MLJ 60

DISPUTE RESOLUTION

Can a Contract be Terminated without Providing Reasons?

IN THIS ARTICLE, LILIEN WONG ANALYSES THE RECENT FEDERAL COURT DECISION OF **SPM MEMBRANE SWITCH SDN BHD V KERAJAAN NEGERI SELANGOR**[1] ON THE VALIDITY OF A NOTICE OF TERMINATION.

Introduction

Subject to other prerequisites for an enforceable contract to arise, a contract exists when two or more competent parties voluntarily agree to be legally bound by an arrangement. In contrast, the termination of a contract, more often than not, occurs unilaterally. Generally, the termination of a contract may be achieved with the issuance of a notice of termination by the terminating party to the counterparty. Such a termination, if not properly effected, may be challenged particularly when the terms of the contract are unclear or ambiguous. Disputes may arise as to the mode of termination, the manner in which a termination is effected or the grounds of termination. A wrongful termination may result in significant financial implications on the part of the terminating party.

The dispute

A dispute arose between the State Government of Selangor ("State Government") and SPM Membrane Switch Sdn Bhd ("SPM") in relation to a privatisation agreement where the State Government appointed SPM to assist with the collection of outstanding quit rent in the State of Selangor ("Agreement"). The State Government issued a notice of termination informing SPM that it would terminate the Agreement after a 30-day notice period. The termination was then effected by way of a subsequent letter after the 30 days had lapsed.

SPM sued the State Government for wrongful termination on the ground that the notices did not state a reason for the termination. The claim was dismissed by the High Court and the Court of Appeal affirmed the decision. The decision of the Court of Appeal was however overturned by the Federal Court. The question of law framed for determination before the Federal Court was "*whether a notice to terminate a privatisation agreement, which was vague, unspecific and uncertain was defective and bad in law*".

Can a contract be terminated without providing reasons?

The Federal Court held that, as a matter of general law of contract, there is no requirement that a notice of termination would necessarily be bad in law in all cases if reasons are not stated in the notice. The Federal Court considered it too onerous to impose a requirement that reasons must be given in the event of termination. The Federal Court nevertheless recognised that there are certain circumstances in which, as a matter of construction of contract, the recipient of the notice of termination is entitled to know the reasons for termination. On the facts of the present case, the Federal Court held that, as a matter of construction of the termination clauses in the Agreement, SPM was entitled to know the reasons for termination and, accordingly, answered the question of law in the affirmative.

How to construe the contractual termination clause

While there is no requirement in law to state the reason for termination, the Federal Court held that, if there is an express or implied term in the contract indicating that grounds should be provided, a termination which would otherwise be valid would become unlawful if no grounds are provided for the termination.

In this regard, the Federal Court held that there is no requirement that the contract must explicitly require that reasons be given for termination. It is sufficient if, upon a proper construction of the contract, the requirement to provide reasons may be discerned.

In the present case, the two provisions in question are clause 8 and clause 9 of the Agreement. Clause 8.1 of the Agreement provides that the State Government is entitled to terminate the contract unilaterally by giving 30 days' notice in the event that one of the grounds for termination set out in clause 8(a) to (h) of the Agreement occurs. Clause 9 of the Agreement provides that the State Government may review the performance of SPM, require SPM to remedy any unsatisfactory situation and terminate the agreement pursuant to clause 8.1 of the Agreement if the situation is not remedied within 30 days.

The State Government purported to terminate the Agreement by giving 30 days' notice pursuant to clause 8.1 of the Agreement on the ground that SPM was unable to perform its services under the Agreement, without undertaking a review of SPM's performance under clause 9 of the Agreement.

Upon a true construction of the Agreement, the Federal Court found that clause 8.1 of the Agreement cannot be exercised independently of clause 9 of the Agreement. There was an obligation on the part of the State Government to conduct a review pursuant to clause 9 of the Agreement prior to termination and to provide reasons for the purported inability to perform services on the part of SPM, prior to exercising the right to terminate the Agreement under clause 8.1 of the Agreement. The Federal Court took the position that if the right to terminate under clause 8.1 could be exercised independently of clause 9, it would frustrate the purpose of clause 9. The State Government's termination was therefore held unlawful and damages were directed to be assessed.

Conclusion

In practice, it is not uncommon to find agreements drafted in such a way so as to provide the right to terminate as well as the manner in which the termination is to be effected. It is important for parties to adhere closely to the form and substance of the provision in giving effect to a termination to minimise the risk of a challenge to the termination.

LILIEN WONG
DISPUTE RESOLUTION PRACTICE GROUP

For further information regarding dispute resolution matters, please contact

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Robert Lazar
rlazar@shearndelamore.com

[1] [2016] 1 MLJ 464

INTELLECTUAL PROPERTY

Fate of the Validity of Dependent Patent Claims after the Federal Court Decision in SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor[1]

IN THIS ARTICLE, LEE CHIAO YING CONSIDERS THE FEDERAL COURT DECISION IN **SKB SHUTTERS MANUFACTURING SDN BHD V SENG KONG SHUTTER INDUSTRIES SDN BHD** ON THE VALIDITY OF DEPENDENT PATENT CLAIMS.

Introduction

An independent claim is a broad stand-alone claim. It contains a preamble that acknowledges the state of the art and all of the elements necessary to define the invention. Under Regulation 14 of the Patents Regulations 1986 ("the Regulations"), a "dependent claim" is one that includes all the features of one or more other claims and may also contain additional features. It includes all the features of the independent claim plus some narrower elements and features and is, therefore, narrower in scope than the independent claim. There is no reason why a dependent claim cannot be rewritten by way of amendment or notionally by reading onto the dependent claim to include all of the features of the independent claim as well as the features of the dependent claim without expanding the scope of protection of the originally claimed invention of the dependent claim. By so doing, while the scope of the independent claim might be broader than the scope of the dependent claim, the scope of the originally claimed invention of the dependent claim remains. Approached in that way, the claim differentiation approach construction rule is not displaced.

The Federal Court in **SKB Shutters Manufacturing Sdn Bhd v Seng Kong Shutter Industries Sdn Bhd & Anor** has ruled that the dependent claims of a patent are invalid when the independent claim they are dependent upon is found to be invalid.

Facts of the case

SKB Shutters Manufacturing Sdn Bhd ("SKB") is the owner of the Malaysian patent entitled "Rolling Door" ("SKB's patent") has 11 claims. Claims 1 and 11 were independent claims while claims 2 to 10 were claims dependent on the preceding claims. SKB had commenced a patent infringement action against Seng Kong Shutter Industries Sdn Bhd and its director ("SK"). SKB alleged, among others, that SK had infringed SKB's patent by manufacturing, selling, using and offering for sale roller shutters which incorporated the features of SKB's patent.

SK, in turn, raised the defence that SKB's patent was invalid because it lacked novelty and did not involve an inventive step. Pursuant to section 57(1) of the Patents Act 1983 ("the Act"), any invalidated patent or claim or part of a claim shall be regarded as null and void from the date of the grant of the patent.

SKB succeeded in the High Court. SK however prevailed upon its appeal to the Court of Appeal. SKB subsequently appealed to the Federal Court on the following approved questions of law.

Questions of law

The questions posed for determination of the Federal Court were:

i. Whether the Court must make a determination on each and every claim in invalidating a patent for lacking novelty and/or inventive step.

ii. Whether having determined that an independent claim of a patent lacks novelty and/or inventive step, the Court is required to assess the claim which is dependent on the independent claims before invalidating a patent.

iii. Whether having only determined that one or more claims of a patent lack novelty and/or inventive step, the Court should invalidate those claims while preserving the patent in respect of the valid dependent claims.

Decision of the Federal Court

In considering the questions of law posed, it was the Federal Court's decision that, unless the dependent claims were redrafted to incorporate the features of the claim that they were dependent upon and were made an independent claim, the dependent claims cannot survive when the independent claim they depended on was found to be invalid[2]. This justification appears to hinge on the inability by patent proprietors to amend the patent claims during the pendency of patent litigation as provided for in section 79A(3) of the Act.

The decision focused on an absolute need to amend which, in effect, is a post-grant amendment under section 79A(1) of the Act which cannot be done by SKB in this case because of the pendency of the invalidation attack, but not on an interpretation of the dependent claims as a matter of construction of claims. To that extent it may be said that the rule of claim differentiation construction remains and the decision confined to the narrow facts of the case.

The relevant laws

The need for claim differentiation requires that each and every claim so granted ought to be subjected to a separate and independent assessment against the pleaded grounds of invalidation raised by the aggrieved party, pursuant to section 56 of the Act. Such sentiment was voiced by Laddie J in the UK case of **Raychem Corp's Patents**[3], albeit in relation to the UK's Patents Act 1977, when he stated:

> "*Those who have experience in the patent field are well aware of the practice of including in patents numerous subsidiary claims of ever narrower scope. This is usually more an exercise in drafting skills than a reflection of the proliferation of inventive concepts. However once such claims are included in the patent and have passed scrutiny in the Patent Office, the onus is on the opponent to prove them invalid. Maintaining independent validity for subsidiary claims has, in substance, a similar effect to the patentee asserting that he has an equivalent number of separate inventions or patents.*"

It is frequently argued that a claim should be construed so as to give a separate meaning to the dependent claims. To quote Floyd J in the case of **Mölnlycke Health Care AB and another v BSN Medical Ltd and another**[4]:

> "*The argument that a claim should be construed so as to give a separate meaning to dependent claims is a common canon of construction in patent cases. It is at its most powerful as an aid to construction when a single feature is added by the dependent claim. If this feature adds nothing to the claim from which it is dependent, one may ask why the dependent claim is there at all.*"

In **Generics (UK) Ltd trading as Mylan v Warner-Lambert Company LLC; Actavis Group PTC EHF v Warner-Lambert Company LLC; Warner-Lambert Company LLC v Actavis Group PTC EHF and others**[5], Arnold J also held:

> "*Most patents contain one or more independent claims together with subsidiary claims with additional features. As progressively more features are included in the subsidiary claims, so the scope of the monopoly narrows. In this way the subsidiary claims provide the patentee with a series of fall-back positions in case the independent valid is held to be invalid.*"[Our emphasis]

Usage of the word "shall" within section 56(2) without the inclusion of any word that seeks to broaden or extend the list of grounds of invalidation suggests that the granted claims of any given patent can only be invalidated on any one of the grounds of sub-paragraphs (a)-(e) of section 56(2) of the Act.

In **Raychem Corp's Patents'**[6] case, Laddie J stated: "*The party attacking validity has to direct his evidence to proving invalidity of all of them [our emphasis]. The result is that the greater the number of subsidiary claims, the greater the volume of evidence, including experiments which will be put before the court.*"

A plain reading of the questions of law posed for determination and the decision suggests that all claims of SKB's patent (independent, dependent and inter-dependent) were attacked on grounds of invalidity and evidence was led in the case of each. Otherwise, the questions posed for determination could not have arisen from the judgment of the Court of Appeal appealed from.

Conclusion

It could be said that the Federal Court's decision on the points of law raised should be confined to the narrow facts of the case. It remains open how dependent and inter-dependent claims are to be construed in the face of an invalidated independent claim. Perhaps another opportunity will present itself for judicial consideration soon.

LEE CHIAO YING
INTELLECTUAL PROPERTY PRACTICE GROUP

For further information regarding intellectual property matters, please contact

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
Karen@shearndelamore.com

[1] [2015] 6 MLJ 293
[2] [2015] 6 MLJ 293 at 305
[3] (1998) RPC 31
[4] [2012] EWHC 3157
[5] [2015] EWHC 3370
[6] (1998) RPC 31

EMPLOYMENT LAW

Transferring an Employee

IN THIS ARTICLE, NADIA ABU BAKAR DISCUSSES AN EMPLOYER'S PREROGATIVE TO TRANSFER EMPLOYEES

Introduction

There may be an instance where you receive a letter from your company with the following content:

> "*In light of the business requirements of the Company, you shall be transferred to xx with effect from xx.*"

In such circumstances, can you refuse to be transferred? Is your employer liable to cover the cost of transporting your belongings as well?

Employer's prerogative to transfer the employee

This issue was raised in the recent Industrial Court case of **Nur Hasmila Hafni Binti Hashim dan 9 Orang Perayu Lain v Hong Leong Bank Berhad**[1]. In that case, the Industrial Court affirmed Hong Leong Bank Berhad's (the "Employer") prerogative to transfer its employees. Although the proceedings before the Industrial Court was conducted *ex-parte* because the 27 claimants in that case had decided not to participate in the hearing, the Industrial Court found that the Employer had proven that the dismissals of the employees were with just cause or excuse.

Fact of the case

The Employer undertook a Centres Hubbing and Relocation exercise which involved the transfer of employees from one State to another State and from one branch to another branch within the same State. The Employer provided three months' notice to the employees, a relocation package, a monthly housing allowance and a cash advance of 50% of the reimbursement was made available to the outstation employees. The Employer decided to defer the effective date of the transfer, whereby the employees concerned were ultimately given five months' notice to transfer. The relocation exercise involved about 300 employees but only the 27 employees, which were the claimants in this case, refused to proceed with the transfer. Due to the employees' refusal, the Employer terminated their services.

This case affirmed the legal position that an employer has the implied right to transfer its employees as held in the Court of Appeal case of **Ladang Holyrood v Ayasamy Manikan & Ors**[2]. In that case, the issue before the Court of Appeal was whether the employer had any right under the contract of service to transfer its employees. The Court of Appeal referred to the judgment of the Industrial Court in the case of **Soon Seng Cement Products Sdn Bhd & Anor v Non-Metallic Mineral Products Manufacturing Employees' Union**[3] which held,

> "*It is well established in Industrial Law that the right to transfer an employee from one department to another or from one post of an establishment to another or from one branch to another or from one company to another within the organisation is the prerogative of the management and the Industrial Court will ordinarily not interfere. But if the transfer is actuated with improper motive, it will attract the jurisdiction of the Court. The power to transfer is, therefore, subject to, according to Ghaiye's Misconduct in Employment (at pages 254 and 255), the following well recognised restrictions*:
>
> *(a) there is nothing to the contrary in the terms of employment;*
>
> *(b) the management has acted bona fide and in the interests of its business;*
>
> *(c) the management is not actuated by any indirect motive or any kind of mala fide;*
>
> *(d) the transfer is not made for the purpose of harassing and victimising the workmen; and*
>
> *(e) the transfer does not involve a change in the conditions of service."*

Hong Leong Bank Berhad further reinforces the position that an employer has just cause or excuse to dismiss an employee who refuses to obey a valid transfer order.

While there is no legal obligation on the employer to bear the transportation cost, it is good industrial practice for the employer to provide a relocation package which includes the cost of transporting the employees' belongings.

Hong Leong Bank Berhad also made a reference to the case of **Sabah Bank Berhad v Hargopal Singh a/l Inder Singh Gill**[4]. In that case, the employee accepted the transfer order from Kuala Lumpur to Kota Kinabalu but requested to travel by air and to send the household belongings by ship, which was approved by the employer. However, the employer restricted the costs of transporting to 600 cubic feet and would not cover the cost to transport the employee's car. The employee then refused to be transferred.

The Industrial Court held that the employer was not compelled to bear the cost of transporting the household goods on transfer and did not consider it reasonable for the employee to refuse to obey the transfer order on this ground. The Industrial Court further held that the employee should have proceeded with the transfer and appealed against the decision of the management in restricting the cost of transferring the personal belongings and disallowing the transportation of the car.

Conclusion

In view of the decision in **Hong Leong Bank Berhad**, the legal position stands that an employee is not at liberty to refuse a transfer order and must proceed with the transfer. Even if the employee proceeds under protest, it must be done without affecting the employee's work performance.

NADIA ABU BAKAR
EMPLOYMENT LAW PRACTICE GROUP

For further information regarding employment law matters, please contact

Sivabalah Nadarajah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

[1] Award No 1087 of 2015 dated 7 September 2015 (consolidated with Case No 13/4-557/14, 16/4-568/14, 602/14 and 18/4-619/14)
[2] [2004] 2 CLJ 679
[3] [1996] 1 ILR 414
[4] [1996] 2 ILR 252

SD

REAL ESTATE

Requirement for Developer to File a Schedule of Parcels before Selling Any Parcel or Proposed Parcel

IN THIS ARTICLE, TAN YIN LU LOOKS AT THE REQUIREMENT FOR DEVELOPERS TO FILE A SCHEDULE OF PARCELS BEFORE SELLING ANY PARCEL OF PROPOSED PARCEL UNDER THE STRATA MANAGEMENT ACT 2013.

Introduction

The Strata Management Act 2013 [Act 757] ("SMA 2013") which came into operation in the State of Selangor and the Federal Territory of Kuala Lumpur on 1 June 2015 is a single legislation enacted to consolidate certain provisions previously in the Strata Titles Act 1985 [Act 318] and the re-enacted provisions of the repealed Building and Common Property (Maintenance and Management) Act 2007 [Act 663].

The SMA 2013 has introduced a new provision requiring a developer of any building or land intended for subdivision into parcels in a development area to file a schedule of parcels with the Commissioner of Buildings before selling any parcel or proposed parcel.

Section 6(1) and section 6(2) of SMA 2013

Section 6(1) of the SMA 2013 makes it compulsory for a developer of any building or land intended for subdivision into parcels in a development area to file with the Commissioner of Buildings a schedule of parcels ("SOP") showing the proposed share units of each parcel or proposed parcel and the total share units of all the parcels and, in the case of any phased development, showing the proposed quantum of provisional share units for each provisional block, before proceeding with the sale of any parcel or proposed parcel.

Section 6(2) makes it compulsory for a developer of any phased development to file an amended schedule of parcels ("ASOP") showing the proposed allocation of the provisional share units among the new parcels in the provisional block, before proceeding with the sale of any parcel or proposed parcel in any provisional block.

The purpose of filing an ASOP is not to amend the SOP as and when the developer wishes. The ASOP merely amends the quantum of provisional share units in the SOP to provide for a more detailed allocation of provisional share units among the new parcels in the provisional block.

A developer is deemed to have sold a parcel or proposed parcel if the developer has, by any written agreement or deed or instrument, agreed to sell, convey, transfer, assign or otherwise dispose of its interest in the parcel or proposed parcel to another person for valuable consideration or otherwise[1].

If the sale of a parcel in any building or land intended for subdivision into parcels in a development area took place before the commencement of the SMA 2013, the developer shall include in the SOP the building or land in which the parcel has been sold[2].

A SOP or an ASOP shall:

a) comprise a location plan, storey plan and delineation plan;

b) show a legend of all parcels, all common properties and all accessory parcels, and in the case of accessory parcels, the parcels that they are made appurtenant to shall be specified in the legend;

c) contain a certificate by the developer's licensed land surveyor that the buildings or land parcels are capable of being subdivided;

d) contain a certificate by the developer's architect or engineer that the buildings or land parcels to be constructed in accordance with the approved plans and specifications and any amendments to the plans and specifications prepared by the developer's architect or engineer are capable of being subdivided; and

e) contain such other details as may be specified by the Commissioner of Building[3].

Section 6(5) of SMA 2013

A copy of the SOP or ASOP shall be displayed conspicuously at all times in any office and branch office of the developer and at such place where the sale of a parcel is taking place and shall be submitted to the Director of Survey and Mapping for the State or the Federal Territory in any application for subdivision of building or land.

Revised SOP or ASOP

A developer may file a revised SOP or ASOP in very limited circumstances only if the plans or legend filed with the Commissioner of Building are altered as a result of the alterations or revisions of the building plans approved by the local authority[4]:

a) due to a requirement of the local authority; or

b) with the agreement of all the purchasers in the development area and such alteration or revision have been approved by the local authority.

In respect of the ASOP, there should not be any change in the proposed quantum of provisional share units for the affected provisional block.

Consequences of failing to comply with section 6(1), section 6(2) or section 6(5) of SMA 2013

In respect of a developer, it is an offence under the SMA 2013 if the developer does not file a SOP or, if required, ASOP before proceeding with the sale of any parcel or proposed parcel, or if the developer fails to comply with section 6(5) of the SMA 2013, and on conviction, the developer shall be liable to a fine not exceeding RM500,000 or to imprisonment for a term not exceeding five years or both[5].

In respect of any other person, it is an offence under the SMA 2013 if such person makes or produces or causes to be made or produced any false certificate required to be included in an SOP or ASOP, whether fraudulently or negligently, and on conviction such person shall be liable to a fine not exceeding RM250,000 or to imprisonment for a term not exceeding three years or to both[6].

Share units

The share units of a parcel determine the voting rights of each proprietor and the amount of charges payable by each proprietor to his management corporation[7].

As the share units are calculated based on the area of a parcel, area of an accessory parcel and weightage factors, the assignment of share units will be different for different parcel proprietors in a building. For example, unit A with an area of 2,500 square feet will have a bigger share unit as compared to unit B with an area of 1,500 square feet unit and, hence, the proprietor of unit A is accorded more voting rights on a poll and has to pay for higher maintenance charges as compared tothe proprietor of unit B.

The management corporation may also determine different rates of charges to be paid in respect of parcels which are used for significantly different purposes[8], for example, residential parcel proprietors may be required to pay less maintenance charges as compared to commercial parcel proprietors.

In the case where share units have not been assigned to each parcel by the developer's licensed land surveyors, Section 8 of SMA 2013 provides that the share units shall be assigned by "*any person or body who has a duty or is responsible under this Part to maintain and manage any building or land intended for subdivision*" and this would include the developer, the joint management body or the managing agent appointed by the Commissioner of Building.

Following the introduction of Section 6 of the SMA 2013, developers are not allowed to sell any parcel or proposed parcel before filing a SOP or an ASOP with the Commissioner of Buildings.

TAN YIN LU
REAL ESTATE PRACTICE GROUP

For further information regarding real estate matters, please contact

Sar Sau Yee
sysar@shearndelamore.com

Aileen P L Chew
aileen@shearndelamore.com

[1] Section 5(2) of the SMA 2013.
[2] Regulation 6(2) of the Strata Management (Maintenance and Management (Regulations) 2015 ("SMR 2015").
[3] Section 6(3) of the SMA 2013.
[4] Regulation 6(3) and Regulation 7(2) of the SMR 2015.
[5] Section 6(6) of the SMA 2013.
[6] Section 6(7) of the SMA 2013.
[7] Section 36 of the Strata Titles Act 1985 (as amended).
[8] Section 60(3)(b) of the SMA 2013.

TAX LAW

2016 Budget Recalibration Highlights

IN THIS ARTICLE, WEN-LY CHIN HIGHLIGHTS SOME OF THE TAX PROVISIONS IN THE RECENT 2016 BUDGET RECALIBRATION.

Due to the challenges and uncertainties posed by the global economic environment, Budget 2016 was recalibrated by the Prime Minister on 28 January 2016 where a total of 11 measures were unveiled to ensure that economic growth can be sustained and to safeguard the welfare of the people.

Some of the key tax related changes and measures in the 2016 Budget Recalibration are discussed below.

Employees Provident Fund (EPF)

Beginning March 2016 until December 2017, the rate of the employees' contribution to the EPF will be reduced to 8% instead of the 11% previously. The rate of contribution by employers will however remain the same at 12%. The EPF has since clarified that the reduction of the contribution rate from 11% to 8% is for employees below the age of 60 while for employees above the age of 60, the contribution rate is reduced from 5.5% to 4%[1]. In addition, employees can voluntarily opt out of the scheme and maintain the contribution rate at 11% by submitting a form to the EPF.

Special Tax Relief

For the year of assessment 2015, individual taxpayers with a monthly income of RM8,000 or below will qualify for a special tax relief of RM2,000.

Tax Collection

"*To enhance efficiency and amount of tax collection*[2]", the Government has announced that it will double compliance and auditing efforts to catch tax evaders.

Relaxation for penalties

To encourage taxpayers to come forward and declare their past years' income, special consideration will be given by the Government on relaxing any penalties to be imposed. However, this only applies to cases where the tax arrears are settled before 31 December 2016. A new guideline explaining the offer to relax penalties was subsequently published in February 2016 and can be accessed at http://www.hasil.gov.my.

Duty-free islands

The sale channels for cigarettes and liquor will be restricted to duty-free outlets licensed by the Royal Malaysian Customs Department to reduce leakages in the sales of cigarettes and liquor.

Duty free treatment on imported vehicles in such islands would also be tightened.

Goods and Services Tax (GST)

In relation to the GST implemented last year, the Prime Minister confirmed that the GST rate would be maintained at its current rate of 6%.

Conclusion

With the revision, recalibration and restructuring of Budget 2016, the Prime Minister emphasised that the Government is committed to achieving the target budget deficit of 3.1% GDP, while ensuring that the national debt level will not exceed 55% of GDP but will be reduced instead[3].

WEN-LY CHIN
TAX & REVENUE PRACTICE GROUP

For further information regarding tax law matters, please contact

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

[1] EPF — Contribution Rate, 5 February 2016, http://www.kwsp.gov.my/portal/en/employers/employers-responsibility contribution/contribution-rate.

[2] Special Address by the Prime Minister, 2016 Budget Recalibration, 28 January 2015.

[3] Special Address by the Prime Minister, 2016 Budget Recalibration, 28 January 2015.

Advocates & Solicitors
Notary Public
Registered Patent Agents
Trade Mark Agents
Industrial Design Agents

Peguambela & Peguamcara
Notari Awam
Ejen Paten Berdaftar
Ejen Cap Dagangan
Ejen Rekabentuk Perindustrian

www.shearndelamore.com

This Newsletter is produced by the Knowledge Management Department. Please contact the Department or the Newsletter Editorial Committee at km@shearndelamore.com, if you need any further information on this Newsletter.

PARTNERS AND PRACTICE GROUPS

DISPUTE RESOLUTION

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

Rodney Gomez
rodney@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Sagadaven Thangavelu
sagadaven@shearndelamore.com

Nad Segaram
nad@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Lai Wai Fong
waifong@shearndelamore.com

Jimmy Liew
jimmyliew@shearndelamore.com

Sathya Kumardas
sathya@shearndelamore.com

Alexius Lee
alexius@shearndelamore.com

Kavitha Karuppannan
k.kavitha@shearndelamore.com

TAX & REVENUE

Goh Ka Im
kgoh@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Irene Yong Yoke Ngor
irene.yong@shearndelamore.com

Cynthia Lian
cynthia@shearndelamore.com

Foong Pui Chi
foongpuichi@shearndelamore.com

IMMIGRATION

Suganthi Singam
suganthi@shearndelamore.com

ENVIRONMENTAL

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

CORPORATE & COMMERCIAL

Datin Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Dato' Johari Razak
jorazak@shearndelamore.com

Lorraine Cheah
l_cheah@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Marhaini Nordin
marhaini@shearndelamore.com

Michelle Wong Min Er
michellewong@shearndelamore.com

Nicholas Tan Choi Chuan
nicholas.tan@shearndelamore.com

FINANCIAL SERVICES

Christina S. C. Kow
christina@shearndelamore.com

Pamela Kung Chin Woon
pamela@shearndelamore.com

INTELLECTUAL PROPERTY & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

Zaraihan Shaari
zara@shearndelamore.com

Jyeshta Mahendran
jyeshta@shearndelamore.com

Janet Toh Yoong San
janet.toh@shearndelamore.com

Ameet Kaur Purba
ameet@shearndelamore.com

Michelle CY Loi
michelle.loi@shearndelamore.com

TELECOMMUNICATIONS, MEDIA & TECHNOLOGY

Wong Sai Fong
saifong@shearndelamore.com

Timothy Siaw
timothy@shearndelamore.com

COMPETITION LAW & ANTITRUST

Dato' Johari Razak
jorazak@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Irene Yong
irene.yong@shearndelamore.com

Jyeshta Mahendran
jyeshta@shearndelamore.com

Cynthia Lian
cynthia@shearndelamore.com

REGULATORY COMPLIANCE & ENFORCEMENT

Robert Lazar
rlazar@shearndelamore.com

Datin Jeyanthini Kannaperan
jeyanthini@shearndelamore.com

Rabindra S. Nathan
rabindra@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Dhinesh Bhaskaran
dhinesh@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

Yee Mei Ken
mkyee@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

EMPLOYMENT & ADMINISTRATIVE LAW

Sivabalah Nadarajah
sivabalah@shearndelamore.com

Vijayan Venugopal
vijayan@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Suganthi Singam
suganthi@shearndelamore.com

Reena Enbasegaram
reena@shearndelamore.com

Wong Kian Jun
wongkj@shearndelamore.com

PERSONAL DATA PROTECTION & PRIVACY LAWS

Rabindra S.Nathan
rabindra@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

Karen Abraham
karen@shearndelamore.com

K. Shanti Mogan
shanti@shearndelamore.com

Indran Shanmuganathan
indran@shearndelamore.com

Raymond T. C. Low
raymond@shearndelamore.com

Irene Yong
irene.yong@shearndelamore.com

INFRASTRUCTURE & PROJECTS

Rodney Gomez
rodney@shearndelamore.com

Putri Noor Shariza Noordin
shariza@shearndelamore.com

Muralee Nair
muralee@shearndelamore.com

ENERGY, NATURAL RESOURCES & GREEN TECHNOLOGY

Datin Grace C. G. Yeoh
gcgyeoh@shearndelamore.com

Goh Ka Im
kgoh@shearndelamore.com

Christina S. C. Kow
christina@shearndelamore.com

Swee–Kee Ng
sweekeeng@shearndelamore.com

Rajasingam Gothandapani
rajasingam@shearndelamore.com

Anand Raj
anand@shearndelamore.com

REAL ESTATE

Sar Sau Yee
sysar@shearndelamore.com

Aileen P. L. Chew
aileen@shearndelamore.com

Anita Balakrishnan
anita@shearndelamore.com

Ding Mee Kiong
mkding@shearndelamore.com

KUALA LUMPUR Office:
7th Floor
Wisma Hamzah–Kwong Hing
No. 1, Leboh Ampang
50100 Kuala Lumpur, Malaysia
T 603 2027 2727
F 603 2078 5625
E info@shearndelamore.com

PRINTER Inch Prints & Productions (001941009-M) A88, Jalan Tuanku 2, Taman Salak Selatan, 57100 Kuala Lumpur. Malaysia. Tel 603 7983 3141 Fax 603 7983 2961