

# Professional Liabilities Covering the Litigation Gaps

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# VERY IMPORTANT INFORMATION

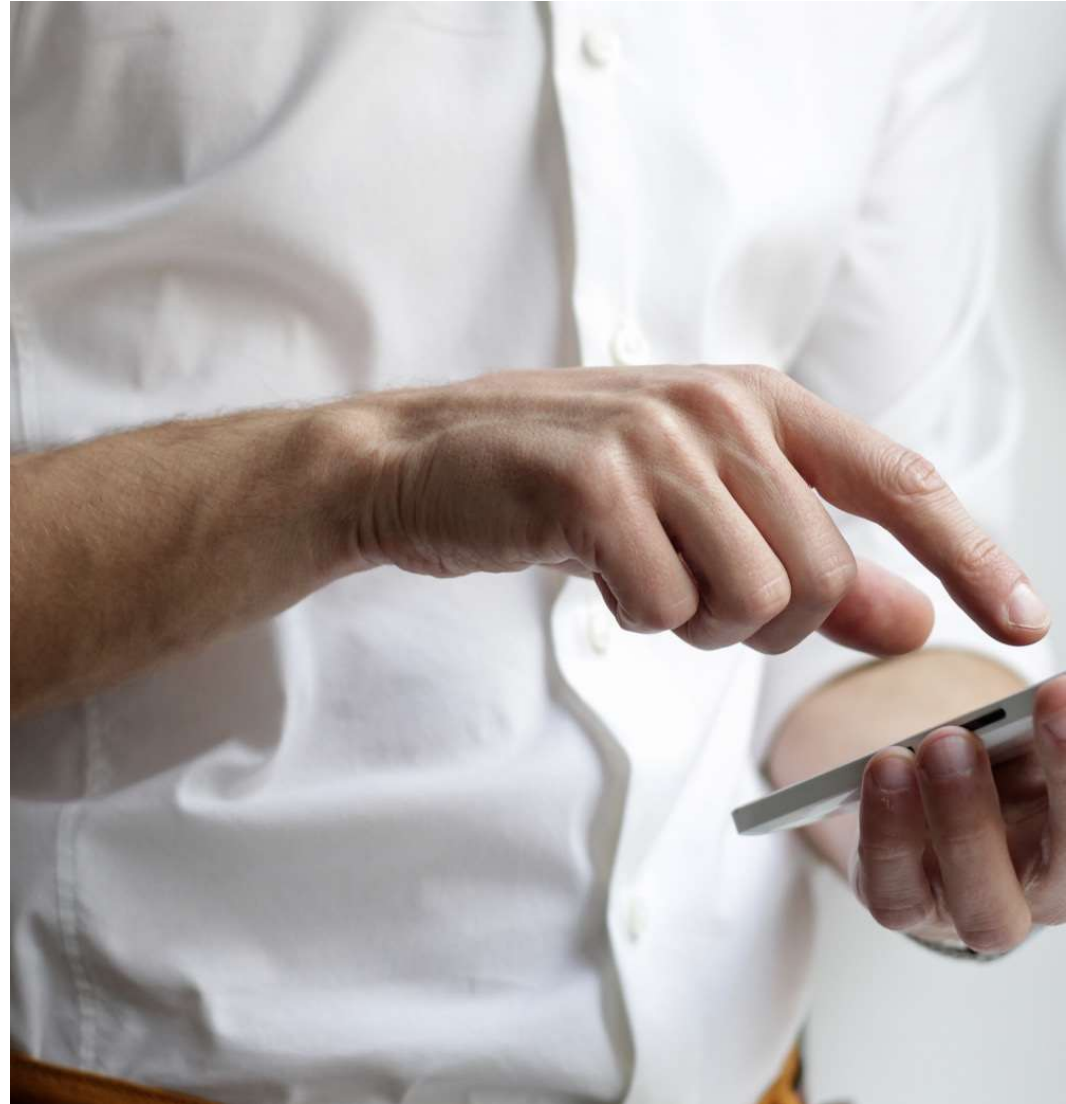
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# JOM BICARA

- **Executive Jeopardy**
- **Non delegable Duty**
- **Damages**





# **Executive Jeopardy**

## **Boardroom Challenges**

CA 2016, Petra Perdana & D&O Policies

# CA 2016

The law and its effect on D&O insurance policy

## CA 1965

- S 140(1) - General rule – corporate indemnification in any form not allowed ( I,e directly or indirectly vide insurance etc)
- S 140(2) - Exception to the rule
  - Company is only allowed to provide indemnification to its officers if they are innocent or are successful in their application of relief ( S 354)

## CA 2016

- S 288, S289(1) and S289 (2) –General rule – corporate indemnification in any form not allowed ( I,e directly or indirectly vide insurance etc)
- S 289(3) & (4) - Exception the rule

## CA 2016

S 140 (1) vs S 288 & S289 (1)& S289 (2)

### CA 1965

Any provision, whether contained in the articles or in any contract with a company or otherwise, for exempting any officer or auditor of the company from indemnifying him against any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

### CA 2016

Any provision, whether contained in the constitution or in any contract with a company or otherwise, for exempting any officer or auditor of the company from, or indemnifying him against any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

Unless provided otherwise in this section, a company shall not indemnify or directly or indirectly or effect insurance for an officer or auditor of the company in respect of—

- (a) the liability for any act or omission in his capacity as an officer or auditor; or
- (b) the costs incurred by that officer or auditor in defending or settling any claim or proceedings relating to any such liability.

An indemnity given in breach of this section shall be void.



## CA 2016

S 140 (2) S289 (3)& S289 (4)

### CA 1965

Notwithstanding anything in this section a company may pursuant to its articles or otherwise indemnify any officer or auditor against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgement is given in his favour or in which he is acquitted or in connection with any application in relation thereto in which relief is under this Act granted to him by court.

### CA 2016

A company may indemnify an officer or auditor of the company for any costs incurred by him or the company in respect of any proceedings—

- (a) that relates to the liability for any act or omission in his capacity as an officer or auditor; and
- (b) in which judgment is given in favour of the officer or auditor or in which the officer or auditor is acquitted or in which the officer or auditor is granted relief under this Act, or where proceedings are discontinued or not pursued.

# CA 2016

S 140 (2) S289 (3)& S289 (4)

## Summary

Subsection 4 below initially allows indemnification of officers by the company in respect of third

party claims ( i.e liability owed to any other person except the company) or where application for relief under the Act is allowed but then clarifies that such indemnification excludes

- (a) criminal fines, or
- (b) regulatory, penalties or
- (c) liability incurred in defending criminal proceedings in which he is convicted or civil proceedings by the company or an associated company in which he is not successful and there is a judgement against him.

## CA 2016

A company may indemnify an officer or auditor of the company in respect of—

- (a) any liability to any person, other than the company, for any act or omission in his capacity as an officer or auditor; and
- (b) costs incurred by that director or officer or auditor in defending or settling any claim or proceedings relating to any such liability except—
  - (i) any liability of the director to pay—
    - (A)a fine imposed in criminal proceedings; or
    - (B)a sum payable to a regulatory authority by way of a penalty in respect of non-compliance with any requirement of a regulatory nature, however arising;
  - or
  - (ii) any liability incurred by the director—
    - (A)in defending criminal proceedings in which he is convicted; or
    - (B)in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him; or
    - (c) in connection with an application for relief under this Act.



# CA 2016

S 289 (5)

Prior Board Approval

## CA 2016

(5) A company may, with the prior approval of the Board, effect insurance for an officer or auditor of the company in respect of—

- (a) civil liability, for any act or omission in his capacity as a director or officer or auditor; and
- (b) costs incurred by that officer or auditor in defending or settling any claim or proceeding relating to any such liability; or
- (c) costs incurred by that officer or auditor in defending any proceedings that have been brought against that person in relation to any act or omission in that person's capacity as an officer or auditor—
  - (i) in which that person is acquitted;
  - (ii) in which that person is granted relief under this Act;

or

(iii) where proceedings are discontinued or not pursued.

# CA 2016

## S 289 (6)

This subsection qualifies that both the corporate indemnification and the insurance indemnification procured by the Company for the directors (distinguished from officers) can't cover S213 breaches. S 213 is an all-encompassing provision which dictates the general duties of a Director.

## CA 2016

In the case of a director, subsection (4) and paragraphs (5)(a) and (b) shall not apply to any civil or criminal liability in respect of a breach of the duty as specified in section 213.

- (1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.
- (2) A director of a company shall exercise reasonable care, skill and diligence with—
  - (a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and
  - (b) any additional knowledge, skill and experience which the director in fact has.
- (3) A director who contravenes this section commits an offence and shall, on conviction, be liable to imprisonment for a term not exceeding five years or to a fine not exceeding three million ringgit or to both.

# CA 2016

S 289 (7)

Disclosure provision

## CA 2016

(7) The directors shall—

- (a) record or cause to be recorded in the minutes of the board of directors; and
- (b) disclose or cause to be disclosed in the directors' report referred to in section 253, the particulars of any indemnity given to, or insurance effected for, any officer or auditor of the company

# CA 2016

S 289 (8)

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The safety net

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## CA 2016

(8) Where insurance is effected for an officer or auditor of a company and subsection (6) or (7) has not been complied with, the officer or auditor shall be personally liable to the company for the cost of effecting the insurance unless the officer or auditor satisfies the Court that he is not liable.

# CA 2016

## S 289 (9)

The pertinent points are

- (i) that the definition of officer now includes former officers.
- (ii) effect insurance includes indirect payment of premiums
- (iii) indemnify includes possible ratification by the shareholders

## CA 2016

(9) In this section—

“officer”, in relation to a corporation, includes—

- (a) any director, manager, secretary or employee of the corporation;
- (b) a former officer;
- (c) a receiver or receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and
- (d) any liquidator of a company appointed in a voluntary winding up, but does not include—
  - (A) any receiver who is not also a manager;
  - (B) any receiver and manager appointed by the Court; or
  - (C) any liquidator appointed by the Court or by the creditors;

“effect insurance” includes pay, whether directly or indirectly, the costs of the insurance;

“indemnify” includes relief or excuse from liability, whether before or after the liability arises, and “indemnity” has a corresponding meaning.

# Tengku Ibrahim Petra Vs Petra Perdana

## Some Background

- Petra Resource Sdn Bhd (PRSB) founded in 1988
  - Wholly owned by Tengku Ibrahim Petra
  - Koh brothers ( Henry and Francis) employees
  - Petronas licensed vendor
  - Bumiputera Company
  - May 2000 – IPO vide Petra Perdana Berhad ( now known as Perdana Petroleum Berhad)
  - 2007 – a subsidiary Petra Energy Berhad was floated ( OSV business remained with Petra Perdana Berhad and non OSV business aligned under Petra Energy Berhad)
  - 2001- Exxon Mobil RM 264 Million contract
  - 2004 – Shell RM 960 Mil contract
  - 2008 - Shell RM 1.1 Bil
- 2009 – 29% of Petra Energy shares sold to pare down debts of Petra Perdana Berhad reducing Petra Perdana's share in Petra Energy by half
- Koh brothers weren't in agreement
- Feb 2010 – 14 hour EGM called to oust Tengku Petra and 4 others



# Tengku Ibrahim Petra Vs Petra Perdana

The battle begins

- 2009 - Suit 735 - Derivative action by Minority Shareholder - Shamsul Saad alleging breach of statutory and fiduciary duties by Tengku Ibrahim and 3 others
- August 2010 – Struck off on technical grounds as Tengku Ibrahim and others removed from PPB
- 2 Feb 2010- Petra Perdana Berhad supposedly files an action against Shamsul and Francis as officers of Intra Oil Services for breach of fiduciary duties
- 4 Feb 2010 – Tengku Petra and 3 others removed from PPB Board
- Soon after (24/2/2010) the suit against Shamsul and Francis was dropped
- May 2010 – Intra Oil sues Tengku Ibrahim Petra but that suit dropped in December 2010
- 2011 - Petra Perdana Berhad sues Tengku Ibrahim Petra and 3 others

# Petra Perdana Vs Tengku Ibrahim Petra & Ors

## Main Battle (Suit 1037)

- Public Listed Co vs 3 previous directors of the plaintiff(Public Listed Co). At one time, Petra Energy Bhd ('PEB'), another public listed company, was a subsidiary of the plaintiff.
- The litigation here arose as a consequence of the divestment of a substantial portion of the shareholding of PEB in 2009, by the then directors of the plaintiff, particularly the defendants.
- It was the plaintiff's case that through a series of systematic acts and omissions on the part of the defendants, the plaintiff's shares in PEB were methodically disposed of, through two divestments. As a consequence of these divestments, the plaintiff complained that it lost its controlling block of shares in PEB and PEB ceased to be a subsidiary of the plaintiff. The shares so divested ended up in the hands of one Shorefield Resources Sdn Bhd, who in turn became the single largest shareholder in PEB.
- Subsequent to the impugned divestments, an extraordinary general meeting of the plaintiff was convened and held, where the defendants were removed as directors. The plaintiff claimed that the defendants had:
  - (a) acted in breach of their fiduciary and statutory duties as directors of the plaintiff;
  - (b) breached their duty of care and trust obligations as directors of the plaintiff; and
  - (c) conspired to injure the plaintiff by divesting of its shares in PEB, which divestments were to the detriment of the plaintiff.

# Petra Perdana Vs Tengku Ibrahim Petra & Ors

## Defendants Story

- The defendants contended that, in authorising and effecting the two impugned divestments of shares in PEB, they had at all material times acted pursuant to the mandates of the board of directors collectively arrived at in August and November 2009.
- The defendants pointed to the fact that the dominant purpose of such divestments was to meet the urgent liquidity needs of the plaintiff and to assuage its dire cash flow position because the plaintiff was at the time in a tight liquidity position and there was threatened litigation by creditors, particularly one Shin Yang Shipyard.
- The plaintiff had, for the first time in its corporate history, made a loss of approximately RM8.9m in the third quarter of 2009 and was unable to obtain funds expeditiously through other means

# Petra Perdana Vs Tengku Ibrahim Petra & Ors

Issued to be addressed by the High Court

- Claim by company against ex-directors upon allegation of wrongful divestment of company's shareholding in subsidiary
  - Whether directors acted in breach of fiduciary and statutory duties
  - Whether breach of duty of care and trust obligations
  - Whether conspiracy to injure the company
  - Whether divestments were to detriment of the company
  - Application of statutory business judgment rule
  - Whether directors ought to be excused for negligence, default or breach — Companies Act 1965 S132(1B) & 354

# Petra Perdana Vs Tengku Ibrahim Petra & Ors

## Appeals

- Court of Appeal held in favour of the Plaintiff and found the defendants liable and directed the matter to be assessed for damages (25/8/2015)
- Defendants were granted leave to appeal and matter was heard at the Federal Court
- 14/12/2017 – Federal Court held in favor of the Defendants and reinstated the High Court Decision
  - All defendants not liable except for 1<sup>st</sup> Defendant in respect of the appointment of Fiduciary Limited an unlicensed broker

# Tengku Ibrahim Petra & Ors vs Petra Perdana

## Recovery of Costs

- OS at HC for indemnity of costs incurred
  - Suit 735 – RM 304,500 after deducting RM 10,000 costs awarded
  - Suit 1057
    - RM RM1,446,189.06 after deducting the various awards of costs received. 1<sup>st</sup> Respondent
    - RM565,973.60 after deducting the various awards of costs received. The 3rd and 4th Respondents
    - RM68,168.22 being legal costs incurred in seeking the indemnity claimed. All respondents
    - RM254,701.46 being legal costs incurred in commencing the current Originating Summons. All respondents
- Claim was premised on contract ( Articles of Association) and Statute ( S289)

### *INDEMNITY*

*170. Every director, managing director, agent, auditor, secretary, and other officer for the time being of the company shall be indemnified out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which relief is granted to him by the Court in respect of any negligence, default, breach of duty or breach of trust.*

- High Court allowed the claim on the 29/5/2019 and the Company appealed the decision



# Tengku Ibrahim Petra & Ors vs Petra Perdana

Court of Appeal : The Honourable Justices : Lee Swee Seng, Darryl Goon Siew Chye & Hj Ghazali Bin Hj Cha

- The Articles of Association binds members and the company
- The articles of association do not become terms in a contract between a company and a third party (i.e. person or persons other than its members qua members), whether it be officers of the company or otherwise.
- However, the articles *may be incorporated* into such contracts, expressly or impliedly.
- Comparatively little is required for the incorporation of a term in the article that provides indemnity to an auditor or director who is appointed. However, it remains necessary that there be an incorporation of the particular article in question.
- The Court of Appeal then found it significant that there was nothing pertaining to the circumstances of the former directors' appointment as directors. There was no evidence tendered as to whether there was any written or oral contract of appointment or employment, nor evidence whether their appointments were in writing or evidenced in writing.

# Tengku Ibrahim Petra & Ors vs Petra Perdana

Court of Appeal : The Honourable Justices : Lee Swee Seng, Darryl Goon Siew Chye & Hj Ghazali Bin Hj Cha

In short, there was no reliance on any contractual basis, or how the Article 170 might have been incorporated as a term of any such contract in the former directors' attempt to enforce the Article 170 indemnity.

“ We do not think the law has gone so far as to enable a director to enforce a provision in the articles of association, *qua* director, merely because he says he was a director, and without more.”

“ This cannot happen automatically. Such would be too miraculous even for any legal fiction to countenance. This is so even though the words employed in Article 170 itself may be clear and emphatic.”

## MOST IMPORTANT QUESTION

“Although not raised by the parties, it is also debatable whether the Respondents may maintain their claim under Article 170 bearing in mind they were removed as directors, and any contract they had would be terminated, well before the decision of the Federal Court in Suit 1057. ”

# Tengku Ibrahim Petra & Ors vs Petra Perdana

Court of Appeal : The Honourable Justices : Lee Swee Seng, Darryl Goon Siew Chye & Hj Ghazali Bin Hj Cha

Other interesting issues

In Suit 1057 – Respondent 1 was not exonerated by the Court. He was found to be negligent and was ordered to pay the Appellant a sum of RM192,780.00. The Court of Appeal in allowing the Appellant's appeal against the decision of the High Court, specifically, did not reverse this finding of negligence by the High Court in respect of the 1st Respondent.

The Federal Court, as pointed out, set aside the decision of the Court of Appeal and reinstated the decision of the High Court.

In the ultimate, in respect of Suit 1057, the 1st Respondent did not secure a “a judgment given in his favour” and would not have satisfied the conditions in Article 170, even if it was part of his contract of appointment as director.

# Tengku Ibrahim Petra & Ors vs Petra Perdana

Court of Appeal : The Honourable Justices : Lee Swee Seng, Darryl Goon Siew Chye & Hj Ghazali Bin Hj Cha

- 289(3)(a) and (b) and (4)(a), (b) and (c),

“ As worded, those provisions of CA 289 are merely permissive. They do no more than to authorise companies to indemnify their officers or auditors as provided in those provisions. They do not in themselves confer any statutory right to directors or auditors of companies such that they may solely by themselves be foundation for a claim for indemnity. Nothing more need be said on this point. ”

# Tengku Ibrahim Petra & Ors vs Petra Perdana

## Lessons Learnt

1. Why is it imperative for any third party who wants to rely on any provision found in the AA or MA or Constitution to ensure that such is incorporated in their contracts ( appointment letters) either expressly or impliedly.
2. What happens if one is no longer an Officer ?
3. What's the relevance of all this in respect of D&O Insurance?

# CA 2016

What have we learnt?

- D&O Policy - two distinct contracts
  - Side A – Protecting D's & O's
  - Side B – Protecting Company Balance Sheet







# Executive Jeopardy Boardroom Challenges

Cyber Exclusions

# Cyber a Boardroom Responsibility

- **Personal Data Protection Act 2010 (“Act”)** regulates the processing of personal data in commercial transactions and is placed under the purview of the Personal Data Protection Commissioner (**“Commissioner”**). The main responsibility of this Commissioner is to enforce and regulate the Act in Malaysia.
- There is no specific provision for Civil Liability under the Act
- Aggrieved parties may take an action for breach of contract and/or tortious action
- The Act spells out various Criminal Liabilities (Next page)
- Where the offence is committed by a Body Corporate - The Act also provides for Joint and Several liability between the ‘officers’ of the said Body Corporate and the Body Corporate. S 133
  - Officers : Director, CEO, COO, Manager, secretary or similar officer

# Cyber a Boardroom Responsibility

## Section 133. Offences by body corporate

(1) If a body corporate commits an offence under this Act, any person who at the time of the commission of the offence was a director, chief executive officer, chief operating officer, manager, secretary or other similar officer of the body corporate or was purporting to act in any such capacity or was in any manner or to any extent responsible for the management of any of the affairs of the body corporate or was assisting in such management—

(a) may be charged severally or jointly in the same proceedings with the body corporate; and

(b) if the body corporate is found to have committed the offence, shall be deemed to have committed that offence unless, having regard to the nature of his functions in that capacity and to all circumstances, he proves—

(i) that the offence was committed without his knowledge, consent or connivance; and

(ii) that he had taken all reasonable precautions and exercised due diligence to prevent the commission of the offence.



# Cyber a Boardroom Responsibility

No	Section	Criminal Offence	Penalty
1	Section 5(2)	Failure to comply with any of the seven (7) principles.	Fine not exceeding RM 300,000.00 or to imprisonment for a term not exceeding 2 years or to both.
2	Section 16(4)	Failure to register as a Data User for specified class of Data Users as specified by the Commissioner.	Fine not exceeding RM 500,000.00 or to imprisonment for a term not exceeding 3 years or to both.
3	Section 18(4)	Continuation of processing personal data by the data user following revocation of its certificate of registration.	Fine not exceeding RM 500,000.00 or to imprisonment for a term not exceeding 3 years or to both.
4	Section 19(2)	Failure to surrender the certificate of registration by the data user following its revocation.	Fine not exceeding RM 200,000.00 or to imprisonment for a term not exceeding 2 years or to both.
5	Section 29	Non-compliance with the code of practice by the data user.	Fine not exceeding RM 100,000.00 or to imprisonment for a term not exceeding 1 year or to both.
6	Section 37(4)	Notification of refusal to comply with data correction request by the data user.	Fine not exceeding RM 100,000.00 or to imprisonment for a term not exceeding 1 year or to both.
7	Section 38(4)	Continuation of processing personal data by data user following withdrawal of consent by the data subject.	Fine not exceeding RM 100,000.00 or to imprisonment for a term not exceeding 1 year or to both.
8	Section 40(3)	Processing of sensitive personal data without complying with Section 40(1) of the Act.	Fine not exceeding RM 200,000.00 or to imprisonment for a term not exceeding 2 years or to both.
9	Section 42(6)	Failure to comply with Section 42(5) of the Act to cease processing personal data that is likely to cause damage or distress.	Fine not exceeding RM 200,000.00 or to imprisonment for a term not exceeding 2 years or to both.
10	Section 43(4)	Failure to comply with Section 43(3) of the Act to cease processing personal data for purposes of direct marketing.	Fine not exceeding RM 200,000.00 or to imprisonment for a term not exceeding 2 years or to both.

11	Section 108(8)	Failure to comply with the enforcement notice.	Fine not exceeding RM 200,000.00 or to imprisonment for a term not exceeding 2 years or to both.
12	Section 129(5)	Transfer of personal data to places outside of Malaysia which has not been specified by the Minister.	Fine not exceeding RM 300,000.00 or to imprisonment for a term not exceeding 2 years or to both.
13	Section 130(7)	Unlawfully collecting or disclosing or procure disclosure of personal data to another person of personal data that is held by the data user.	Fine not exceeding RM 500,000.00 or to imprisonment for a term not exceeding 3 years or to both.
14	Section 130(7)	Sale of personal data.	Fine not exceeding RM 500,000.00 or to imprisonment for a term not exceeding 3 years or to both.
15	Section 131	Abetment and attempt punishable as offences.	Imprisonment for a term not exceeding one-half of the maximum term provided for the offence.

# Cyber a Boardroom Responsibility

Exclusions/Endorsements to look out for

- Explicit Cyber Exclusions
- Other Insurance Clauses
- Insured vs Insured exclusion
- Absolute Bodily Injury/Property Damage exclusions
- Failure to maintain insurance Exclusion
- Shareholder Exclusion



# Cyber a Boardroom Responsibility

## **3) Failure to Maintain Insurance Exclusion**

It is hereby understood and agreed that the insurer shall not be liable to make any payment for loss in connection with any claim alleging, arising out of, based upon or attributable to any failure or omission on the part of the insureds or the company to effect and maintain insurance or adequate insurance.

Subject otherwise to the terms, exclusions and conditions of this policy.

## **4) Absolute Bodily Injury and Property Damage**

It is understood and agreed that Exclusion 5.5 Bodily Injury and Property Damage in this policy is deleted in its entirety and replaced by the following:

Absolute Bodily Injury and Property Damage

# Cyber a Boardroom Responsibility

## Major Shareholder Exclusion

It is hereby understood and agreed that the following Major Shareholder Exclusion shall be added to Section 4 “Exclusions” of this policy:

### *Major Shareholder Exclusion*

arising out of, based upon or attributable to any **Claim** made against an **Insured** which is brought by or behalf of, whether directly or derivatively, any individual or entity that owns or controls (whether beneficially, directly or indirectly) 20% or more of the issued and outstanding voting share capital of the **Company**.



# Non Delegable Duty

Hemraj VS TNB

# TNB Vs Hemraj

## Some Background

- Plaintiff TNB is licensed under the Electricity Supply Act 1990 for the generation, transmission and distribution of electricity supply
- Defendant 1 : Hemraj & Co Sdn Bhd was the owner of a bungalow in Titiwangsa, KL
- Defendant 2 : Girish Chandra A/L Hemraj Shastri is the director of Def 1
  - Circa 2013 Def 1 commissioned LCS Engineering Services as the engineer for the construction of the said bungalow
  - LCS to apply to IWK for necessary approval
  - Hiep Leck appointed as contractor to carry out the excavation work for sewerage on the 13/11/2013
  - 14/11/2013 – during routine inspection TNB workmen found underground cable outside the bungalow where excavation was done to be exposed and showed presence of leaking oil
  - Excavation work done without DBKL approval and TNB's knowledge
  - TNB Sued for RM 3.1 Mil + 25% admin cost to repair the cables
  - Hemraj took out third party proceedings seeking indemnity against the three parties

# TNB Vs Hemraj

## Some Background

- High Court
  - Hemraj was found liable in negligence and was also in breach of its non-delegable duty of care for excavation works on public roads that was carried out by its contractors
  - Third parties to be jointly and severally liable for the damages and costs which were awarded against Hemraj and conditional upon Hemraj making payment
- Court of Appeal
  - Hemraj's case
    - Non delegable duty not pleaded
    - Judge erred when he imposed a non-delegable duty of care on Hemraj in respect of the negligence of its contractors
    - Failed to apply Biffa Waste Services

# TNB Vs Hemraj

## Some Background

- Court of Appeal (J LSS, J GBC and Justice Azizah Nawawi JCA)
  - Hemraj's case
    - Non delegable duty not pleaded
    - Judge erred when he imposed a non-delegable duty of care on Hemraj in respect of the negligence of its contractors
    - Failed to apply Biffa Waste Services
  - CoAs' findings
    - Non delegable duty was pleaded
    - Judge did not err. Excavation was executed on public roads – involving exceptional danger to the public and also damages/inconveniences to the neighborhood
    - Duty imposed on Hemraj was a positive one to protect the TNB underground cable and subsequently to the public at large who rely on electricity
    - Biffa not the same

# TNB Vs Hemraj

## Some Background

- Federal Court

- Hemraj's case

- Q1: Whether as a matter of policy, routine residential construction work carried out by a homeowner through its independent contractors is so extraordinarily hazardous as to impose a non-delegable duty of care on the homeowner to a public utilities company, namely TNB for the negligence of those independent contractors?
    - Q2: If the answer to the 1st question is in the negative, whether there is a special relationship between the homeowner and TNB which satisfies the criteria of the “2nd category” described in *Woodland v Essex County Council* such as to impose a non-delegable duty of care on the homeowner in respect of the negligence of its independent contractors?
    - Q3: Whether non-delegable duty of care is a cause of action that must be expressly pleaded particularizing the basis on which the duty is said to arise or whether it is a matter of law which may be raised during submissions?

# TNB Vs Hemraj

## Some Background

- Federal Court
  - Judgement
    - Elaborated the Woodlands case
    - Discussed the application of Woodlands in the Malaysian FC case of Dr Kok Choong Seng
    - Clarified that the Tenaga National Berhad v Syarikat Bekalan Air Selangor Sdn Bhd [2017] imposes a duty of non-delegable duty on public utilities which are bodies providing essential services to the community cannot extinguish their duty by sub-contracting it to an independent contractor.



# TNB Vs Hemraj

## Some Background

[30] Given the aforesaid, the case of **SYABAS** does not reflect the correct approach in the application of the principle of non-delegable duty of care as enunciated in **Woodlands** and **Biffa Waste**. In any event as was said by the Court of Appeal in **SYABAS** in its concluding paragraph 128, that the determining factor was based on policy consideration, namely that public utilities bodies providing essential services to the community cannot extinguish their duty by sub-contracting it to an independent contractor. The statutory bodies (TNB and Syabas) could not delegate liability for negligence by their independent contractors where they are authorised to carry out the works. The reliance of the Court of Appeal in the present appeal on **SYABAS** in imposing the non-delegable duty of care is therefore misconceived.

# TNB Vs Hemraj

## Some Background

[60] In the present appeal, as a matter of policy, from a risk allocation point of view, it would not be fair, just and reasonable to hold that routine residential construction works are subject to non-delegable duty as this would expose homeowners to an indeterminate liability for the tortious acts of their independent contractors, whose manner of work are beyond their control.

# TNB VS Hemraj

## Lessons Learnt

1. Decision very much driven by policy decision – unfair to expose homeowners to indeterminate liability
2. Utility companies still have the non-delegable duty if the work carried out is hazardous
3. Good TPL limits?



# Damages

Aggravated, Punitive and Exemplary Damages

# Damages

- **Compensatory**
- **Punitive**

# Damages

- **Compensatory**

- **Special Damages**

- amount that is claimed because of a breach or wrongful act of another where such an amount can be quantified

- **General Damages**

- where though a loss is suffered or damage is experienced, it may not be possible at the outset for the aggrieved person to immediately quantify the damage or loss in monetary terms.

- **Aggravated Damages**

# Damages

- **Punitive**
  - Non compensatory
  - Exemplary damages

# Damages

**DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**  
**DALAM WILAYAH PERSEKUTUAN, MALAYSIA**  
**BAHAGIAN SIVIL**  
**NO. GUAMAN SIVIL : WA-21NCVC-56-07/2018**

ANTARA

MUHAMAD AMIR LOKMAN BIN AMIRNUDDIN  
(SEORANG BUDAK DAN MENDAKWA MELALUI IBU DAN  
SAHABAT WAKILNYA NOR HAMSIAH BINTI AHMAD LATHIN)  
...PLAINTIF

DAN

2. DR. HASLINA BINTI HASHIM
3. PENGARAH HOSPITAL KUALA LIPIS PAHANG
4. DATO' DR ROHAN MALEK BIN DATO' JOHAN THAMBU
5. PENGARAH HOSPITAL SELAYANG, SELANGOR
6. KERAJAAN MALAYSIA  
...DEFENDAN-DEENDAN



# Damages

## Damages

31. The Court rules that the losses suffered by the Plaintiff is as a direct result of the negligence of the Defendants the Plaintiff is entitled to claim damages from all the Defendants.
32. The main loss suffered by the Plaintiff is the loss of the most valuable asset a man can have. There is definitely nothing that can replace this loss. All the shame and humiliation the Plaintiff suffers is a result of this terrible loss.
33. The mother had testified that since the age of 10 the Plaintiff has entered into a shell and finds it hard to interact with others let alone develop a courage to ever marry. Even if the Plaintiff develops the courage in the Court's view, no women knowing the Plaintiff's condition will want to marry him

# Damages

## Conclusion

39. Taking into account the above factors the Court allowed the special damages as pleaded to the sum RM108,356.00 a sum of RM2 million for general damages and RM500,000.00 each for exemplary and punitive damages and a cost of RM100,000.00.
40. The Court also allowed 5% interest on the special damages from the date of service of the writ until full payment and a 5% interest on other damages from the date of writ until the date of judgment.

# Damages

## Lessons Learnt

1. Aggravated damages is compensatory
2. Are aggravated damages excluded from insurance policies?
3. What about punitive or exemplary damages? Are they insurable?

**GOOD JUDGEMENT COMES  
FROM EXPERIENCE.**



**AND EXPERIENCE? WELL THAT COMES  
FROM POOR JUDGEMENT.**



# Thank You

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