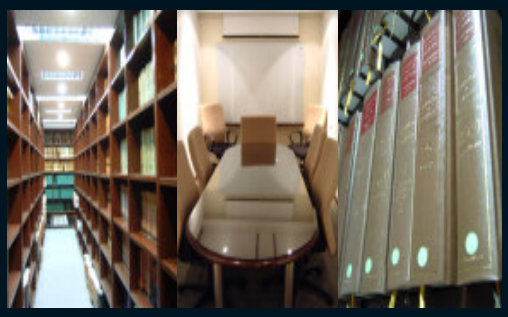


SHOOK LIN & BOK EST 1918 KUALA LUMPUR

LEGAL UPDATE

Vol 1 No 3 PP13906/8/2005 3rd Quarter 2005

The firm's annual dinner for the year was held on 3rd September 2005 at the Westin Kuala Lumpur. The theme for the evening was "punk night". This allowed ample room for creativity and imagination to flourish, as the images from the evening will attest. With plenty of fun and excitement for all, it was a memorable evening. More pictures in the pages ahead.

IN THIS ISSUE

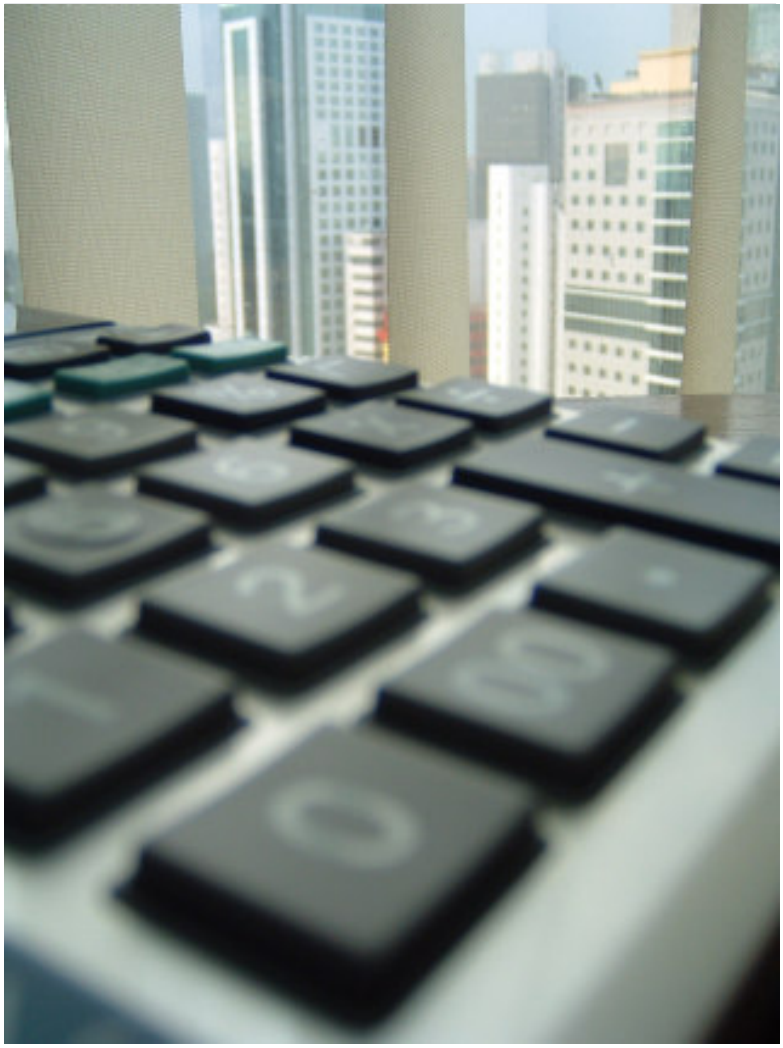

THE WESTIN


Welcome to
SHOOK LIN & BOK
ANNUAL DINNER & DANCE 2005


Welcome to
SHOOK LIN & BOK
L DINNER & DANCE 2


Welcome to
SHOOK LIN & BOK
DINNER & DANCE 2005


Welcome to
SHOOK LIN & BOK
ANNUAL DINNER & DANCE 2005



Creation of Exchange Traded Funds

On 21st June 2005, the Securities Commission issued its Guidelines on Exchange Traded Funds (ETF Guidelines), thereby initiating the launch of exchange traded funds (ETFs) in Malaysia.

Pursuant thereto, the country's first ETF, the ABF Malaysia Bond Index Fund (the ABF Fund), was launched by AmInvestment Services Berhad and was listed on the Main Board of Bursa Malaysia Securities Berhad (the Malaysian stock exchange) on 18th July 2005. The ABF Fund is also the first bond ETF to be launched in South East Asia.

Shook Lin & Bok were the legal advisers for the ABF Fund, and it being the first ETF in Malaysia, worked closely with the regulatory authorities and other advisers involved to successfully launch the ABF Fund. The ABF Fund is an initiative of the Executives' Meeting of East Asia and Pacific Central Banks (EMEAP), which is made up of representatives from the central banks of several East Asian and Pacific countries, with the objective of, among other things, increasing private investor participation and accelerating development in the relevant EMEAP members' bond markets.

ETFs worldwide

Existing ETFs worldwide generally are passively managed funds which track the performance of specific market indices, whether a broad market equity or share index such as the S&P 500 Index in the USA, or a specific sector index, or a bond index. Such passively managed funds aim to achieve returns which mirror the performance of a market in general, as reflected in the market index being tracked, and do not seek to outperform or beat the index. This is achieved by investing in the exact component securities included in the index, or a representative sample of the securities in the index, which may result in small differences of returns (tracking errors) as compared with the benchmark index.

The bulk of ETFs worldwide are equity index funds, but there are some bond index funds. The ABF fund is a bond index fund, and tracks a newly created index, the iBoxx® ABF Malaysia Bond Index, comprising mostly Malaysian government related bonds. It has been reported that ETFs have become a global phenomenon and have seen explosive growth in major world financial centres, since the first ETF was launched more than a decade ago. In the Asian region, ETFs appear to have seen strong growth as well, including in Japan, Australia, Hong Kong, Taiwan and Singapore.

Coming on the heels of recent initiatives to boost the growth of Real Estate Investment Trusts (REITs) in Malaysia, and in line with developments in the region, the introduction of ETFs will add variety to the types of investments available, and breadth, depth and liquidity to the Malaysian capital markets.

Comparison of ETFs and units trusts, and their comparative benefits, include as follows.

- The philosophy behind both unit trusts and ETFs is to make available the benefits of diversification of investments [where investment in a broad range of securities reduces the risk associated with holding a single security alone (the proverbial "all eggs in one basket")], to

investors for a small monetary amount. Both units trusts and ETFs may be actively managed (i.e. relying on skills of managers who seek to outperform the general market), or passively managed (i.e. merely tracking the performance of market indices), but most ETFs are passively managed.

Both unit trusts and ETFs offer the opportunity to invest in a diversified basket of securities through the purchase of a single or minimum number of units of the unit trust or ETF.

- ETFs have more flexibility than unit trusts. Unit trusts are priced once a day at the close of business. Everyone buying or selling/redeeming the fund that day gets the same price, regardless of the time of the day. In contrast, ETFs are listed on the stock exchange (hence the name "exchange traded") and can be traded continuously throughout the day at changing intraday prices, providing an opportunity for investors to bet on the shorter term market movement through trading of units in a single fund, i.e. an ETF. In markets such as the USA, ETFs also allow for speculative trading strategies such as short selling and trading on margin.

  ETFs therefore have an edge over unit trusts by allowing investors to trade the market or a specific sector or sectors of that market, as though it were a single stock. This added flexibility over unit trusts is a significant factor accounting for the popularity of ETFs.

- Like index based unit trusts, index based ETFs being passively managed to track an index, do not have significant turnover in the component securities, resulting in lower expenses than actively managed funds.

  In addition, ETF expenses are often lower than index unit trusts, as most ETF holders buy and sell ETF units in the secondary market on the stock exchange rather than through direct subscription or redemption with the ETF, and so there is a lesser degree of record keeping in relation to the register of unit holders. However, purchases and sales of ETF units on Malaysian stock exchanges attract brokerage commissions, clearing fees and stamp duty.

- Unlike unit trust funds, an individual or retail investor generally does not subscribe for or redeem ETF units directly. In the Malaysian context, ETF units are subscribed for and redeemed only in certain block sizes of ETF units (Creation Units) by parties called "participating dealers" (described below). Furthermore, Creation Units are usually subscribed for and redeemed not for cash, but "in kind", i.e. subscriptions are made by the participating dealer providing a basket of securities (the components of which are pre-determined by the ETF fund manager) which essentially mirrors the ETFs' component securities, to the ETF, and the ETF in turn issues new ETF units in Creation Unit blocks to the participating dealer. The procedure for redemption will be the reverse. Therefore, in general, securities are traded for securities, and no cash changes hands.

  The participating dealer may then sell the ETF units to the general public or retail investors in the secondary market on the stock exchange, and thereafter these units will trade on the exchange like any other listed security.

Requirements under the Malaysian ETF Guidelines

Pursuant to the ETF Guidelines, a participating dealer must be either a member of a stock exchange or a financial institution licensed by Bank Negara Malaysia. Among its roles are to arbitrage any deviations that may arise between the price of the ETF on the stock exchange and the net asset value of the ETF, and perform a market making role, in order to provide sufficient liquidity for the trading of ETF units.

Creation and redemption of Creation Units for cash is allowed by the Securities Commission only in exceptional circumstances. Creations and redemptions must also be effected in a pre-set minimum block size. The minimum block size will typically be announced by the ETF on the stock exchange on a daily basis. Any change in such block size requires notification to the Securities Commission.

Like unit trusts, ETFs are regulated by the Securities Commission under the Securities Commission Act 1993. The Act and the ETF Guidelines require the manager of an ETF to enter into a deed with an independent trustee acting on behalf of unit holders.

The ETF may only invest funds in the types of investments specified in the ETF

Guidelines unless the Securities Commission's prior approval is obtained. Certain types of derivative instruments are also allowed under the ETF Guidelines to minimise tracking errors but the usage of which must be consistent with the objectives of the ETF. Borrowing is prohibited and lending is permitted only in limited circumstances.

The benchmark index which the ETF is meant to track must fulfil certain requirements of the ETF Guidelines including being sufficiently liquid, transparent, broadly based and being able to reflect the price movements of its component securities. The Securities Commission may withdraw authorisation for the benchmark index if it is no longer considered acceptable.

Intellectual Property News

Industrial Designs

Previously, before the enactment of the Malaysian Industrial Designs Act 1996 (IDA), all industrial designs registered under the United Kingdom Registered Designs Act 1949 (the UK Act) were given recognition in Malaysia and enforceable in Malaysia under the repealed predecessor statutes to the IDA. By the UK Act, registered designs are valid for 25 years.

By the IDA, the Act provides for registration of industrial designs in Malaysia, with industrial designs needing to be registered in Malaysia to be recognised in Malaysia, after the commencement of the IDA. Designs registered in the United Kingdom prior to the commencement of the IDA continue to be given recognition by the IDA.

By the IDA, designs registered under the Act will be valid for an initial term of 5 years with extension for two further terms of 5 years each permitted.

The Industrial Designs Registration Office (IDRO) has recently issued a circular stating that, on the advice of the Attorney General's Chambers, designs registered under the UK Act would not be allowed to be extended beyond three terms of 5 years each.

This is contrary to the announcement made by the then Secretary General of the Intellectual Property Corporation of Malaysia (IPCM), Datuk Dr. Sulaiman bin Mahbob, and Encik Ismail bin Jusoh, the then Director General of IPCM, at a Dialogue with practitioners held on 27th March 2004 [IPCM had on 3rd March 2005 changed its name to Malaysian Intellectual Property Office (MyIPO)].

The advice of the Attorney-General's Chambers is inconsistent with the provisions of the IDA as explained below:

(a) the validity period of designs registered under the UK Act should be governed by the UK Act under which registered designs are valid for 25 years. Section 49(2)(c) of the IDA stipulates that any design registration recognised and protected under the repealed predecessor statutes to the IDA [i.e. the United Kingdom Designs (Protection) Act 1949, United Kingdom Designs (Protection) Ordinance of Sabah and United Kingdom Designs (Protection) Ordinance of Sarawak], would continue to be in force and have the like effect as if it had been effected under the IDA;

(b) Section 50(2) of the IDA stipulates that a certificate of registration granted under the UK Act would have "the maximum period of validity accorded under the repealed laws". The words "period of validity" should be contrasted with the words "period of registration" used in Section 25(1) and 25(2) of the IDA; and

(c) owners of designs registered under the UK Act prior to coming into force of the IDA have vested right to extend their respective registration to a maximum period of 25 years. It is established law that a vested right would not be taken away by Parliament unless it is expressly stated in the statute or by necessary implication.

A party aggrieved by a decision of the IDRO has a right to appeal to the High Court pursuant to Section 46(1) of the IDA.

It is hoped that the Attorney General's Chambers would clarify its position on this issue in the light of the interpretation of the statute as stated above. The recent circular has caused uncertainty and anxiety amongst practitioners and owners of UK registered designs since the IDA came into effect on 1st September 1999.

Trade Marks

MyIPO, the Malaysian Intellectual Property Office has significantly improved the time taken to examine and process trade mark applications and reduced delays in opposition proceedings and advertisement of trade marks in the Government Gazette. MyIPO's efforts to improve its services is continuing in line with the Government's efforts to promote Intellectual Property protection in the country. The public will soon be able to view the public records of all registered trade marks online at MyIPO's official website once MyIPO's data verification exercise is completed by the end of this year. The public will also be able to conduct computerised searches on all trade marks (including device marks) at MyIPO's office once MyIPO's upgrading of its computer system under the EC-ASEAN IP Co-operation Programme is completed by the end of 2006.

MyIPO is expected to make available to the public, online trade mark searches at MyIPO's official website and will be launching its online trade mark filing system as soon as the E-Government Act comes into force.

The above information was obtained from the Ministry of Domestic Trade and Consumer Affairs' Annual Dialogue with the Private Sector on June 17, 2005.

Case Updates

Administrative Law

Application for judicial review of discretionary power of Securities Commission

In *See Choo @ See Guat Kiok v Suruhanjaya Sekuriti* [2005] 2 AMR 579, the Court of Appeal dealt with the question as to whether the appointment of the Kuala Lumpur Stock Exchange (KLSE) by the respondent, the Securities Commission (SC), to audit the appellant's share trading accounts was in accordance with section 53 of the Securities Industry Act 1983 (the Act).

The appellant maintained several share trading accounts with a stockbroker, and alleging irregularities in the accounts, requested the SC to appoint an independent auditor to audit the accounts under section 53 of the Act.

Section 53(1) of the Act provides that upon the application from a person who alleges that another person has failed to account to the Commission in respect of any monies or securities held by the other person on his behalf, the Commission "may appoint in writing an independent auditor or such other person or body of persons as the Commission may decide" to audit the accounts. Section 53(4) provides that the Commission may not appoint an independent auditor unless the Commission is satisfied that the applicant has good reason for making the application and it is expedient that the accounts be audited.

In response to the application, the SC appointed the KLSE to audit the accounts. The appellant however objected to the appointment, and wanted an independent auditor. The SC then appointed an internal auditor under Section 53(4) to determine whether the appointment of an independent auditor was justified. The internal auditor found the accounts to be in order. The SC thereupon refused the appellant's request for an independent auditor.

The appellant applied for the issue of certiorari to quash the SC's decision and for mandamus directing the SC to appoint an independent auditor. Her application was dismissed in the High Court. In dismissing the appellant's appeal, the Court of Appeal agreed with the High Court that the appointment of the KLSE was in accordance with section 53 of the Act. The KLSE falls within the contemplation of the words 'such other person' in section 53(1) of the Act. Further, the SC has a discretionary power but no obligation to appoint an independent auditor under Section 53. The SC had acted bona fide, fairly and honestly in the exercise of its discretion. There were no grounds to interfere with its decision.

Bankruptcy

Annulment of bankruptcy orders

In *Bungsar Hill Holdings Sdn Bhd v Dr Amir Farid Datuk Ishak* [2005] 2 AMR 733, the Federal Court considered the ambit of the court's power to annul bankruptcy orders under Section 105(1) of the Bankruptcy Act 1967 (the Act), which provides as follows:

"105(1) Where in the opinion of the court a debtor ought not to

> have been adjudged bankrupt, or where it is proved to the satisfaction of the court that the debts of the bankrupt are paid in full ... the court may annul the adjudication."

The respondent had been a partner with two other doctors in a clinic. In 1989 a dispute arose between them. In 1990 the appellant obtained judgment against the respondent for RM32,095.41, and issued a bankruptcy notice against him in May 1993. In November 1993, the partners entered into a settlement agreement providing for the sale of the partnership.

The appellant filed a bankruptcy petition against the respondent in 1994, which was served by substituted service and heard in June 1995. It appears that the respondent did not know of the hearing date, and bankruptcy orders were made against him in his absence.

Subsequently in 1996, the respondent applied under Section 105(1) of the Act to annul the bankruptcy orders, on the ground that monies would be due to him from the liquidation of the partnership which would be sufficient to settle the debt. His application was dismissed by the Registrar but was allowed on appeal by the judge, whose decision was upheld on appeal to the Court of Appeal.

On further appeal, the Federal Court took the view that the scope of the court's discretion to annul under section 105(1) of the Act is not only limited to technical defects, but is wider and can include other legal grounds, for example, abuse of the process of the court. Although the respondent's ability to pay his debt was not strictly a technical ground, it is a legal ground that falls under the first limb of section 105(1). The relevant date for consideration of whether a debtor ought have been adjudged bankrupt, is the date of the bankruptcy orders. The Court held that there was no reason to disturb the finding of the judge that the respondent was, at the date of the bankruptcy orders, solvent and able to pay his debt, and ought not to have been made bankrupt.

Constitutional Law

Freedom of religion

In *Fatimah bte Sihi & Ors v Meor Atiqulrahman bin Ishak & Ors* [2005] 2 MLJ 25, the respondents who were students, took out an action against the appellants, including the first appellant who was the school principal, contending that their fundamental right of freedom of religion guaranteed by Article 11(1) of the Constitution had been infringed by the first appellant's actions because she had prevented them from entering the school wearing a serban (a headgear worn by some Muslim males) which is part of their religious rights. The second appellant was the Secretary General of the Ministry of Education while the third appellant was the government. The High Court judge allowed the action.

On appeal, the Court of Appeal overturned the Judge's decision. The Court of Appeal observed that the Constitution protects not merely freedom of religious belief, but also practices in pursuance of a religion including rituals and observances, ceremonies, modes of worship, and even food and dress which are regarded as integral parts of a religion. The question was whether wearing a serban is an integral part of the religion of Islam. There was no evidence that this was so. The evidence was that it was merely permissible to wear a serban. There is no evidence that it was mandatory and an integral part of Islam.

The Court further said that even if there were no regulations which vested power in the appellants to prescribe the appropriate dress code for school children, at common law, every educational institution is entitled to prescribe the appropriate uniform that is to be worn by its pupils. The appropriate uniform to be worn and the maintenance of discipline are best left to the Department of Education and the individual school principal. The court will only intervene where there is a duty to act fairly and that duty is breached.

Contract

Whether a binding contract where proforma of sale is 'subject to contract'

In *Sinar Wang Sdn Bhd v Ng Kee Seng* [2005] 2 MLJ 42, the appellant and the respondent signed a proforma of sale, for the sale of a property owned by the appellant to the respondent. The proforma was expressed to be 'subject to contract'. In the course of preparing a formal sale and purchase agreement subsequently, a dispute arose, as to the

inclusion of a certain term, upon which the respondent insisted but the appellant disagreed. The appellant refused to proceed, stating that there was no binding contract and that it was not under any obligation to sell the property to the respondent. The respondent filed an action for specific performance of the contract and obtained judgment in his favour.

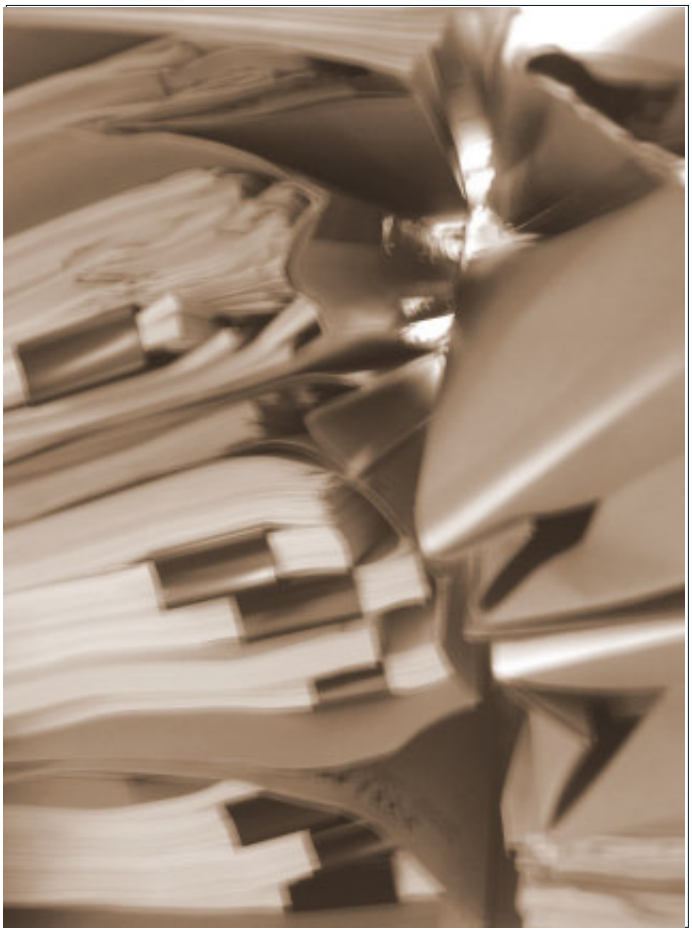
In dismissing the appellant's appeal, the Court of Appeal reiterated the principle that the issue of whether there is a binding contract arising from negotiations is to be determined on the facts in each case. If the documents or correspondence relied on a constituting a contract contemplates the execution of a formal contract between the parties, it is a question of construction whether the case is one where the parties have agreed on a contract and intend to be immediately bound, but at the same time wish to have the terms restated in a form which is fuller or more precise but not different in effect; or whether the case is one in which the intention of the parties is not to make a concluded bargain at all, unless and until they execute a formal contract. The use of the words 'subject to contract' does not automatically mean that there is no concluded contract until a formal contract is signed. The judge in the court below had reached his findings after considering the correspondence and attendant circumstances. There is no appealable error in his approach, reasoning or conclusion, to warrant an interference with his finding.

Insurance

Contractor's all risk policy – meaning of 'collapse'

MBf Insurans Sdn Bhd v Penang Garden Sdn Bhd [2005] 2 CLJ 928 involved a contractor's all risk policy under which the appellant insured the respondent developer in respect of certain construction works in a building project carried out by the respondent's contractor. The relevant clauses of the policy are summarised below:

(a) Clause 105(4) – The indemnity in the policy is restricted to "total or partial collapse" resulting from underpinning, tunnelling or other operations involving supporting elements or the subsoil.



(b) Clause 3 – The insured shall at his own expense take all reasonable precautions to prevent loss.

(c) Clause 105(2) – Loss or damage is only covered if prior to the commencement of works, necessary safety measures have been taken.

(d) Clause 105(3) – Should further safety measures become necessary during construction, the expenses incurred for such measures are not indemnifiable.

(e) Clause 5 – In the event of any occurrence which might give rise to a claim, the insured shall take all steps to minimise the loss. Upon notification to the insurer of such occurrence, the insured may carry out repairs, failing which the liability of the insurer shall cease.

When piling works in Phase 2 of the project commenced, the building structures in Phase 1 settled and tilted. Piling works were suspended and the respondent commenced remedial works, which led to its claim for indemnity for the expenditures incurred for the remedial works. The high court allowed the

respondent's claim, but this was reversed on appeal to the Court of Appeal.

In the Court of Appeal, the respondent argued that clause 5 of the policy required the respondent to carry out the remedial works to minimise loss or damage, and there is an implied obligation on the appellant to indemnify the respondent for the costs thereof.

The Court of Appeal disagreed, holding that the policy must be read as a whole, and doing that, safety measures which became necessary during the construction were not indemnifiable. The appellant's liability would only arise if the buildings collapsed either wholly or partially. The Court also declined the invitation of the respondent to follow the liberal interpretation of "collapse" favoured by the American courts, to include impairment to the basic structure or substantial integrity of a building.

The Court instead adopted the ordinary meaning of the word which means the building must cave in or fall down. In the present case, there was no such collapse.

Land

Statutory vesting

A statutory vesting takes effect automatically, and does not require registration under the National Land Code (the Code) to take effect. This was so held by the Court of Appeal in *Zubir bin Mustafa v Tenaga Nasional Bhd & Anor* [2005] 2 AMR 317. The appellant, whilst an employee of the National Electricity Board (NEB) had purchased land (the property) with a loan from NEB and the property was charged to NEB. The appellant subsequently resigned from NEB and defaulted in payment under the loan. Pursuant to the Electricity Supply (Successor Company) Act 1990 (the Act) and a Transfer Date Order (the Order), NEB's property, rights and liabilities were vested in the first respondent Tenaga Nasional Berhad (TNB), the successor company, from September 1, 1990.

Section 3 of the Act provides:

"3. The Minister may, by order published in the Gazette, appoint a transfer date and on such date, all property, rights and liabilities to which the Board was entitled or subject to immediately before that date shall become by virtue of this section property, rights and liabilities of the successor company."

The Minister had appointed the transfer date of September 1, 1990, by the Order.

Section 414 of the Code provides that "statutory vesting" means a "vesting effected by any written law of any registered interest in land . . . whether or not under the provision effecting such vesting any instrument . . . is required to be presented to the Registrar in order to give effect to such vesting ..."

Section 415 of the Code provides:

"415(1) A transferee ... may apply to the Registrar ... for statutory vesting of a registered interest in land held by the transferor to be registered in the name of the transferee...

415(2) Where the Registrar is satisfied that the registered interest in land ... has been vested in the transferee under the written law ... the Registrar shall ... make a memorial on the register document of title to the effect that the registered interest ... has been vested in the transferee ..."

The appellant failed to pay TNB's demand for the outstanding sums under the loan, and TNB obtained from the second respondent (the Land Administrator) an order for sale of the property. TNB applied to register the statutory vesting only after the order for sale had been obtained. The appellant applied to set aside the order for sale on the ground that TNB did not have standing to apply for the order for sale as the property was charged to NEB and there was no automatic vesting of the charge in TNB, and TNB failed to register the statutory vesting before the order for sale. The judge dismissed the application.

On appeal, the Court of Appeal by a 2-1 majority and dismissing the appeal, agreed with the judge that by the provisions of the Act and the Code, and the Order, the statutory vesting had automatically vested the rights in the charge in TNB with effect from September 1, 1990, which became the registered chargee in place of NEB. The registration of the statutory vesting was not mandatory and not required for the vesting to take effect.

In the dissenting judgment, the judge was of the view that TNB did not become a registered chargee until the statutory vesting was registered, and hence had no standing at the relevant time to apply for the order for sale.

Injunctions

Injunctions against government

The issue of injunctions against the government and government servants was considered by the Court of Appeal in *Sabil Mulia (M) Sdn Bhd v Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 3 MLJ 325. The appellant, a canteen operator, alleged that she was given a contract to operate a canteen at a government hospital. The appellant filed an action against the director of the hospital (the 1st defendant/respondent), the Ministry of Health, the government and the 4th defendant/respondent, alleging that the 1st defendant had breached its contract with the appellant by resiling from it, and awarding a new contract to the 4th respondent. The appellant sought an interlocutory injunction against the 1st and 4th respondents from evicting it from the canteen premises. The judge below declined to grant the injunction on the ground that court had no jurisdiction to so by virtue of Section 29 of the Government Proceedings Act 1956 (the Act), which provides:

"29(1) In any civil proceedings by or against the Government the court shall ... have power to make all such orders as it has power to make in proceedings between subjects ... provided that:

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance ...

(2) The court shall not in any civil proceedings grant an injunction or make any order against any officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government."

The Court of Appeal held as follows:

(a) Section 29 does not prevent the grant of an injunction against a private party from entering into a transaction with the government

(b) Section 29 does not prevent the grant of permanent nor temporary (interim or interlocutory) injunctions against servants or officers of the government

(c) Section 29 does not prevent the grant of temporary injunctions against the government.

The court would therefore have allowed the injunction sought if not for the fact that in the circumstances, damages would be an adequate remedy for the appellant, and an interlocutory injunction was not justified.

Mandatory interlocutory injunctions

In *ESPL (M) Sdn Bhd v Radio & General Engineering Sdn Bhd* [2005] 2 MLJ 422, the Court of Appeal held that mandatory interlocutory injunctions are governed by the same principles as prohibitory interlocutory injunctions. A, the main contractor for electrical and mechanical works, appointed B as the sub-contractor for the works. B in turn appointed C as the sub-sub contractor. The sub-sub contract was later novated to D, which replaced C as the sub-contractor.

In the contract between A and B, it was provided that B will receive the payments from A and will hold the right to receive such payments as a trust fund to be applied towards payment of inter alia, the sub-sub contractors.

Pursuant to this, in the sub-sub contract between B and D, it was provided that B and D shall open a bank account (the bank account) to be jointly operated by them, into which all payments received by B from A shall be deposited, and subsequently disbursed by joint consent of B and D.

It was also part of the agreement between B and D, that B shall have a right of set-off against D in respect of defective works by D.

Disputes arose between B and D with regard to the quality of D's work. B proceeded to remedy the alleged defective work. An issue arose whether it was mandatory for B to continue to pay monies received from A into the bank account. B contended that it was not obliged to do so by

reason of its asserted set-off. B then filed an action against D claiming in respect of the alleged defective works. D responded with a counterclaim against B, and applied for an interlocutory mandatory injunction against B, compelling B to pay all monies received into a separate account to be held by stakeholders, pending the trial of their actions. The High Court declined the injunction on account of the asserted set-off.

In allowing D's appeal and granting the injunction sought, the Court of Appeal held that it was clear that there was an intention on the part of A and B to create a trust over the monies in favour of D. As a result, B was obligated under the trust, to pay the monies into the bank account. Until B's asserted set-off is established by the court, its obligation to hold the monies on trust remains.

In the course of the decision, the Court dispelled the notion that there is any difference in the principles applicable to the grant of interlocutory mandatory and prohibitory injunctions. The dicta of some judges have given rise to an impression that there is a higher standard for the grant of mandatory injunctions as compared with prohibitory injunctions, i.e. that a high probability or degree of assurance of success at the final trial of its action, is required of the applicant for the injunction. The court held that there is no principle that that a higher standard is required for mandatory injunctions. The fundamental principle is the same for both mandatory and prohibitory injunctions. In granting or not granting interlocutory injunctions, there is a risk of the court making a wrong decision since interlocutory injunctions are sought before the action is finally decided at trial, and hence a risk of causing injustice to one or other of the parties. The fundamental principle is that the court should take whichever course of action appears to carry the lower risk of injustice if it should turn out to be wrong.

A mandatory injunction generally carries a higher risk of injustice, since it goes further than a prohibitory injunction (which restrains a party from some action), by compelling a party to take some positive action, which usually causes more waste of time and money if it turns out to have been wrongly granted. Therefore normally a high assurance of success by the plaintiff is required to balance against the higher risk of injustice. However there are cases where withholding a mandatory injunction may carry a greater risk of injustice than granting it, and in such cases the injunction can been granted even if there is no high degree of assurance of the plaintiff establishing his right.

In the present case, the court found that D had established a trust in its favour, justifying the grant of the injunction.

Intellectual Property

Industrial Designs and Copyright

In *Honda Giken Kogyo Kabushiki Kaisha v. Allied Pacific Motor* [2005] 3 MLJ 30, Honda applied for an interlocutory injunction against the defendants based on the alleged infringement of (i) five industrial design registrations owned by Honda for the Honda Wave 125 motorcycle, by the defendants' Comel Manja JMP 125 motorcycle, and (ii) Honda's copyright in drawings of the Honda EX5 Dream motorcycle, by the defendants' Comel Manja JMP 100 motorcycle. The designs were registered on December 7 2000. The drawings were created by Honda in Japan and first published in Thailand.

In dismissing the defendants' contention that the designs were not new as vehicles of a similar design had been sold in Thailand prior to the plaintiff's application to register the designs in Malaysia, the High Court ruled that the novelty requirement in the Industrial Designs Act 1996 is territorial. Therefore, prior disclosure of designs outside Malaysia is irrelevant. Therefore, the court held that the designs were valid, ruling that there were many similarities between Wave 125 and JMP 125. In determining the copyright claim, the court applied the Copyright (Application to Other Countries) Regulations 1990 and held that although the drawings were first published by Honda in Thailand, they were entitled to copyright protection in Malaysia. The Defendants' JMP 100 were similar to Honda's drawings and had infringed them.

The court concluded that Honda had raised serious questions to be tried, but did not grant it the interlocutory injunction inter alia, for reason of balance of convenience, as the grant of an injunction pending final disposal of the suit would have a negative and perhaps irreversible impact on the defendants, as an injunction would affect third parties and the government, and damages for loss of profits would be an adequate remedy for Honda should its claims succeed at trial.

Scenes from the firm's drinks and cocktail evening at Bon Ton restaurant on 17th June 2005. A regular event on the firm's social calendar, the cocktail evenings are aimed at fostering interaction among present and past members of the firm and guests.

The acceptance of pupils to undergo the requisite pupillage prior to admission to the bar is a time honoured tradition in the firm. Pupils have their own hall designated as "chambers". The period of shared experience creates lasting bonds which endure for a lifetime. The photos are of the most recent batch of pupils. Joining the firm upon admission to the bar are Alex Ng, Elaine Phung, Chryshantini Florence Niles, Audrey Tang, May Chua, Tan Lee Chin, Lim Jo Yan, David Dinesh Mathew, Soh Shey Yin, Isaac Lee and Poh Choo Hoe.

Steven Thiru was elected a committee member of the Kuala Lumpur Bar Committee 2004-2005 and Chairman of its Continuing Legal Education sub-committee 2005-2006. An active participant in the activities of the greater professional community, he has previously held positions in the Human Rights, Law Reform, Professional Development and Contempt of Court committees of the Malaysian Bar Council.

Dahlia Lee was appointed Deputy Chairman of the Court Liaison sub-committee of the Kuala Lumpur Bar Committee 2005-2006. In this capacity, she contributes to regular dialogues between members of the bar and judges and judicial officers, with the objective of addressing issues and concerns affecting members of the bar in the conduct of litigation.

The Orang Asli celebrating their victory.

Giving Legal Representation to the Poor: Shook Lin & Bok's Pro Bono Legal Work

Shook Lin & Bok has always had a strong pro bono culture. The firm's lawyers have rendered legal representation to indigent persons often at the call of the Bar Council. Recently our Senior Partner Dato Cyrus Das who heads the firm's General Litigation Department led a team of lawyers (comprising of lawyers from other legal firms as well) in representing a community of Orang Asli people of the Temuan tribe in Bukit Tampoi, Dengkil to win a landmark victory in respect of their land rights in the Court of Appeal. The case was undertaken on behalf of the Bar Council.

In a decision delivered by the Court of Appeal on 19th September 2005 the Court unanimously held that the Orang Asli had customary legal title over their ancestral land. The Court further held that their right to compensation for the land from which they were evicted was under the Land Acquisition Act 1960 which compensated for loss of land and not the Aboriginal Peoples Act 1954 which merely provided compensation for loss of trees and crops on the land. The Court declared that this was a right guaranteed under Article 13 of the Federal Constitution that guarantees "adequate compensation" for deprivation of property. The Orang Asli were also awarded aggravated damages for trespass and the manner in which they were forcibly evicted from their land.

Michael Soo was elected President of the Malaysian Intellectual Property Association (MIPA) for 2004-2006. MIPA was established in 1989. Michael Soo heads the firm's Intellectual Property, Information Technology and Licensing department. MIPA membership comprises individuals and corporations with an interest in intellectual property. It represents the interests of its members in intellectual property matters, including liasing with government departments; the Malaysian Intellectual Property Office which administers the Registry of Trade Marks, Registry of Patents, Industrial Designs Registration Office and Registry of Geographical Indications and Names; Bar Council of Malaysia and international professional associations with interest in intellectual property. His election is a recognition of his contribution to the promotion of intellectual property rights in Malaysia.

He is also a member of the Ad-hoc Copyright Law Review Committee of the Attorney-General's Chambers, Malaysia. In addition, he is also the Vice President of the Asian Patent Attorneys Association (APAA) for Malaysia. APAA headquarters are in Tokyo and has members in 16 Asian countries.

He is also a Panelist for Domain Name Dispute Resolution, at the Regional Centre of Arbitration of Kuala Lumpur (RCAKL). He was appointed sole Panelist in a domain name dispute between *Ledtronic, Inc. v. Ledtronic Sdn Bhd* and rendered decision on 4th February 2005. A copy of the decision is available on RCAKL's website www.rcakl.com.my. There have been 4 decisions rendered by panelists for domain name disputes since 2003.

SHOOK LIN & BOK

EST 1918
KUALA LUMPUR

Advocates & Solicitors | Registered Patent Agents | Registered Trade Marks Agents | Registered Industrial Design Agents | Notary Public

PARTNERS

Too Hing Yeap Ext 201
hytoo@shooklin.com.my

Dato' Dr Cyrus V Das Ext 217
cydas@shooklin.com.my

Porres P Royan Ext 212
pproyan@shooklin.com.my

Lai Wing Yong Ext 213
wylai@shooklin.com.my

Patricia David Saini Ext 288
patdavid@shooklin.com.my

Nagarajah Muttiah Ext 216
naga@shooklin.com.my

Michael CM Soo Ext 370
michaelsoo@shooklin.com.my

Romesh Abraham Ext 241
romesh@shooklin.com.my

Jalalullail Othman Ext 204
jal@shooklin.com.my

Yoong Sin Min Ext 242
smyoong@shooklin.com.my

Yuen Kit Lee Ext 246
yuenkitlee@shooklin.com.my

Ivan Ho Yue Chan Ext 225
ivanycho@shooklin.com.my

Khong Mei Lin Ext 221
meilinkhong@shooklin.com.my

Lee Wooi Mien Dahlia Ext 244
dahlialee@shooklin.com.my

Mohanadass Kanagasabai Ext 234
mohan@shooklin.com.my

Steven Thiruneelakandan Ext 236
stevent@shooklin.com.my

Adrian Hii Muo Teck Ext 255
adrianhii@shooklin.com.my

Goh Siu Lin Ext 206
siulin@shooklin.com.my

Hoh Kiat Ching Ext 208
kchoh@shooklin.com.my

Chay Ai Lin Ext 228
ailinchay@shooklin.com.my

Lam Ko Luen Ext 243
koluen@shooklin.com.my

Sudharsanan Thillainathan Ext 227
sudhar@shooklin.com.my

Chan Kok Keong Ext 237
kkchan@shooklin.com.my

Tharmy Ramalingam Ext 233
tharmy@shooklin.com.my

CONSULTANT

Michael KL Wong Ext 215
michaelwong@shooklin.com.my

PRACTICE AREAS & PARTNERS

CORPORATE
Lai Wing Yong
Patricia David Saini
Jalalullail Othman
Yuen Kit Lee
Ivan Ho Yue Chan
Khong Mei Lin
Hoh Kiat Ching
Chay Ai Lin

BANKING & FINANCE
Lai Wing Yong
Patricia David Saini
Jalalullail Othman
Yuen Kit Lee
Khong Mei Lin
Hoh Kiat Ching
Chay Ai Lin

PROPERTY & CONVEYANCING
Lai Wing Yong
Patricia David Saini
Jalalullail Othman
Yuen Kit Lee
Khong Mei Lin
Hoh Kiat Ching
Chay Ai Lin

INSURANCE, SHIPPING & AVIATION
Porres P Royan
Nagarajah Muttiah
Romesh Abraham
Steven Thiruneelakandan
Sudharsanan Thillainathan

BANKING & FINANCE LITIGATION
Too Hing Yeap
Porres P Royan
Yoong Sin Min
Lee Wooi Mien Dahlia
Adrian Hii Muo Teck
Goh Siu Lin
Chan Kok Keong
Tharmy Ramalingam

BUILDING & CONSTRUCTION
Dato' Dr Cyrus V Das
Nagarajah Muttiah
Mohanadass Kanagasabai
Lam Ko Luen

GENERAL & CIVIL LITIGATION
Dato' Dr Cyrus V Das
Porres P Royan
Nagarajah Muttiah
Romesh Abraham
Mohanadass Kanagasabai
Steven Thiruneelakandan
Adrian Hii Muo Teck
Goh Siu Lin
Lam Ko Luen
Sudharsanan Thillainathan
Tharmy Ramalingam

INTELLECTUAL PROPERTY, INFORMATION TECHNOLOGY & LICENSING
Michael CM Soo
Porres P Royan
Ivan Ho Yue Chan

PROBATE & ADMINISTRATION
Dato' Dr Cyrus V Das
Goh Siu Lin

EMPLOYMENT & LABOUR
Dato' Dr Cyrus V Das
Romesh Abraham
Steven Thiruneelakandan

TAX ADVISORY & COMPLIANCE
Dato' Dr Cyrus V Das
Sudharsanan Thillainathan

COMPANY SECRETARIAL SERVICES
Too Hing Yeap
Chay Ai Lin

Shook Lin & Bok
20th Floor, AmBank Group Building
55, Jalan Raja Chulan
50200 Kuala Lumpur
Malaysia

Tel: (603) 20311788
Fax: (603) 20311775/8/9

website: www.shooklin.com.my
email: general@shooklin.com.my