VOIX D'ADVOCAT

THE SAME VOICE, A LAWYER'S VOICE

ISSUE 02/2020
FOR MEMBERS ONLY

"*Gratitude* makes sense of our past,
brings peace for today and
creates a vision for tomorrow."

- Melody Beattie

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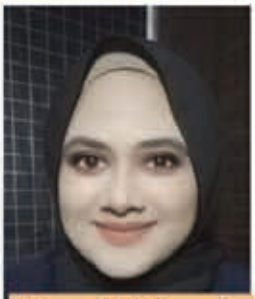

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A WORD FROM THE EDITOR

Every Cloud Has A Silver Lining

Dear Members,

It is time to wind down and lay the rollercoaster year 2020 to rest. Let us reflect on the experiences and struggles we encountered throughout the year.

Without any warning, this novel coronavirus hit us like a storm, completely changing our daily lives. Businesses suddenly faced and still face existential threats and job losses, restrictions on our freedom of movement, and worst of all, the personal tragedy of the passing of loved ones.

This Pandemic has enlightened me on the fragility of life and how short it is. It has made me reset my priorities. To be receptive to change, become more adaptable, maneuverable, and conquer new challenges head-on, have been necessary. This year has taught me gratefulness. Expressing gratitude feels more essential than ever!

Bearing in mind the importance of showing gratitude, the Editorial Board has devoted and converted the back cover of Voix d' Advocat to six "thank you" cards for you to articulate your gratitude to your friends and relatives during this trying time. Snip them off, gift, and spread the gratitude!

My team and I have curated this publication with the purpose of providing a variety of articles and an enjoyable read. Sadly, our Medley of Moments segment does not carry as many pictures as it used to as the events were conducted online.

The Editorial Board would like to clarify a query on the present name given to our Penang Bar publication, Voix d' Advocat. It is a French name, with a tweak, for 'Suara Peguam'. The French word 'Avocat', which means Advocate, was tweaked to 'Advocat' to indicate the connection to 'advocate'. The name was presented to the Penang Bar Committee and proceeded with their consent.

On a final note, the Editorial Board welcomes Kimberly Lim Ming Ying to the team. The contributions of my team members are worthy of praise. This edition would have been impossible without them. Thank you, team! On behalf of the Editorial Board, I extend our thanks to our fellow members for contributing their articles. We welcome more participation from the members of the Penang Bar.

My team and I wish you,
"Merry Christmas & Happy New Year!"

Warm regards,

Krishnaveni Ramasamy
Editor
Dec 2020
voixdadvocat@gmail.com

AGE IS NOT A BARRIER FOR A HUMANITARIAN DATO' SERI KHOO KEAT SIEW

by Clarie Ann Malar Jochaim

The Publications Subcommittee of the Penang Bar Committee was privileged and honoured to have a brief interview on 26 June 2020 at Penang Club with the epitome of Philanthropy, Dato' Seri Khoo Keat Siew, who is 90 years old.

He is a man who takes great pride in his Peranakan heritage, and his motivation to help others was driven by his ancestors' attitude of service. The legacy left behind by his forefathers is "Charity begins at home but should not end there", and that remains one of his key principles in life.

He was admitted to the Malaysian Bar on 9 November 1956 and is currently the second most senior member of the Malaysian Bar. He believes in serving others, so much so that he was even presented with the *Tokoh Kebajikan Kebangsaan* award in 1988. He is a person who loses himself in the service of others to discover happiness and joy. He has also written a book titled "Rebel with a Cause", which is an autobiography that was launched 3 years ago.

Q: Please tell us about your family background, early education, and yourself?

A: I was born on 18 March 1930 to my parents, Khoo Sian Ewe and Lee Gaik Thye. I was one of seven sons and seven daughters. I belong to the Khoo clan, and I'm a true and true Penangite at heart. The Khoos migrated from Sin Kang Village to Penang from

the late eighteenth century, whereby they came with nothing but the clothes on their backs. Despite a fair share of struggle and hardship, my late dad, Khoo Sian Ewe was very well-known as a real estate magnate in the 1800s.

I initially lived in a mansion called Sunbeam Hall at 24 Light Street across the (then) Supreme Court. I received my education in Feeders School (Hutchings School) and eventually continued my secondary education in Penang Free School. I read law at Bristol University and studied for the bar in Middle Temple. I was eventually admitted to the Malaysian Bar in 1978. I married my wife, Daisy Yeow in 1967, and was blessed with three amazing children, namely, Poh Jin, Poh Chye, and Poh Aun.

Q: Dato', could you tell us what was practice like for you when you first started and what inspired you to pursue the legal profession?

A: In my early days, it used to be slightly frightening at times, especially, when I was suddenly thrown with some new cases which I had to handle. As a young person, it was challenging to figure out the solution or answer for the novel cases, and it takes a good amount of time to build up the guts to overcome all the difficulties. Nevertheless, it is part and parcel of life, and one will get used to it. My greatest inspiration is to see justice being served.

Q: Dato', having lived through years of remarkable change, what has life taught you? Could you share some of your principles in life that you live by every day?

A: Well, life has taught me many things, especially, not to overlook minor things. I live an ordinary and simple life. I would like to contribute to society as much as I can. I try my best to keep up with changes in order to contribute to others. Besides that, I do train my mind to be highly alert at all times. In a nutshell, my principles are to contribute and help others, whilst you can, while leading a simple and humble life.

Q: Dato', can you share some of the most challenging cases that you have encountered in your legal career?

A: I could recall a disciplinary matter that I chaired, and Mr. Tharumarajah was the secretary. In that case, a lawyer had misappropriated his client's money for an approximate amount of RM15,000.00. After the committee went through the facts and evidence with a fine-tooth comb, we decided to strike off the said lawyer from the roll of advocates and solicitors.

Sometime later, I received a letter from Lord Shaw from the Court of Appeal in Australia asking the committee to give grounds for striking off the said lawyer since he was trying to get himself to be admitted to the Australian Bar. The main challenge was that the said lawyer had changed his name, but I eventually had to write back stating that the Australian provisions provided that if an advocate and solicitor was struck off in any jurisdiction then preferably he or she should not be admitted.

Lord Shaw stated in his Notes of Evidence, "Do you expect us to go behind the bar committee that struck you of the roll and instead admit you to the Australian Bar?" As a result, the said lawyer was not admitted to the Australian Bar.

Q: Dato', what do you think is your most notable contribution to the legal profession?

A: I would say that the legal profession is not as glamorous as it seems since, in reality, it places a heavy responsibility on the lawyers. I am more of a solicitor than a litigator and I have largely contributed in matters before the Bar Council Disciplinary Board and Tribunals for over 30 years. Moreover, most of my disciplinary matters were assisted by Mr. Tharumarajah, as my secretary, who did most of the administrative work.

Q: What are the main qualities that have to be possessed by those in the legal profession?

A: First and foremost, lawyers are the guardians of one's liberty and integrity. They should be a clear example of the justice system so that the public is not misled. Although lawyers sometimes may feel uncomfortable in making difficult decisions, we have to be bold in upholding justice.

Q: Dato', what do you think is your greatest strength and weakness?

A: As cliché as it sounds, my greatest weakness is procrastination, whereas my strength would be to resist any good offer. For example, I refused the former Penang Chief Minister Dr. Lim Chong Eu's request to join Gerakan as the party was about to take over the state in 1969 as I knew politics was not for me because one of my main purposes was to help people, just like my forefathers.

Q: Dato', how far do you think the Malaysian Legal System has progressed, and how would you revolutionize the Legal System if you were given the power to do so?

A: I think our legal system is realistic to a certain extent today and has advanced so much and I believe it is for the better. If I was given the power, I would introduce laws that would not marginalise anyone and provide equal rights irrespective of their social background or status. I will uphold the rule of law whereby no one is above the law.

Q: Dato', can you please share with us your most prominent philanthropic contributions to the community and what roused you to become an activist in the community?

A: In my opinion, helping the less fortunate is what my family took pride in, and I, too, have immense satisfaction in doing so. I want to take this opportunity to thank all

those who have mooted the ideas and joined me in contributing to the community in the form of charities and social organisations.

We started Befrienders Penang in 1978 to provide 24/7 phone-in service for people who are lonely, in distress, in despair, or having suicidal thoughts. In the same year, I volunteered together with Toh Puan Datuk Hajjah Sadiah Sardon (Consort of Tun Hj. Sardon Jubir, the then Governor of Penang) to establish the Penang Cheshire Home to provide a home for the disabled.

Apart from that, the Women's Welfare Council was established as a refuge for unwed mothers and day-care for working parents. I am currently contributing to all of the above and also to Khoo Kongsi.

I must admit that I became an activist quite late. I have always had the indication or sign in me that I have to actively make changes irrespective of any aspect.

Q: Dato', what would be your advice to the upcoming lawyers?

A: As I have mentioned earlier, being a lawyer is a heavy responsibility and should not be treated lightly. You must abide by the law at all times and be determined to observe the principles by which you first started. In the event, a lawyer breaches the law then consequentially, it tarnishes the whole profession. Hence, one must think wisely before pursuing law as the degree of accountability is definitely higher.

We are thankful beyond words, Dato' Seri, for this opportunity to have interviewed you. We hope to follow in your footsteps in being committed to serving the community. You are an inspiration to many of us, and we have learnt that a small act of kindness is powerful enough to transform the world around us.

PRACTICAL PROBLEMS ON PARENTING ARRANGEMENTS DURING CMCO

by Matt Wong Chong Ee
Selangor Bar

On 7 November 2020, the Senior Minister Datuk Seri Ismail Sabri Yaakob announced that the Conditional Movement Control Order (CMCO) would be enforced in all states in Peninsular Malaysia, except for Kelantan, Perlis, and Pahang, from 9 November to 6 December 2020. This was followed by the announcement of the Education Minister Dr. Mohd Radzi Md Jidin that all schools will be closed for the year from 9 November 2020 onwards.

These announcements affect families involved in divorce and custody proceedings. Currently, there are no guidelines issued on the manner in which separated parents can exercise their care and control or access to their children, with the implementation of movement restrictions. There are also no reported local cases on these aspects.

This article discusses some problems faced by parents during these movement restriction periods and highlights the key considerations of parenting or care arrangements during CMCO.

Custodial Parents

If your clients' parenting arrangements are regulated by court orders, they should comply with the terms of the court orders. These orders could be interim orders or final orders on custody, care, control, and access of a child. They could be of general terms, where the non-custodial parent has "reasonable access" or several access sessions to the child subject to prior notice. These are generally prayed for in joint petition proceedings where matters are less contentious and the parents are on speaking terms. There are also detailed orders spelling out expressly the specific days and times for access. These are usually used when parents are in high conflict.

In advising custodial parents who are unable or refuse to facilitate access to the non-custodial parent according to the terms or the existing order, the legal aspect of it is simpler - non-compliance of the order may amount to contempt of court, and the non-custodial parent may commence committal proceedings against the breaching parent.

Most of the time, this approach does not resolve your client's problem. They either follow your advice "under protest", or find another lawyer who tells them it's

OK, or both. Apart from custodial parents who make it their mission to prevent access to the other parent, which would probably have started before the Covid-19 pandemic or the announcement of the first MCO on 18 March 2020, many think they are unable to meet their obligations in the court orders because of genuine health concerns. Each parent reacts to the Covid-19 pandemic differently, and each case needs to be dealt with on its facts. In considering these underlying concerns, it's pertinent to ask these questions:

1. What are your client's duties or obligations under the court order?

   Were the terms in the order specific, or was there room for adjustment? Can your client wiggle out of the fixed access terms, or change permissible due to practical difficulties?

   This analysis is important before advising your clients to maintain the status quo. If your client has no alternative but to comply with the court order, be sure to advise on the consequences of breaching the order and the legal challenges the other side may face in the committal proceedings.

2. What are your client's underlying concerns? Are these concerns valid?

   What is the age of the child – does the matter involve an infant, toddler, preschooler, or an older child? Does your client live in a red zone? Where does the non-custodial parent live? Does the access require the child to cross the district or state border? Is the venue of the access or care and control fixed? Is there a high-risk individual living in the house? Is it a landed house where visitation is possible, or is it a high-rise or other regulated residence where the management may have imposed visitation restrictions?

   Speak to your clients, and try not to be judgmental or dismissive, especially when your client's concerns or fears are irrational. These underlying concerns may be of help in justifying the alternative proposals to the non-custodial parent or support your client's application for a variation of the existing court order.

3. Can alternative plans be made?

   Review the facts of each case, and be creative in suggesting alternative solutions. Some common alternatives to physical access are access replacement, modification of current physical access, virtual access using Zoom, Google Meet or Microsoft Teams, or video or phone calls. Sending regular photos, video recordings or updates may keep the non-custodial parents informed of the child's status. Sometimes, the non-custodial parents just want to know that the child is alright. Access may be carried out at a mutually agreed location - this could be the home of a relative or a common friend.

   If access at one parent's home is an option, do consider parties' power imbalance, the risk of parental abduction, domestic violence, your client's and the child's safety, and your client's readiness in handling conflicts.

Negotiations between lawyers or assistance from a mediator may be helpful in facilitating the forming of these alternative plans. If there are viable alternative plans, write to the other side for consent. Where possible, record the temporary changes in a court order.

4. Is a variation of the terms of the order the only way?

If parties are unable to consent to the alternative arrangements, your client may need to apply for a variation of the existing court order, provided one of the grounds of misrepresentation, a mistake of facts, or material changes in the circumstances is present - see Section 96, Law Reform (Marriage and Divorce) Act 1976.

This variation could be temporary or permanent. It could be to change the terms of the order or to suspend the effect of the terms for a period of time. Requesting for temporary modification of the parenting arrangements may be more palatable to the court or the opposing parent.

Apart from the health hazards and movement restrictions, the child's care arrangements may also have been affected due to CMCO. School closure would mean that children of schooling age are staying at home and required to attend online classes. Care centres and tuition classes are also not operational, and sending the child to a babysitter may not be suitable. Is the custodial parent working from home? Is he or she able to cope with the changes? Is there support or assistance?

Non-Custodial Parents

While it's equally important for non-custodial parents to assert their rights to access the child, hauling the custodial parents to prison by way of committal proceedings may not be the answer. Non-custodial parents need to acknowledge that strict enforcement of the access terms during CMCO may not be workable or even possible. Some compromises ought to be made, all in the name of the best interests of the child.

Conclusion

Both custodial and non-custodial parents have to recognize the impact of CMCO and the changes it brought to our court operations. Will the court hold the breaching parent in contempt when there were valid and reasonable excuses, bearing in mind the criminal standard of proof? Will variation application be heard in time if parties are unable to settle on their alternative parenting arrangements? These factors are more significant when there is no court order in place, and your client only has *de facto* custody of the child being the primary caregiver.

Legal advisors play a huge role in steering these parents during these trying times. In some circumstances, we have to admit that litigation is not the best way to resolve these parenting disputes. Our persuasion skills may instead be used to change our clients' position in parenting arrangements, to achieve a settlement.

THE CHALLENGES OF WHATSAPP EVIDENCE AT TRIAL

by Nicholas Wong Kwang Tee

As cross-platform message services like WhatsApp become more ubiquitous, more and more of these messages are finding their way into the Courts as evidence at trial. However, they also present new and unique challenges for lawyers to navigate.

The law

There is, of course, no issue as to admissibility if both parties agree to put the WhatsApp evidence in question in Part B – that is if there is no dispute as to the authenticity of the messages.

What if your opponent does dispute the authenticity of your WhatsApp evidence – that is, what if they insist on putting it in Part C? This was exactly what the High Court case of ***Mok Yii Chek v Sovo Sdn Bhd & Ors [2015] 1 LNS 448*** considered. The parties in that case had actually agreed the WhatsApp messages were Part B evidence; however, the Court helpfully went on to consider how such evidence could be adduced otherwise.

Other than the need to overcome the usual evidentiary hurdles of evidence (that it concerns the existence or non-existence of a fact; that it is relevant; whether or not it is hearsay), the Court further held that print-outs of WhatsApp messages were 'documents', in this case, produced by a computer, falling within the broad meaning of **section 3 of the Evidence Act, 1950**. Such 'documents' therefore constituted primary evidence which could be adduced under **section 64 of the 1950 Act**.

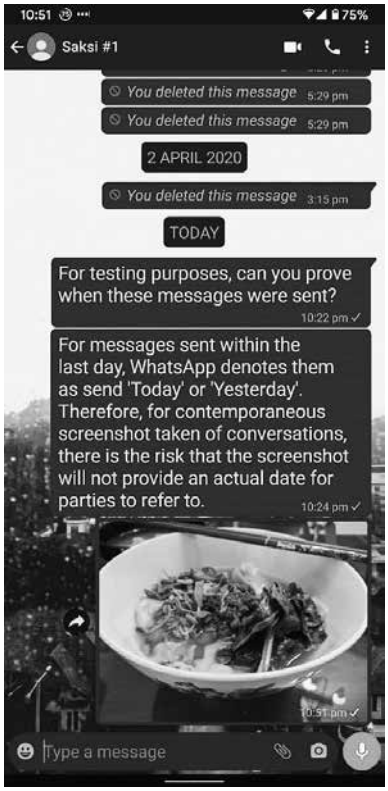
Section 90A provides specifically for the admissibility of documents produced by computers, most notably by requiring that they were 'produced by the computer in the course of its ordinary use' (section 90A(1) of the 1950 Act). Here, the Court of Appeal in ***Gnanasegaran Pararajasingam v PP [1997] 4 CLJ 6*** set out two ways by which this could be done: firstly, by giving oral evidence that it was so produced, or secondly, by producing a certificate under section 90A(2) of the 1950 Act. This was later followed by the Federal Court in ***Ahmad Najib bin Aris v Public Prosecutor [2009] 2 MLJ 613*** as well as the High Court in the aforementioned ***Mok Yii Chek*** case.

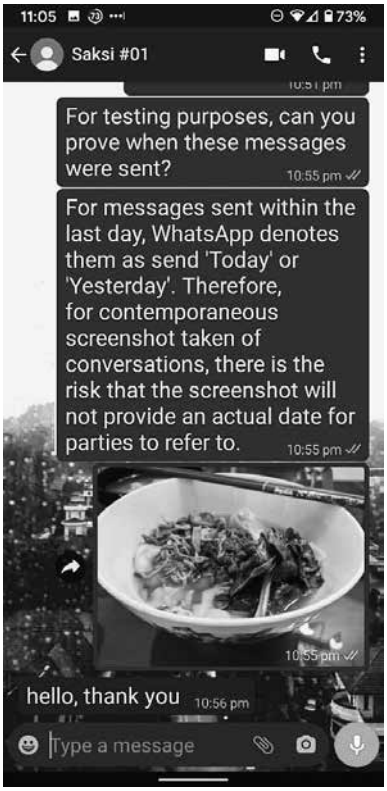
(It should, however, be noted that neither ***Gnanasegaran*** nor ***Ahmad Najib*** dealt with WhatsApp evidence specifically)

Practical considerations

The long and short of it is that, whether by way of oral evidence or a **section 90A(2)** certificate, WhatsApp messages may be adduced in Court notwithstanding initial disputes as to their authenticity. However, they remain open to attack on their authenticity as well as on the issue of the weight to be given to them as evidence. This is where unique challenges arise.

Screenshots of WhatsApp conversations. The format in which the WhatsApp conversation is produced matters. Clients often supply screenshots of their WhatsApp conversations, but depending on how and when they are taken, problems may occur. Here is an example of one such screenshot, mocked up for illustrative purposes:





Such a screenshot would be open to challenge on the basis that they do not indicate the date of the alleged text messages. As you can see from the screenshot, messages

sent in the past are date-stamped ('2 April 2020') but messages sent on the same day are only marked 'Today'. Likewise, messages sent the day before are marked 'Yesterday'. Neither is the date displayed next to the phone's clock in the notification bar (although depending on the model and make of your client's phone, you may have better luck).

Worse still is that the 'Today' label only appears at the top of the messages sent on the day – if your conversation runs longer than that, no date-stamp or label will appear at all.

Fortunately, the date-stamp hovers over the conversation for messages sent 2 days before. This is, therefore, more of a problem for screenshots taken contemporaneously. Practically, what this means is that there is less issue with your client taking screenshots of old conversations – but they should be warned of these problems if they are in the habit of taking screenshots as and when conversations happen.

Exported WhatsApp Chats. Is there a better way? Your clients may also export their WhatsApp conversations using the app's settings (go to the Settings/Chats/Chat history/ Export chat – then select the conversation to export). This will create a plain text file (a .txt file) which you can save to your device or share via another app (to email to yourself, for example).

When you open such a text file, it will appear as follows:

> *12/04/2020, 10:55 pm - Nicholas Wong: For testing purposes, can you prove when these messages were sent?*
>
> *12/04/2020, 10:55 pm - Nicholas Wong: For messages sent within the last day, WhatsApp denotes them as send 'Today' or 'Yesterday'. Therefore, for contemporaneous screenshot taken of conversations, there is the risk that the screenshot will not provide an actual date for parties to refer to.*
>
> *12/04/2020, 10:55 pm - Nicholas Wong: <Media omitted>*
>
> *12/04/2020, 10:56 pm - Saksi #01: hello, thank you*

The messages are all date- and time-stamped, which is much more helpful than the previous screenshots. Exporting chats is, therefore, a more comprehensive and arguably neater way of introducing WhatsApp conversations into evidence – particularly if the conversation to be referred to is a lengthy one.

Note that if you access a WhatsApp conversation via WhatsApp Web on your laptop or desktop, you can also quickly create a similar transcript-like output of a conversation by manually copying the messages you are interested in and pasting them in a text file or a document.

However, any media in the conversation - such as photos and videos - are necessarily omitted (as it's only a text file). This may present another challenge to you if the presence of the media in the conversation is itself relevant to the evidence you are looking to present.

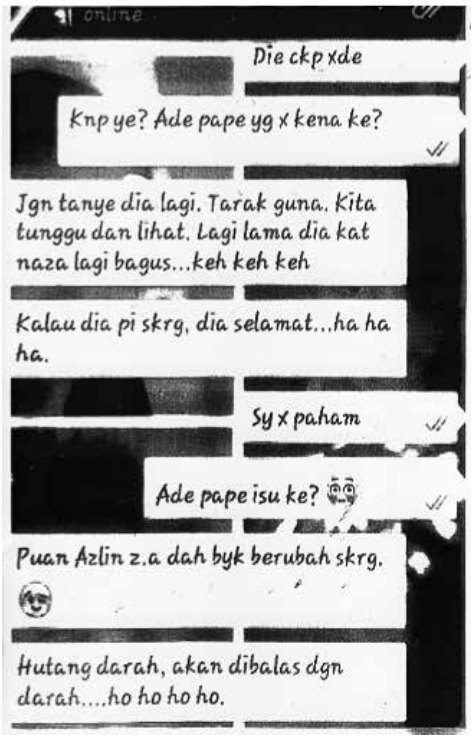
WhatsApp and tampering. Unfortunately, WhatsApp's ultimate pitfall is that it is relatively easy to manipulate and even fabricate conversations. As WhatsApp's export

chat function only creates editable .txt files, these can be opened and altered by anybody. While WhatsApp does have a backup function, wherein backups of your messages are saved in Google Drive, these do not appear to be accessible by the user (it is the app which accesses it directly to restore your messages) – so they are of no use otherwise.

Another problem is that neither the screenshot nor the transcript above can prove the identity of the other party to the conversation. They only display the name of the other side as you have saved them in your contact book.

It is therefore easy for anyone with ulterior motives to fake a WhatsApp conversation by using two different phone numbers to fabricate both sides of a conversation. Depending on the facts of the case (how long ago the conversation allegedly took place, whether there is any corroborating evidence or lack thereof), this may prove convincing to a judge looking for doubts in the evidence.

This is in fact what happened in the Industrial Court case of ***Mohamad Azhar bin Abdul Halim v Naza Motor Trading Sdn Bhd, case no. 4(2)(4)/4-241/15***, where the Court found the following screenshot of a WhatsApp conversation lacking and ultimately unreliable. Like our sample screenshot above, this screenshot lacks a date-stamp. Unlike our sample, this one does not even indicate the other party to the conversation. A demonstration was conducted in Court to illustrate how a WhatsApp conversation could be fabricated, which also factored into the Court's finding that the conversation was suspect.



How might these concerns be dealt with at trial? **Firstly**, the safest course of action would be to produce the original WhatsApp messages as they appear on the witness' phone. Of course, this will not always be feasible as old messages are lost and old phones are discarded. This was again another issue in ***Mohamad Azhar***.

Secondly, parties may choose to rely on a combination of both screenshots of the messages in question as well as the exported text versions of the conversation, for completeness.

Thirdly, parties should make an effort to obtain corroboration of the evidence in the WhatsApp conversation. This may include producing a subpoenaing as a witness the other party to the conversation and having them produce their end of the WhatsApp conversation as corroboration. Adducing other relevant and contemporaneous evidence of the matters referred to such WhatsApp conversations is, of course, trite and good practice.

Ultimately, what is clear is that WhatsApp evidence should, ideally, not form the linchpin of any party's case in Court, given the various ways in which such evidence can be challenged.

Justice Ruth Bader Ginsburg: Voice of the Minority, Fighter of Justice and Human Rights

by Kimberly Lim Ming Ying

On the 18 September 2020, the world was greeted with forlorn news that Supreme Court Justice, Ruth Bader Ginsburg, had passed away due to complications from pancreatic cancer. A name that wasn't entirely foreign to those in the legal fraternity, Justice Ginsburg, or more fondly known as RBG, led a remarkable life that left a lasting impression in the hearts of many people around the world. Despite her small stature, RBG was a giant in her pursuit for justice, ferociously upholding the United States' Constitution in her 27 years of being a Supreme Court Justice.

A fierce advocate for gender equality and known to be its trailblazer, RBG's mother had instilled in her the belief that women ought always to be independent[1] -- *women belong in all places where decisions are being made. It shouldn't be that women are the exception*.[2] Her unwavering passion in gender equality could perhaps be attributed to her own fair share of discrimination since her days at Harvard Law,[3] followed by countless missed opportunities despite the fact that she graduated at the top of her class, solely due to the fact that she was a woman in the 1960s.[4] Eventually, RBG became a professor in Rutgers Law School and Columbia Law School, teaching Civil Procedure, even becoming the first female tenured professor for the latter before venturing into the US Judiciary.

Being part of the American Civil Liberties Union (ACLU), RBG founded the ACLU Women's Rights Project in 1972.[5] Two decades later, this Project is still active in its march for women's rights, being the principal group advocating for systematic legal reforms in both equality and economic rights.[6]

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1 Tribute: The Legacy of Ruth Bader Ginsburg and Wrp Staff. ACLU. Retrieved from https://www.aclu.org/other/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff?redirect=womens-rights/tribute-legacy-ruth-bader-ginsburg-and-wrp-staff

2 Washington (CNN) (2009) "Justice Ginsburg ready to welcome Sotomayor." Retrieved from: https://edition.cnn.com/2009/POLITICS/06/16/sotomayor.ginsburg/index.html

3 RBG, being one of the nine women enrolled in a batch of 500 students, was asked by the Dean why they were occupying seats that ought to be for men.

4 RBG graduated First Class from Columbia and was recommended by Albert Sachs, her Professor at Harvard, for a clerkship with the Supreme Court Justice Felix Frankfurter. Justice Frankfurter responded that he wasn't ready to hire a woman and asked Sachs to recommend a man.

5 *Supra* n1

6 "About the ACLU Women's Right Project." Retrieved from: https://www.aclu.org/other/about-aclu-womens-rights-project

Believing that the Constitution catered for equality, RBG relied on the equal protection clause of the 14th Amendment,[7] using that as a basis of her own advocacy strategy of looking at gender discrimination as something which both men and women could face.

This approach was proven to be revolutionary as she went on to win five lawsuits centring on gender equality. The landmark case of *Reed v Reed*[8] in 1971 was groundbreaking, to which the Court had, for the first time since the 14th Amendment was enacted in 1868, struck down a state law that discriminated against women.[9] That state law was such that a male was preferred over a female in the appointment of an administrator of an estate. RBG was, at that time, one of the attorneys who wrote the brief in the Supreme Court.

In another example, in the 1973 case of *Frontiero v Richardson*,[10] where the Appellant, a female lieutenant of the U.S Air Force sought military benefits for her husband who was her 'dependent'. If the roles were reversed, such military benefits would automatically be rewarded, but the Appellant's application was refused solely on the conventional belief that her husband could not possibly be 'dependent' on her and that women could not be the primary economic providers for their families. RBG successfully argued that the differential treatment between male and female members of the uniformed services was unconstitutional.

Apart from that, RBG was credited for the passing of the Pregnancy Discrimination Act in 1978, in which she worked together with ACLU Women's Rights Project Attorney, Susan Deller Ross. The Pregnancy Discrimination Act safeguards women in that it is now unlawful to fire a woman or discriminate against her job application simply because she is pregnant. Not only that, the ACLU Women's Rights Project also advocated for better procedures and regulations for sterilisation. Part of RBG's Senate confirmation speech in 1993 touched on women's decision and choice to bear a child, one that RBG is of the opinion *"is a decision she must make for herself"*, and not by the government.[11]

Her achievements as an attorney were only but the beginning of her remarkable journey as a fighter of justice. When RBG was appointed as a Supreme Court Justice in 1996, thirty years since she'd used the 14th Amendment as the foundation of gender

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7 "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; … nor deny to any person within its jurisdiction the equal protection of the laws."

8 404 U.S. 71 (**1971**). Retrieved from: https://www.law.cornell.edu/supremecourt/text/404/71.

9 Learning Ground. Supreme Court Decisions & Women's Rights – Milestones to Equality. Retrieved from: https://supremecourthistory.org/lc_breaking_new_ground.html

10 411 U.S. 677 (1973). Retrieved from: https://supreme.justia.com/cases/federal/us/411/677/

11 Ginsburg, R.B. Senate Speech (1998); *"The decision whether or not to bear a child is central to a woman's life, to her well-being and dignity. It is a decision she must make for herself. When the government controls that decision for her, she is being treated as less than a full adult human responsible for her own choices."*

equality, she carried forward her belief through the case of *United States v Virginia*,[12] in which Virginia Military Institute was the last higher learning institution to accord admission only to men. RBG wrote the judgment for the majority and stated that any law that *"denies to women, simply because they are women, full citizenship stature - equal opportunity to aspire, achieve, participate in and contribute to society*," violated the 14th Amendment. Any such laws must be subjected to "sceptical scrutiny", a standard which she introduced to protect women and their rights. RBG went on to write that while "inherent differences" between men and women exist, it simply cannot be the basis *"for denigration of the members of either sex or for artificial constraints on an individual's opportunity"*.[13]

That decision was groundbreaking as it afforded other minority groups legal reliance upon the 14th Amendment. In *Romer v Evans*,[14] the Supreme Court struck down a state Amendment which would have prevented protection against the LGBT group, citing that Amendment to be unconstitutional. A culmination of victories afterwards led to the landmark decision of *Obergefell v Hodges*[15] in 2015 wherein the Supreme Court recognised same sex marriage as a fundamental right. This indirectly expanded the application of the 14th Amendment so that equal protection extends to that of the LGBTQ community.

What was worth noting was that the 14th Amendment was never intended for such expansive protection; it all started with RBG paving its application by first using that clause to promote equality for women. This was highlighted by Justice Gorsuch in 2020, where he had stated that the drafters "*might not have anticipated their work would lead to this particular result [...] but the limits of the drafters' imagination supply no reason to ignore the law's demands*".[16]

There is no doubt that RBG had left behind a profound legacy that has inspired and shaped many people to this very day, leading an exemplary life which cannot be elaborated in its entirety in one article. She was unapologetic and confident in her beliefs and principles, so much so that it earned her the nickname of "Notorious R.B.G", one which the Justice found to be funny, and that it was a "wonderful" [17] nickname.

When RBG was asked how she would like to be remembered during an interview with MSNBC, she answered *"I would like to be remembered as someone who used*

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12 518 U.S. 515 (1996). Retrieved from https://supreme.justia.com/cases/federal/us/518/515/

13 On page 533 of the judgment.

14 517 U.S. 620 (1996) Retrieved from https://supreme.justia.com/cases/federal/us/517/620/

15 576 U.S. 644 (2015) Retrieved from https://www.oyez.org/cases/2014/14-556

16 Bostock v. Clayton County 140 S. Ct. 1731

17 Kia, M (2014) Vanity Fair. "Ruth Bader Ginsburg Loves her Notorious R.B.G Nickname." Retrieved from: https://www.vanityfair.com/news/politics/2014/07/ruth-bader-ginsburg-notorious-rbg-nickname

whatever talent she had to do her work to the very best of her ability. And to help repair tears in her society, to make things a little better through the use of whatever ability she has."[18] I'd say that that quote now, rings true to the hearts of many people. Justice Ruth Bader Ginsburg would indeed be remembered in history as someone like that; the voice of the minority and a staunch fighter of justice. Or as the Chief Justice John G. Roberts, Jr said in the Supreme Court's statement regarding her passing, "*a tireless and resolute champion of justice*".[19]

Supreme Court Justice Ruth Bader Ginsburg

18 Full Transcript of the Interview. Retrieved from https://www.msnbc.com/msnbc/exclusive-justice-ruth-bader-ginsburg-interview-full-transcript-msna531191

19 "Supreme Court Announces Justice Ruth Bader Ginsburg's Death." Retrieved from: https://edition.cnn.com/2020/09/18/politics/ruth-bader-ginsburg-death-release/index.html

THE LAWYER'S STRUGGLE TO SURVIVE POST-MCO

by William Lee Jing Yao

The 2020 Movement Control Order (MCO) implemented by the government of Malaysia was to curb the spread of COVID-19. This *cordon sanitaire,* while effective in significantly reducing the number of COVID-19 infections, did come with some devastating consequences on the economy. Coming out into a post-MCO world, both law firms and lawyers alike are faced with navigating the unprecedented impacts from an economy that was heading towards a standstill. It should be said that the struggles suggested below are not new. Nonetheless, their impacts are exacerbated by the weak economy resulting from COVID-19 and the MCO.

Maintaining Cash Flow

A law firm's cash flow is fundamentally critical. A healthy and running cash flow is literally tied to the survivability of any law firm. That said, managing a healthy cash flow is a challenging task under normal circumstances. However, COVID-19 has thrown the entire economy out of whack. This means keeping that cash flow running has gotten even more complex.

One way to protect the cash flow is to start investing in clients who are willing to become evergreen retainers. By using retainers, the client deposits a fund in trust with the law firm. Once the funds hit a predetermined minimum balance, the client is then required to replenish the amount. Having a retainer should significantly save the law firm's time and effort in chasing overdue invoices. Additionally, clients would likelier find it more affordable to pay via such a scheme as there is no need for the client to pay a large amount upon opening their legal case.

Non-Paying Clients

It can be quite devastating to find out the client whom you have poured your heart and soul into is now intentionally deferring payment on your legal invoices. Since everyone's financial ability was affected by the MCO, it is no surprise that the

client who uses MCO as an excuse to avoid payment to their creditors are also using MCO as an excuse to avoid paying your legal invoices.

At this juncture, it is worth considering prioritising the right clients. After all, our duty as an advocate and solicitor stands firm regardless of the presence of COVID-19. We are obligated to give our absolute best to our clients. It is therefore important that law firms do not fall victim to theft of services by defaulting clients. Lawyers deserve to be paid what they're worth. Additionally, it is always wasted time when lawyers are forced to take time away from their caseload to deal with clients taking advantage of their firm.

The above should be distinguished from clients who are willing to pay but face difficulty in doing so. In such scenarios, it is just a matter of taking progress payments until the full settlement of the invoice.

Mastering Technology In Law

Like any other business, technology is a tool to help lawyers streamline their service. However, legal practices had always been slow in embracing such technological changes for fear of malpractice suits or losing their licenses. However, post-MCO potentially will be a trigger for more rapid adoption of technology in legal practice.

The Malaysian Judiciary has proposed amendments to certain written laws to allow for greater use of technology. E-Review is thrust into the limelight and lawyers no longer need to be in each other's physical presence to manage their cases. Post-MCO has resulted in the introduction of the e-Appellate system by the Malaysian Judiciary. That means there is now less of a need to ship volumes upon volumes of documents to Putrajaya only to have the hearing adjourned or vacated. All these initiatives are fundamental to allow the Malaysian judiciary to facilitate efficient and equitable justice in this modern society.

While such changes should be viewed positively, some lawyers are struggling to keep pace with such rapid changes. Not every lawyer is technologically adept. Naturally, a sudden over-reliance on technology could pose a huge learning curve.

Digitalisation By Law Firms

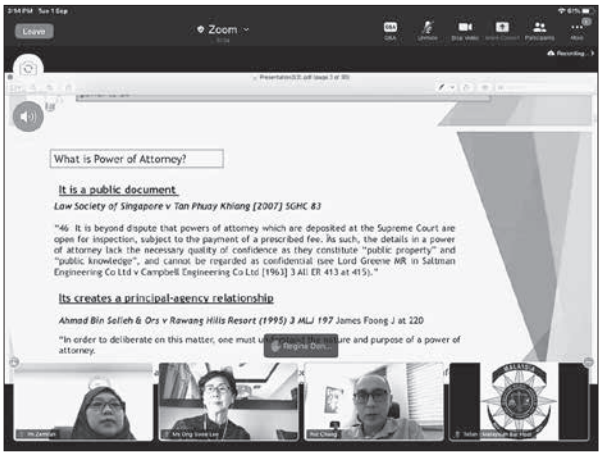
It is also interesting to note that a substantial amount of legal work can be done using virtual means. Online virtual meetings with clients have become a norm in a bid for law firms to comply with social distancing procedures. Some creative users, with the aid of applications like TeamViewer, have also been able to work remotely on their office computer, all while in the comforts of their own home. All these culminate real questions of whether it is possible to run a legal firm through a virtual office. A virtual office reduces the need for large office space and could potentially help legal firms save on overhead expenses.

In conclusion, building and/or running a sustainable legal practise post-MCO is certainly a daunting task, but the legal profession, if anything, has always been adaptive and flexible. Regardless of the challenges faced during post-MCO, it is about finding the right strategy that will help legal firms survive in the long run.

Medley of Moments

Shariah Principles in Default Cases and Challenges in Restructuring and Rescheduling (R&R) (18 Aug 2020)

Power of Attorney: A Discussion (1Sep 2020)



Fundamentals of Corporate Practice (12 Nov 2020)

The Legit Quiz Night 2020

(2 Oct 2020)

A STEP FORWARD FOR INTELLECTUAL PROPERTY IN MALAYSIA

by Mah Jiachyi & Chung Wei Leng, Patricia

In this era of information technology (IT) and with the emergence of a variety of technologies, more and more innovations are created by innovative individuals, universities, researchers, and companies. As a result, the protection for Intellectual Property (IP) related rights of the IP owner has become more vital compared to the past decades.

There are several organisations worldwide that provide a platform and support for IP owners to be educated on their basic IP rights, but to find one focusing/emphasizing how IP owners should fully utilize their IP assets by way of commercialization is very rare to find an organization which is recognized by most of the Intellectual Property Offices in respective member states of the Paris Convention and by the World Intellectual Property Organization (WIPO), the International IP Commercialization Council (IIPCC) is the only one as of now.

WHAT IS INTERNATIONAL IP COMMERCIALIZATION COUNCIL (IIPCC)?

IIPCC is a global, non-profit, non-partisan organisation providing a platform for the innovator and entrepreneur community and enterprise to increase their understanding of IP and to gather resources for unleashing the value and realising the commercialization potential of their creative and innovative IP into products, services, or processes. IIPCC is also a Permanent Observer of WIPO.

The main objective that IIPCC strives to achieve is the appreciation of the value creation of IP. They embrace innovation and it's IP that promotes inclusive and balanced sustainable economic growth, which directly creates quality jobs for all social strata, protection of the environment, and improvement of quality of life.

IIPCC's missions are to promote IP education, impose good IP practices and standards toward certification for effective commercialization and provide a trusted global social network for innovation, entrepreneurship, networking, and collaboration for shared interests in IP commercialization opportunities.

For more information, kindly visit IIPCC's official website: https://www.iipcc.org/

IIPCC is also having a Malaysia Chapter led by local Professionals, for more information, kindly visit https://www.iipcc.org/malaysia.

WHAT IS INTELLECTUAL PROPERTY (IP)?

Intellectual property refers to creations of the human mind such as inventions, literary and artistic works, symbols, names, and images, etc., for which exclusive IP rights are conferred by laws.

Intellectual property can be categorized into different categories, such as Trademarks, Patents, Designs, Copyrights, Geographical Indications, Domain Names, Plant Varieties, Trade Secrets, and so on.

PATENT

A patent is an exclusive right granted by the government to the inventor for his invention, which covers product, method, application, and/or process. The registered owner has the exclusive right to stop others from making use of the invention in Malaysia without the registered owner's consent or permission.

For a product to be patentable, it must be novel, inventive, and industrially applicable. The patent can be protected up to 20 years subject to annual renewal once it has been first filed at any of the relevant Intellectual Property Office in different member states of the Paris Convention Treaty to seek protection in that particular jurisdiction. In Malaysia, a patent application can be filed at the Intellectual Property Corporation of Malaysia (MyIPO).

On the other hand, an exclusive right is also granted to Utility Innovation, which is a "minor" invention sometimes known as a petty patent which does not require the inventor to satisfy the test of inventiveness as opposed to patent. Utility Innovation is protected with an initial period of ten (10) years and is renewable for two consecutive terms of five (5) years each upon approval of the application to extend for further terms.

TRADE MARK

After the implementation of the Trade Marks Act 2019 together with the Madrid System, Trade Mark can now consist of Conventional Marks and Non-Conventional Marks (which includes any letter, word, name, signature, numeral, device, brand, heading, label, ticket, the shape of goods or their packaging, colour, sound, scent, hologram, positioning, a sequence of motion or any combination thereof), Collective Mark and Certification Mark.

A Trade Mark is important for any form of business because it represents the identity of that particular business. In Malaysia, the right of a trade mark owner is governed under the Trade Marks Act 1976 and Trade Marks Regulations 1997 prior to the implementation of the Trade Marks Act 2019. The registered trade mark owner has the exclusive right to prevent third parties from using an identical or confusingly similar mark or resembling association with them without their consent, and the owner may take legal action against anyone who infringes his/her rights under the Trade Description Act 1972 and/ or Trade Marks Act 2019.

Registration certificate issued by MyIPO is a prima facie evidence of trade mark ownership. A trademark certificate of registration serves as an important document to establish the ownership of goods by bearing the registered trademark therein. The Trademark Certificate of Registration will continue to be valid and subsistent so long as there is a renewal every ten (10) years.

INDUSTRIAL DESIGN

An industrial design means features of shape, configuration, pattern, or ornament applied to an article by any industrial process which in the finished article, appealing to the eyes and are judged by the eyes. The owner of a registered Industrial Design has the exclusive right to make, import, sell, or hire out any article to which the design has been applied.

In order to be qualified and be registered as an Industrial Design, the product must first satisfy the definition of Industrial Design stated in the Industrial Designs Act 1996. Secondly, the product must be relatively new to the public and is not contrary to public order or morality.

However, pursuant to Section 3 of the Industrial Designs Act 1996, the method of construction of the device or features of shape or configuration of an article which are dictated solely by functionality which the article has to perform, or dependent upon the appearance of another article of which the article is intended by the designer to form an integral part, are not registrable as Industrial Design.

A registered industrial design is given an initial protection period of 5 years from the date of filing, and it is extendable for a further four consecutive terms. The maximum protection period for an Industrial Design is 25 years.

GEOGRAPHICAL INDICATION

A geographical indication (GI) is a sign used to indicate the specific geographical origin of a product that possesses qualities or a reputation that are originated from that place of origin, for example, Sabah Tea. The rights of the registered product are governed under the Geographical Indications Act 2000.

It is notable that Section 3 of the Geographical Indications Act 2000 afforded protection of the product against any other product that falsely represents to the public that the product originates in another country, territory, region, or locality, regardless of whether or not it is registered under the Act.

An applicant can register geographic indications that are found in Malaysia with the MyIPO without the need for appointing an agent, or vice versa. A registered geographical indication is given ten (10) years of protection from the date of filing and is renewable for every ten (10) years.

COPYRIGHT

Copyright is the exclusive right to control creative works created by the author, copyright owner, and performer for a specific period governed under the Copyright Act 1987.

Creative works that are eligible for protection under the Act include Literary Works, Musical Works, Artistic Work, Derivative Work, Film, Sound Recordings, and Broadcasts. Generally, the protection period for copyright will be during the subsistence of an author's lifetime up to the expiry of 50 years from his/ her death or 50 years upon the first publication of the copyrighted work, whichever comes first.

A copyright owner has the exclusive legal right to control his work of art. The copyright owner also has the right to derive financial awards/profits from the works created. The copyright owner, further, has the exclusive Paternity Rights and Integrity Rights towards the works created. Using copyrighted works without consent or authorisation from the copyright owner constitutes an infringement, and the owner can enforce his right as provided under the Copyright Act 1987.

Effective from 1 June 2012, it is possible for the copyright owner to make a voluntary notification of copyright filing under the Copyright Act 1987 and Copyright (Voluntary Notification) Regulations 2012 with MyIPO. The certificate of filing in respect of the notification of copyright will be prima facie evidence when dealing with copyright infringement proceedings.

TRADE SECRET

Trade secrets are confidential information that consists of commercial value and are usually known to a limited group of persons only whereby the rightful holder of the confidential information will take reasonable steps to keep it secret, including binding agreements with the business partners and employees to maintain strict confidentiality.

There is no specific law to govern this area of Intellectual Property except the common practice of entering into Non-Disclosure Agreements, which is under the purview of contract law. The protection period will be forever if no one were to disclose it.

Since there is no specific law in respect of Trade Secret, thus the definition of the same is ambiguous. However, trade secrets will usually include any confidential business information which provides a competitive edge to a company and is secretive and unknown to others. It can be financial and/ or business model information, source codes, technical information such as test data, recipes, drawings, designs, formulas, marketing and/ or

advertising strategies, list of suppliers, processes, and so on which cannot be found at public domain.

There was a Symposium on Trade Secret and Innovation held by WIPO in Geneva, Switzerland last November 2019 whereby global IP experts, practitioners, policy makers, judges, and other important stakeholders were there discussing and sharing about Trade Secret Law and possible solutions for Enforcement of Trade Secret Law in different jurisdictions. Hence, Trade Secret might be the next and/ or last IP Rights to be recognized worldwide, including Malaysia.

WHAT IS IP COMMERCIALIZATION?

According to a report dated 30/09/2015 published by the Committee on Development and Intellectual Property (CDIP) working under the umbrella of the World Intellectual Property Organisation (WIPO), IP Commercialization is defined as:-

"Commercialization of intellectual property (IP Commercialization) is making money out of one's ideas. As such, an idea has no value until one makes it into a tangible object, and its utility has been proven such that others would pay to use, see, read, recognise, or listen (to) that product. We define the commercialization of intellectual property as a continuum of activities and actions that provide for the protection, management, evaluation, development, and value-creation of ideas, inventions, and innovations to implement them in practice. Prototypes and implemented processes lead to the development of products and services by entrepreneurs, startups, existing companies as well as governments resulting in economic and societal benefits."

In addition, the guide also listed the impact of commercialization where the intellectual property may provide financial, cultural, economic, and social impact on key stakeholders. This may be in the form of financial remuneration, jobs, infrastructure development, improvements in the quality of life, and condition of health, induced spending, and a sense of pride in accomplishment based on innovation and pioneering leadership.

Kindly refer to https://www.wipo.int/meetings/en/doc_details.jsp?doc_id=316830 for the complete report.

The European Union had published the Handbook for IP Commercialization in the Year 2019.

IP Commercialization can be carried out by its owner, through assignment, or by business partnerships (which includes Licensing, Franchising, Joint Venture, and Spin-Off).

IP OWNER

The most common IP Commercialization is usually through the IP owner himself. The guide has given the procedure of IP Commercialization starting from the protection of trade secrets, searching of IP Registration Database prior to the registration of the IP Protection and Enforcement of IP (by registration) and finally safekeeping of records (which will be essential evidence when there is an infringement of IP proceedings).

ASSIGNMENT

Another popular type is through IP assignment, where the ownership of an IP, such as a patent, trade mark or design, is transferred from one party (the assignor) to another party (the assignee) in return for commercial value in any form of consideration or via testamentary disposition and consequently, the assignee becomes the new owner of the IP. Throughout the negotiation process via the former, it is advisable that both parties sign a Non-Disclosure Agreement (NDA) to ensure that shared confidential information will not be disclosed other than for the intended purposes only. Further, IP due diligence shall be carried out to assess

the value, possible encumbrances, and liability tagged with the said IP concerned. Once the above processes are completed, the parties may proceed to enter into the deed of assignment or similar kind of agreement.

LICENSING AND FRANCHISING

Licensing and Franchising are other forms of IP Commercialization. A license is a contract under which the holder of an IP (licensor) grants permission for the use of its IP to another person (licensee), within the limits set by the provisions of the contract. Licensing has a vital role in companies' commercialization strategies, since there are significant advantages of licensing IP, creating a win-win situation for both parties.

There are many types of IP Licensing; however, it is common to see the two general types of Licensing Agreement, i.e., the Exclusive and Non-Exclusive Licensing. For Exclusive Licensing, the Licensor will be prevented from further licensing out the IP to another third party. As for Non-Exclusive Licensing, on the other hand, allows the Licensor to negotiate and enter into other non-exclusive licensing with any other third parties.

Franchising is a subset of Licensing, enabling the replication of the owner's (franchisor) business concept in another location by providing continuous support and training to the recipient (franchisee), in short, a short cut for Franchisee whom may not be required to possess the similar and/ or relevant qualifications and/ or experiences into the same industry of the Franchised Business. Compared to Licensing, the risk assessed for franchising is lower, and the cost involved is usually lesser since the Franchisee can easily penetrate any industry not necessarily having the expertise and/ or experiences in that particular industry market since the commencement of a business by a Franchisee is based on an established brand in that industry with the IP based licensing on the related Intellectual Property Rights and know-how.

JOINT VENTURES (JV)

JVs are business alliances of two or more independent organisations (ventures) to undertake a specific project or achieve a certain goal by sharing risks. IP has an important role in the creation of such collaborations since each venture brings its own intellectual assets for the success of a JV.

The life span of a JV starts from the pre-contractual stage where both ventures shall protect their respective IP (by signing a NDA, performing due diligence, and paying particular attention to the Competition Law). Once the JV contract is signed, the Implementation Stage kicks in. Parties should decide who will own the foreground rights and who will exploit them; ownership of the improvements of an already existing background made by one of the ventures; and also by whom and how exploitation activities are run. The Termination Stage will be very crucial to be incorporated, where detailed discussion as to the process of termination and ownership of IP rights shall be considered. However, a JV agreement can differ on a case-to-case basis, thus the terms and conditions that may be seen exhaustive to certain parties might not be comprehensive to other parties, provided the essence of the IP related terms shall be stipulated clearly to avoid unnecessary disputes.

SPIN-OFF

Spin-offs (or spin-outs) usually take place when there is an IP assignment from a parent company to a newly incorporated separate legal entity and thereafter further exploitation of the said IP by the new assignee via any type of IP Commercialization. It is generally an efficient solution for the parent organisations, who may not be fully capable of commercialisation of their own IP assets, such as for universities and research institutions.

Spin-offs are seen as an important means of technology transfer since they are acting as an intermediary between the research environment and industries while putting research results into the commercial market with a marketable product.

For the full Handbook, kindly refer to https://www.iprhelpdesk.eu/sites/default/files/2018-12/european-ipr-helpdesk-your-guide-to-ip-commercialisation.pdf

Refer also to https://www.wipo.int/edocs/mdocs/africa/en/wipo_inn_dak_15/wipo_inn_dak_15_p4.pdf

WHAT IS IP VALUATION?

IP valuation is a process to determine the monetary value of the subject IP. An IP must be separately identifiable in order for the valuation to be carried out.

The value of the IP will be affected by Premise of value; Standard of value; Purpose of valuation; Time or date of valuation; Access to and reliability of relevant data and information; Valuation method(s) applied and assumptions made by a particular valuation method; Legal, tax, financial, or other business circumstances; Nature, scope and strength/validity of the underlying IP asset; and Infringement or freedom to operate issues.

There are a few common approaches used to evaluate the value of an IP, which are cost approach, market approach, and income approach and the methodology adopted for IP Valuation in the market are commonly in compliance with the International Financial Reporting Standards (IFRS) and/ or the International Valuation Standards (IVS). These approaches provide a reasonable indication of a defined value for the subject's intangible assets on the valuation date.

IP Valuation plays an integral role in IP Commercialization as it ultimately determines the financial value of the IP in the business market. Indeed, knowing the economic value and importance of IP assists in the strategic decisions to be taken on the assets, but also facilitates the commercialization and transactions concerning the IP.

For more information, kindly read:-

https://www.wipo.int/export/sites/www/sme/en/documents/pdf/ip_panorama_11_learning_points.pdf

https://www.iprhelpdesk.eu/sites/default/files/newsdocuments/Fact-Sheet-IP-Valuation.pdf

CONCLUSION

It is essential for a business owner to conduct searches, due diligence, and register his relevant IPs before investing or launching the IP products to the market. As mentioned above, the person who first registers as the owner of the IP product has the exclusive right to the same. In the event of disputes regarding infringement of IP, failure to register will be very detrimental to the owner's case.

Reference to:

1. http://www.myipo.gov.my/en/
2. https://www.iipcc.org/
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Mysteries excite any individual, regardless of age. Our own land has her fair share of age-old unsolved murders, which warrants a Sherlockian detective to solve it. The veil of this edition is opened with a murder mystery that would move anyone to tears and ***"Papa, I'm very scared. They're going to beat me."*** *would keep ringing in your ears as the vision of the petrified boy flashes.*

THE MURDER OF XU JIAN HUANG

by Nurul Hidayah binti Tajuddin

Parents in the world want nothing but the best for their children. Xu Jin Lai and his wife, Fang Qiong Ying, desired the same thing too. They wanted nothing but to provide a good education for their sons when they sent the boys over to their wealthy uncle in Malaysia. What could be perfect than having a family member agreeing to fund your sons' education and ensure a bright future for them?

The boys were just 12 and 14 when they arrived in a foreign country, but having to live with their uncle and staying in a sprawling bungalow did not sound like a bad idea; what more, when your uncle was a Datuk Seri and a stock broking firm director. It all seemed like a good flow of events when the sons were enrolled in an international school before one of them decided to return to China, leaving the youngest one behind.

Just when the parents thought leaving their son with their uncle was a good idea, Jian Huang's future came to an end when he was found dead in his uncle's house. The child's body was found floating in a swimming pool with his hands and feet bound, and 23 bruises were spotted on his delicate body. Who would have thought your own blood would be the suspect in your son's murder?

Jian Huang's uncle, Koh Kim Teck, who was a former Datuk Seri (before the title was revoked by the Pahang royal palace just a year after he had received it) was charged for the murder of his nephew, along with his two bodyguards, Resty Agpalo and Mohd Najib Zulkifli.

Testimonies were heard during the 36-days trial, and the main point taken from the witnesses was that the boy was physically abused and tortured because he had been accused of stealing a total of RM30,000 from his uncle. The poor boy's father told the court how his son sounded alarmed and frightened when he called him before his death. However, the statement was not recorded due to the fact that it came from an 'emotional witness'. Allowing the objection from the defence team, the judge, however, requested the father to disclose what the kid had said –

"Papa, I'm very scared. They're going to beat me."

Like all high profile cases before this one (the murder of Noritta Samsudin & Datuk Norjan Khan Bahadar), this murder case faced the same end when all the accused were acquitted of the crime after the court ruled that the prosecution had failed to clear many unresolved and unanswered doubts. The same *"poor police investigation, their failure to call the key witnesses and allegations that the police had demanded an amount of money from the accused to settle the case*" were cited by the judge, although all allegations had been denied by the police, both inside and outside court.

Even if the prosecution did call for the right witnesses, the Defence in the case highlighted several contradictions in the statement by a key prosecution witness, Mr. Koh's driver, Muhamad Razbean Md Tab. Razbean, in his first statement to the police, said he saw the accused cradling the child and heard the sound of the child being thrown into the swimming pool. When being questioned whether or not he saw the accused throw the victim in a second statement, he answered that he only heard a sound like something falling into the water. However, it was noted that in the first statement, Razbean said he saw the child being tied and thrown into the swimming pool by "*an accused*". However, in the second statement, when he was asked whether he could see the pool from the outside, he said he couldn't as there was a wall. With such a contradiction to his own statement, Razbean went missing since the trial began.

All three of them walked free with no charges. The decision to acquit the accused persons had created public outrage and further undermined the confidence in the police force, and fueled growing calls for a massive shake-up of Malaysia's judicial system when Jian Huang's father had publicly called for his son's justice. Some lawyers willingly helped him to rebuild his case, and even the Hokkien Association was footing all of the expenses. At the same time, the prosecution team appealed against the acquittal of all the accused; however, during the time of the appeal, Mr. Koh vanished and was reportedly hospitalized in China, although the Chinese media announced that he was never hospitalized and no health declaration was issued for him.

The three of them remained free after the court ruled that the prosecution had failed to provide evidence to answer all the doubts in the case, what more to provide any circumstantial evidence that the accused had a common motive to kill Jian Huang. In the end, the case was never solved and Mr. Koh's whereabouts stayed obscure. As for the mother who had lost her child, seeing her son's classmates would make her think of Jian Huang, and she said –

"He was very dear to us, I cannot forget him."

Sources :

1) 6 Mysterious, Unsolved Cases that Took Place on Malaysian Soil (https://worldofbuzz.com/6-mysterious-unsolved-cases-took-place-malaysian-soil)
2) Pp v Resty Agpalo & Ors. (Appeal) (https://www.yumpu.com/en/document/read/17728378/dalam-mahkamah-rayuan-malaysia-bidangkuasa-)
3) Who Killed Jian Huang? (http://maverickysm.blogspot.com/2005/09/who-killed-jian-huang_21.html)


NEW STRAITS TIMES
ESTABLISHED 1845
WEDNESDAY SEPTEMBER 21, 2005
PRIME NEWS >> P8
NAMES OF 337 MPs AND SENATORS WHO GOT APs
www.nst.com.my
Peninsular Malaysia RM1.20 Sabah and Sarawak RM1.80 Brunei B$1.80 • PP413/9/2006
CHINA SCHOOLBOY MURDER TRIAL
ACQUITTED!
FREE: Koh and bodyguards, Mohamed Najib and Resty Agpalo (R), outside the courtroom yesterday
HIGH-PROFILE CASES THE PROSECUTION LOST
UNRESOLVED
Noritta Samsudin
Datuk Norjan Khan
Xu Jian Huang
DOUBTS AND MORE DOUBTS
WHAT THE JUDGE SAID:
Suffice for me to conclude that with such real doubts, it would not only be unfair, but legally wrong, for me to call any of the three accused for their respective defence.'
SO WHO KILLED HIM?
'My son was tortured and murdered but no one will have to pay for this.'
The father
• REPORTS: PAGES 2 & 4

The front cover of New Straits Times dated 21 September 2005 that covered the case.

Jian Huang's parents holding on to the portrait of him outside the courtroom.

ILLEGITIMACY AND INHERITANCE IN MALAYSIA: TWO CAUTIONARY TALES

by Cassandra Lee

Let's begin...

In this piece, I seek to outline the trouble with inheritance laws in Malaysia [1] in so far as it concerns children deemed to be illegitimate. I draw examples from 2 recent High Court decisions which, in my opinion, demonstrate in reality the harshness of our current laws to children deemed illegitimate under Malaysian law. These 2 cases are:

1. **Maxwell John Gray (as administrator/trustee for the estate of Cory John Gray, deceased) v Lim Siew Shun [2]** (the "**Maxwell John Gray case**"); and
2. **Tan Ying v Tan Kah Fatt & Anor and another appeal [3]** (the "**Tan Ying case**").

The lessons we can learn from these 2 recent High Court decisions are:

1. Never draft your own Will unless you are a legally trained probate practitioner; and
2. If you have children out of wedlock and intend to provide for them when you are gone, make sure you make a Will;

It is not enough to simply make a Will. To avoid the situation in the **Maxwell John Gray** case, you should name each child you wish to make a beneficiary of your estate, especially if they are born out of wedlock and have not been legitimized under the law.

I will confine this discussion to the position of children born out of wedlock and who are not subsequently legitimized under the provisions of the Legitimacy Act, 1961 (for example, by virtue of the subsequent marriage of their parents), i.e. children who are deemed "illegitimate" for the purposes of inheriting from an estate where a parent dies intestate (read: without leaving a Will). There are actually other ways in which a child can be deemed illegitimate, but we shall keep that discussion for another day.

In short, the law provides for limited circumstances in which an "illegitimate child" can inherit from his parents' estate. An "illegitimate child" is entitled to inherit from his/her mother's estate IF she dies without leaving a Will and does not have any legitimate children. The law suggests that an illegitimate child loses his/her rights of inheritance in the event the mother dies without leaving a Will but leaves legitimate children, presumably from an earlier or later marriage.

In the case of inheriting from his/her father's estate, a child deemed to be "illegitimate" is NOT entitled to inherit from his/her deceased father's estate should he die without leaving a Will. Generally, having a well-drafted Will can overcome these limitations. However, a poorly drafted Will can cause serious implications, as can be seen from the Maxwell John Gray case.

"Generally, having a well-drafted Will can overcome these limitations."

The legal definition of a "child"

A "child" is defined in section 3 of the Distribution Act, 1958 as "*a legitimate child and where the deceased is permitted by his personal law a plurality of wives includes a child by any such wives, but does not include an adopted child adopted under the provisions of the Adoption Act, 1952 or the Adoption Ordinance of the State of Sarawak.*"

A similar definition is seen in section 3 of the Intestate Succession Ordinance 1960 which applies in the state of Sabah.

"Legitimate child"

In simple terms, a "*legitimate child*" is a child born in wedlock or having been legitimized pursuant to the provisions of the Legitimacy Act, 1961. For example, a child born out of wedlock can be legitimized through the subsequent marriage of his/her parents [4].

For the purposes of this discussion, an "*illegitimate child*" is therefore one who is born out of wedlock and was not legitimized pursuant to the provisions of the Legitimacy Act, 1961.

The Maxwell John Gray case

In this unfortunate case, the executor of the deceased's estate brought an action against the deceased's "wife" ("the Defendant") for vacant possession of a house owned by the deceased. The Defendant, in resisting the action, argued that she and her child were entitled to remain and stay in the house because she was the wife of the deceased and the child was the deceased's biological child. Here's the catch - the deceased married the Defendant through a customary marriage. Arguments put forth by the Defendant were rejected by the High Court. The High Court found that since the alleged customary marriage was never solemnized and registered under the Law Reform (Marriage and Divorce Act) 1976, the customary marriage was not recognized by law and thus, the child was deemed to be born out of wedlock and as such deemed to be an illegitimate child.

The question of the child's legitimacy was also an important consideration in this case because the deceased had actually executed a Will more than 2 years after the customary marriage took place and after the child was born in which he made reference to the word "children" in the Will. Clause 3 of the deceased's Will stated as follows:

"I GIVE all my personal chattels including motor vehicles equally for those my children who survive me."

The Defendant quite cleverly argued that, since the deceased had only 1 other child from his previous marriage, the word "children" used by the deceased in his Will is meant to include her child. It is important to note that in this case, there is no dispute that the Defendant's child was the deceased's biological child.

The High Court rejected the Defendant's argument and, in doing so, suggests that the word "children" used in the deceased's Will can only be interpreted to mean "legitimate children". The Defendant's child with the deceased was as such excluded from the deceased's Will because he was born out of wedlock. The High Court also held that had the deceased intended to name both the Defendant and her child as beneficiaries of the estate, he would have named them in the Will.

In my opinion, the High Court's decision raises a number of serious questions.

Firstly, it is debatable whether the learned judge, who was essentially interpreting the terms of the deceased's Will, gave effect to the deceased's true intentions. On the flip side of the argument, should the deceased intended to provide only for his legitimate children, wouldn't he have used the words "legitimate children" in his Will instead of just the general term "children"? Couldn't the exclusion of the Defendant and her child be done expressly instead if the deceased so wishes to?

In a case where the deceased died leaving a Will, the question of a child's legitimacy, in my opinion, should not be of importance especially in a case where the paternity of the child is not in question. The Court may serve the parties' interests better by interpreting the deceased's Will to give effects to the deceased's true intentions.

This case serves as a cautionary tale to those who may have more complex family relationships to never attempt to draft their own Wills, at least not without proper legal advice.

The *Tan Ying* case

In comparison to the ***Maxwell John Gray case***, the High Court in the ***Tan Ying case*** was called upon to determine a child's legitimacy for inheritance purposes as her late father had died without leaving a Will.

In the ***Tan Ying case***, legal suits were filed by the lawful wife of the deceased to seek, amongst others, a declaration that the child fathered by the deceased with another woman is an illegitimate child and hence, will not have the right to claim an interest in the deceased's estate. Sadly but quite rightly, based on the present law of this country, the High Court granted the unfortunate declaration.

We can take comfort that the harsh realities of these laws were expressly recognised by the learned Judicial Commissioner in her decision where she held as follows:

"It is trite that a court of law is only duty bound to interpret the provisions as is passed by the legislature. In that light it does not have the power to read deeming provisions into the said Act in the event of a lacunae as that power resides with the legislature. In the circumstances I am granting the declaration that the said child D2…in Suit-1 is an illegitimate child and consequently will not have the right under the present law to claim an interest in the estate of the deceased father. Unless and until that position in the Distribution Act of 1958 is altered by the legislature, the court is bound by its limitation no matter how harsh it may appear. Such duty of the legislature cannot be surrogated to the courts of law."

The need for reform in this area of law

The area of law regarding inheritance for illegitimate children is in much need for reform. In my opinion, the law in its current form has no place in modern society. In the absence of a Will, the law should provide each and every biological child with equal inheritance rights. The law in its current form seems to penalize or punish a child, in so far as his inheritance rights are concerned, for the ignorance, faults, failings or folly of his parents.

The two cases discussed here demonstrate what I believe would be painful examples of innocent children being caught in battles they certainly did not ask or wish to be in. Maybe there is room to argue that the adults in these cases failed them. But to err is only human. Our laws, on the other hand, should seek to address such human failings.

[1] This article discusses primarily the application of the Distribution Act, 1958 which applies in Peninsular Malaysia & Sarawak (by virtue of the Modification of Laws (Distribution Act 1958) (Extension to the State of Sarawak) Order 1986 (U (A) 446/86 which came into force on 12.12.1986).
[3] [2018] MLJU 1070; [2018] 1 LNS 1084
[4] Sections 4 and 5 of the Legitimacy Act, 1961.

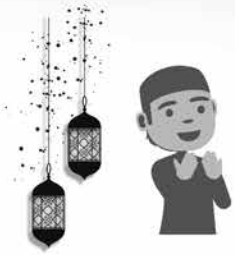
Attorney Humour

A man had been crossing a street when a car slammed into him. The pedestrian sued the motorist, whose lawyer made the following statement at the end of the trial.

"Your honour, my client was not at fault. He has been driving a car for 30 years, and has never had an accident, nor gotten so much as a speeding ticket. I do not think I need to say any more."

Unimpressed, the lawyer for the plaintiff rose.

"Your honour, since counsel insists on bringing up the matter of experience, may I remind the court that my client has been walking for over 70 years…"



"QARINAH" A METHOD OF PROOF IN ISLAMIC LAW OF EVIDENCE

by Abu Bakar Kugaselva bin Abdullah

ABSTRACT

The term Qarinah in the Islamic Law of Evidence has left an indelible mark on my mind because there are so many terms in the English Law of Evidence to describe this, all encompassing terms in the English Law of Evidence.

INTRODUCTION

This term Qarinah simply means a causal link between facts in which a legal conclusion can be made.

This term covers
1. Circumstantial Evidence
2. Similar Fact Evidence
3. Presumptive Proof
4. Motive
5. Res Gestae
6. Expert Opinion Evidence

1. Circumstantial Evidence

In the famous case of the Sunny Ang murder trial held in 1963 in the Singapore High Court, the accused was convicted of murder, although the corpse of the victim was not found (corpus delicti). However, several circumstantial facts pointed to the accused as the perpetrator of the crime:-

(a) The accused brought his girlfriend, who was the victim in this case, who happened to be a novice scuba diver to the dangerous and hazardous waters of Pulau Dua;

(b) The accused bought insurance policies worth hundreds of thousand dollars and renewed existing policies just a few days before the incident;

(c) The beneficiary in all the policies was Madam Yeo, who is the mother of Sunny Ang, although the victim Jenny had a half-sister who was alive at that time.

Facts (a), (b) and (c) are Qarinah in the Islamic Law of evidence.

2. Similar Fact Evidence

In the case of a man marrying a rich widow and the widow later dying of arsenic poisoning in which he inherits his wife's wealth:-

(a) In the first case we can consider this an accident;
(b) If it is repeated to two other victims then it becomes QARINAH.

3. Presumptive Proof

Let's say that "K" is pregnant. The second fact is that "K" does not have a marriage certificate. We can conclude that "K" has committed adultery.

4. Motive

If a husband beats his wife, and there are witnesses to prove the fact that he used a harmful weapon, like a hockey stick, coupled with his utterance of foul language, which points to the conclusion that the husband has committed cruelty to his wife.

5. Res-Gestae

The term Res-gestae means part of a story. If a person runs away from his house while his house is burned down, the fact that the person is running away and his hurried demeanour will prove that he committed arson.

6. Expert Opinion Evidence

In order to prove that a particular solution is acid or alkali, litmus paper is used. If the litmus paper turns red then it is acid, if it turns blue then it is alkali.

It is fascinating to acknowledge the fact that a simple term, "QARINAH" can explain numerous terms used in the English Law of Evidence.

To what extent can this term Qarinah Law of Evidence is used? An innocent person can be implicated for a CRIME just by two or three weak facts to substantiate the conclusion made.

In the Islamic Law of Evidence, there is what is called a weak Qarinah and a Strong Qarinah depending on the varying degree of circumstances. Only the strong Qarinah is taken into consideration when implicating an accused for a crime and it must be extremely used with caution when it comes to HUDUD Cases.

In conclusion, I am fascinated with this single term that describes various situations of the Law of Evidence.

Attorney Humour

A man in an interrogation room says, "I'm not saying a word without my lawyer present." "You are the lawyer," said the policeman. "Exactly, so where's my present?" replied the lawyer.

This new law will protect SMEs from going bankrupt. How does it work?

Introduction

There are certain incentives, such as the subsidy for employee wages, which were introduced by the government to ease the economic blow due to the Covid-19 pandemic. Companies and SMEs in particular had taken a brunt due to their inability to operate for a few months during the MCO period. As a result, the government has introduced a temporary relief in the form of a new bill called the Covid-19 (Temporary Measures) Bill. One of the main intentions of this Bill is to prevent legal actions against parties who cannot fulfil their contractual obligations due to the pandemic.

The Covid-19 Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020

The aforementioned Bill has been gazetted on 23 October 2020 and will be enforced for a period of two years.

To cushion the effects of the Covid-19 pandemic towards companies especially SMEs which cannot fulfil their contractual obligations, the Covid-19 Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 provides for a temporary pause in their supposed contractual obligations for six months.[1]

This essentially means that neither party is able to sue the other for the failure to fulfill their contractual obligations due to their businesses being affected by this pandemic. Therefore, the other party will not be able to seize company property or wind up a company. Our neighbouring country, Singapore, has gazetted their Covid-19 (Temporary Measures) Act 2020 on April 9 and has similar provisions to protect businesses affected by the pandemic. However, this isn't automatic protection, as businesses are required to prove that their non-fulfillment of contractual obligation had been due to the pandemic. To avoid abuse, an assessor may be asked to determine if this particular situation falls within the ambit of the temporary relief.

Some of the highlights of our Act 2020 include the following:-

a) Settlement out of Court

   The introduction of the Covid-19 Mediation Centre encourages parties in contractual disputes to opt for mediation services for disputes below RM 300,000.

1 Additional comment: for the Covid-19 Temporary Measures for Reducing the Impact of Coronavirus Disease 2019 (Covid-19) Act 2020, it is important to note that existing suits involving breaches of contract that were commenced before the Act was introduced, would not be included in this narration.

To further encourage parties not to bring their action to court, the government will cover the mediation costs for those who fall within the categories of small and micro enterprises, B40 and M40. Further information can be obtained via email at pertanyaan@pmc19.gov.my .

b) Late Payment Charges under the Housing Development Act (Control and Licensing) Act 1966

The Developer cannot impose late payment charges on Purchasers of a development property if the Purchasers are unable to pay the instalments between the periods of 18 March 2020 to 31 August 2020.

c) Extension of Time for Housing Developers

The period of 18 March 2020 to 31 August 2020 shall not be included in the calculation of the time for the Developers to deliver vacant possession. This would mean that Developers are given additional 6 months to complete their housing project. Hence, Purchasers are not able to seek Liquidated Damages against the Developers for not completing the project within the supposed stipulated time.

d) Warrant of Distress

Landlords are not allowed to seize and sell the Tenants' property if the Tenants cannot pay rent for the period between 18 March 2020 to 31 August 2020.

e) Suppliers cannot Repossess Goods

There is a suspension of rights towards Owners to repossess goods under a Hire Purchase Agreement for any default in payment between 1 April 2020 to 30 September 2020.

f) Longer Warranty for New Homeowners

The 24 months Defect Liability Period is extended for houses purchased before the MCO period, as the period of time between 18 March 2020 to 31 August 2020 is not to be calculated in the computation of the defect liability period. Essentially this would mean that Purchasers now have a longer time to claim for any defects.

Conclusion

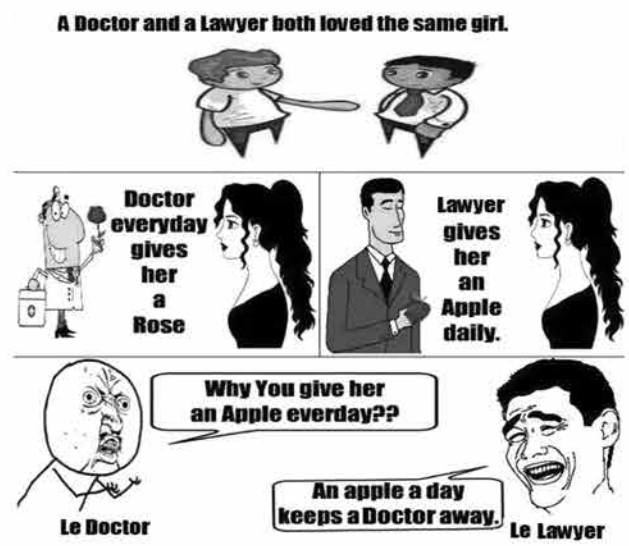
With the introduction of the Covid Act, it is hoped that companies and SMEs will be given temporary relief and would be able to recover from the economic brunt due to the Covid-19 pandemic.

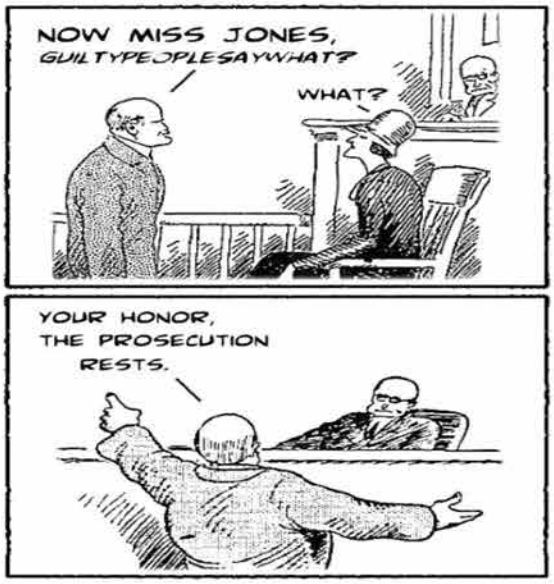
The information in this article is sourced from Ask Legal (6 Nov 2020) "*This New Law Will Protect SMEs from going bankrupt. How does it work*?", retrieved from https://asklegal.my/p/protect-SME-close-down-temporary-relief-written-obligation-contract?fbclid=IwAR2rRVjyrsB7j2lKVUlvjq76B4wtvbBsvaPSpiK6tTP2I277Ko6w54Cv7gg .

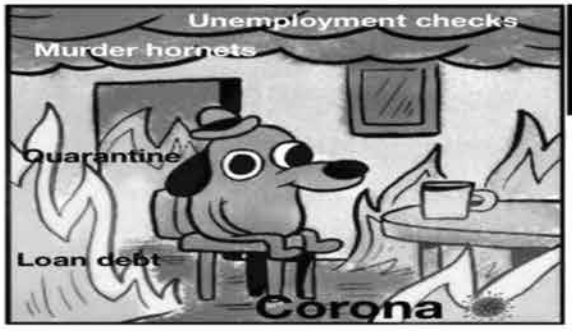
Paraphrased by Kimberly Lim Ming Ying

Attorney Humour

Compiled by Guhapria Kumaravellu







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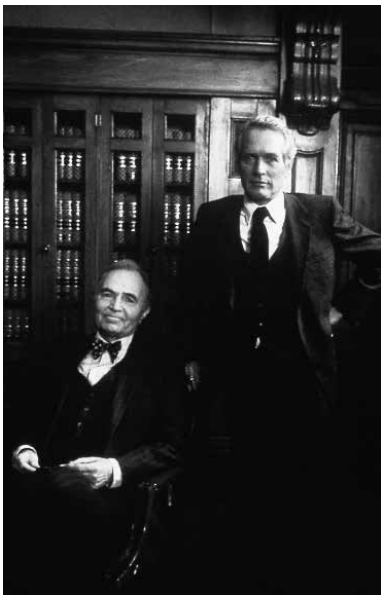
Legal Movie Review
THE VERDICT

by Ramesh Rajadurai

The Verdict is a 1982 American legal drama directed by Sidney Lumet and written by David Mamet adapted from Barry Reed's eponymous novel. It stars Paul Newman, Charlotte Rampling, Jack Warden, James Mason, Milo O'Shea, and Lindsay Crouse.

Once-promising attorney Frank Galvin, framed for jury tampering years ago, was fired from his elite Boston firm and is now an alcoholic ambulance chaser whose practice is on the verge of collapse. As a favour, his friend and former teacher Mickey sends him a medical malpractice case in which it is all but assured that the defence will settle for a large amount. The case involves a young woman given an anaesthetic during childbirth, after which she choked on her vomit and was deprived of oxygen. The woman is now comatose and on a respirator. Her sister and brother-in-law are hoping for a monetary award in order to give her proper care. Frank visits the comatose woman and is deeply affected. Later, a representative of the Catholic hospital where the incident took place offers a substantial settlement. Without consulting the family, Frank declines the offer and states his intention to take the case to trial.



The Verdict garnered critical acclaim and box office success. The film was nominated for five Academy Awards, including Best Actor in a Leading Role (Paul Newman), Best Actor in a Supporting Role (James Mason), Best Director (Sidney Lumet), Best Picture, and Best Adapted Screenplay (David Mamet).

THANK YOU!

Dear _____

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Love, _____

THANK YOU!

Dear _____

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THANK YOU!

Dear _____

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Love, _____

As the year ends, here are 6 thank you cards that you can cut and gift to a friend or relative. Spread the gratitude!