VOIX D'ADVOCAT

THE SAME VOICE, A LAWYER'S VOICE

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FOR MEMBERS ONLY

FEATURING
DATUK SERI GOPAL SRI RAM

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2021 - 2022

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A WORD FROM THE EDITOR

We welcomed in the year 2021 with hope. Hopeful that we would be released, to some extent at least, from the COVID-19 pandemic. To our dismay, it remains a mere hope as we traverse the first half of the year. In spite of shortfalls and drawbacks that ensued with the pandemic, our readiness to embrace digitalisation has shed some light on our navigation during this trying time. Undeniably, technology plays a pivotal role in our lives now. Virtual hearings and virtual meetings are part of the new normalcy for us in the legal fraternity.

The Penang Bar Committee's virtual election, notwithstanding hiccups, is another example of the importance of technology in assisting us in moving forward. The Editorial Board welcomes Ravi Chandran Subash Chandran, our new Chairman, and his committee in guiding the Penang Bar to the pinnacle under his leadership. Our heartiest congratulations to him and his team.

This edition of the Voix d'Advocat carries an exclusive interview featuring Datuk Seri Gopal Sri Ram. We had the privilege of spending an afternoon, very constructively, with our former Federal Court judge known for his deliverance of *ex tempore* judgments, amongst others. Datuk Seri quenched our thirst for knowledge, tirelessly answering our questions and sharing his experiences. Three hours passed in an instant! Being present in the same room with the epitome of knowledge and listening to him speak was memorable. To our surprise, the Free Malaysia Today (FMT) stated excerpts of our interview, and we are proud to present that interview to our Members. I am certain Datuk Seri Gopal Sri Ram's recount of experiences and knowledge will be valuable.

Apart from the usual segments, this edition has incorporated a few good reads pertinent to the current situation and legal development for the benefits of the Penang Bar members.

On a final note, I take this opportunity to welcome our new members: Seffia Gan, Ooi Tat Chen and Quiin Hng. "Teamwork is the ability to work together toward a common vision." I applaud my team for upholding it and the co-operation shown. The Editorial Board urges more participation and contributions from the Penang Bar members.

Happy reading, and stay safe!

Warm regards,

Krishnaveni Ramasamy
Editor
June 2021
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Chairman's Note

2020 will go down in history as the Year of the Pandemic.

The Covid-19 Pandemic will be a watershed moment in our way of life, which has been drastically changed with the adoption of the New Norms.

A popular joke these days is that in Pre-2020, everyone was being exhorted to "be positive" but these days, we all pray to be negative.

Jokes aside, the new norms have not spared our practice, with overnight queues at the land office, virtual proceedings, so much so that the prefix "e" seems to have attached itself to everything. As said by a philosopher whose name I cannot readily recall, **"Change is the only constant."**

With that in mind, we in the legal profession will have to accept the changes, but we should not do it silently as a victim of circumstances but by being proactive and thinking out of the box. For a start, our IT subcommittee has transformed itself as the Legal Tech Subcommittee with a charter to explore avenues to assimilate the latest digital technologies into our practice.

I wrap up this address by wishing you and your loved ones the best of health and fervently hope that 2021 will be seen as the year of recovery for all.

Regards,

Ravi Chandran Subash Chandran
Chairman
Penang Bar Committee 2021/2022

Face to Face with...

"Knowledge is the Greatest Power" — A Conversation with Datuk Seri Gopal Sri Ram

by Kimberly Lim Ming Ying

"When light passes through a prism, it breaks down to its constituent colours. The same way if you interpret the word 'life' prismatically, it cannot mean mere animal existence."

Such were the words of our former Federal Court judge, Datuk Seri Gopal Sri Ram, one fine Thursday when we met him for this interview. Dressed in bright and fun colors of purple and pink, Datuk Seri welcomed us into his conference room, his presence undoubtedly formidable as he sat at the end of the table.

Indeed, Datuk Seri's reputation precedes him as we nervously took our seats; there were far too many stories, recollections of memories that were stretched across years and years of his career on the bench. Hearts in our throats, we stepped into the conference room full of anticipation of the unknown, of treading into uncharted waters. We stepped out of the room three hours later, with an indescribable feeling of awe carved into our hearts forever.

The Beginning

The common stereotype of lawyers being terrible with numbers does not apply to Datuk Seri, as his first love had been mathematics. Coming from your typical Asian household, however, Datuk Seri recounted with a laugh that his mother wouldn't give him five cents if he had studied mathematics in university.

And so, Datuk Seri's journey in the legal fraternity began on 16 July 1966, when he arrived at 6 in the morning in London to read law. Exactly three years and twelve hours later, on 16 July 1969 at 6 in the evening, he was called to the English Bar at Lincoln's Inn. Datuk Seri had been in practice for a number of years until he was appointed to be a Court of Appeal judge in September 1994. Datuk Seri retired as a Federal Court judge in February 2010.

When asked what his aim was in becoming a judge, Datuk Seri answered that his ***"main intention was to work hard and make sure the streams of justice flowed pure and swift."*** It was the paramount reason that pushed him into delivering *ex tempore* judgments, embodying the principle that justice delayed is justice denied.

Accompanied by a strong foundation in the law, to Datuk Seri, the ***"easiest thing to do is to decide the case, easier than that is to write the judgment."*** The only time he had some semblance of difficulty was during the case of ***Abdul Razak Datuk Abu Samah v Shah Alam Properties Sdn Bhd,***[1] where it took him two months to write a judgment. Datuk Seri overcame this difficulty by careful thought and deliberate consideration, harkening back to the first principles of contract law on the classification of contractual statements.

Judicial Temperament

Our curiosity of getting to know Datuk Seri better led us into asking him this — ***what do you think is your greatest strength and weakness?***

His answer came swiftly, without an ounce of doubt.

"*I have no strength, only weaknesses. I can't say which is my greatest strength because I have none."*

Datuk Seri proceeded to elaborate that to have strength, one needs to have the qualities of somebody like the late Chief Justice Verma of India. The late Chief Justice had, against the wishes of his brother judges, succeeded in convincing the government to agree that judges should declare all their assets upon the taking oath of their office. That, in Datuk Seri's opinion, showcased the strength of character.

Another person of great character in his view is the Right Honourable Lord David Neuberger of Abbotsbury. An admittance of his mistake in a previous judgment may seem minuscule, but in actuality, takes great character.

"It (ego) creates arrogance, and arrogance is the first hallmark of ignorance. You must be prepared to be corrected, and to correct yourself."

Datuk Seri didn't believe he had any judicial temperament. In fact, he had admitted, firmly, that he had a total absence of judicial temperament. That he was *"completely unfit to be a judge"*.

Of course, his demeanour on the bench was notoriously acknowledged among the legal

1 [1999] 2 MLJ 500 (CA)

fraternity. When the members of the Bar discovered that the hearing of their cases would be held before Datuk Seri, such discovery often came with an ensuing sigh of trepidation. The ardent expectation towards counsel submitting their case in front of Datuk Seri was not something to be trifled with; an unprepared counsel was akin to digging their own grave in Datuk Seri's court.

Datuk Seri mused later on that, perhaps, his strength was his willingness to work hard. But he opined that it was a common feature everyone has, so he didn't think it was a trait of strength.

Fundamental Liberties

(i) The Right to Life

Datuk Seri, being a staunch fighter of fundamental liberties enshrined in our Constitution, led us into asking him about his opinion on Article 5 - The Right to Life. He had once decided, in ***Tan Tek Seng v Suruhanjaya Perkhidmatan,***[2] that the word 'life' could not be read merely in its literal meaning. In interpreting the word 'life', Datuk Seri was very much guided and impressed by the judgment of Justice Field in ***Munn v Illinois,***[3] where he said in the dissenting judgment in the US Supreme Court that life is not mere animal existence. That it was a concept submerged in a number of different ideas —*like a layer cake*, was the metaphor Datuk Seri had given.

He reiterated that ***"the Constitution is an organic instrument. It is like a living tree, whose branches keep growing and stretching out and covering more and more areas, giving cover to wider areas."***

Such concepts encompassing all the elements which make up the quality of life must ***"keep developing and enlarging, but never contracting in the passage of time."*** One example Datuk Seri provided was how before 1882, women could not own property. Rather, women were *regarded as property*. ***"Try telling that to women today, that is to say, if you don't want to stay alive. If you have no interest in the right to life, you can tell a woman that,"*** Datuk Seri said, just as the room erupted into laughter.

But the point remains. In the passage of time today, the right to life would include the right for a woman to bear children, to not be dismissed from work simply because she became pregnant.

Therefore, the interpretation of such words must be according to the generation, and the point of time to which they fall for interpretation.[4]

(ii) Freedom of Speech and Media

The right to freedom of speech comes with your neighbour's rights to have his reputation protected. It is a great responsibility which society must shoulder upon in order to live harmoniously and in an even tempo. A fine line that must be adhered to, otherwise it isn't freedom of speech, but abuse of freedom of speech.

Datuk Seri elaborated that there are sufficient laws in place in the Penal Code to take care

2 [1996] 1 MLJ 261

3 [1877] 94 U.S. 113

4 Lord Hoffman in Boyce & Anor v R (Barbados) [2004] UKPC 32

of that — and that the Sedition Act is not necessary. Being an Act enacted in 1948 pre-parliament makes it unconstitutional.

"You can take the Sedition Act, frame it, and admire it on your wall, but you can't enforce it. The moment you seek to enforce it, you fall foul of Article 10(1). You can put flowers on it, scent it, put perfume on it, and hang it up. Look at it everyday and admire it on the wall. But you can't use it."

That was what Datuk Seri thought about freedom of speech; that it came with a responsibility to speak responsibly.

In light of recent times, however, Datuk Seri supports the minority judgment of the MalaysiaKini case; that in his opinion, MalaysiaKini committed no offence of contempt.

Datuk Seri went on in sharing his view that there should be no laws governing and regulating the media. What he thinks could be good would be to establish a Press Council made up of independent people who do not have any positions in the government. At the same time, the right to make representations ought to be given to the government as well — in other words, to make them like any other private persons.

Public Interest Litigation

An important procedural mode to facilitate the access of justice is public interest litigation, an area of the law, which is all too familiar to Datuk Seri.

Two important Articles on this topic are Article 8(1) on equality and Article 69(2), which states that the Federation may sue and be sued. As it is, the word "sued" has been interpreted at common law to mean "sued to judgment". In other words, to be able to acquire its targeted remedy, not just simply to file an action. Datuk Seri elaborated that this would mean that an individual could obtain against the government, all those remedies which a private person can get from one another. To arm, this statement of his, reference was made to Section 29(1) of the Government Proceedings Act 1956, which states exactly that. It is Proviso (a) and (b) that raise the eyebrows of many, as they prevent the remedy of injunction and specific performance, as well as the inability to recover land or other property against the government. These two Provisos, in Datuk Seri's belief, are unconstitutional in respect of Articles 69 and 13.[5]

Moreover, the Government Proceedings Act, being a Pre-Merdeka statute ought to automatically trigger the applications of Articles 162(6) and (7).[6] But ***"Who has argued the point? Nobody!"*** Datuk Seri retorted in utter disappointment.

The fact of the matter is this; the laws on public interest litigation, in Datuk Seri's opinion, are more than enough to protect the rights of the public. Ultimately, it all boils down to how active and interested the Bar is. When Datuk Seri was a young lawyer, he used to think of ways to bring an action against the government, to challenge them. However, he has observed a decline in this movement among the members of the Bar in recent years, to which he deeply frowns upon.

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5 Article 13 – The Right to Property

6 Article 162(6); Any court or tribunal applying the provision of any existing law which has not been modified on or after Merdeka Day under this Article or otherwise may apply 138 with such modifications as may be necessary to bring it into accord with the provisions of this Constitution.
Article 162(7); in this Article "modification" includes an amendment, adaptation, and repeal.

"It is all up to you all. You must file the action."

Datuk Seri stated sharply, ***"The judiciary's function must be triggered. The judiciary is like a powerful cannon, you must first of all, arm it and then trigger it. But if you don't arm it and don't trigger it then you can't say that it's not doing anything. It doesn't work by itself. It's like your motor car, you have to start it."***

His Biggest Regret Today

Datuk Seri opined that our judiciary is independent. And one major attribution to this is our current Chief Justice of Malaysia, the Right Honourable Tengku Maimun Tuan Mat, whom Datuk Seri spoke highly of during our interview with him.

"*She is the only man in the Federal Court when it comes to Constitutional cases. She is no one's servant; she is only the servant of the Constitution."*

This wasn't always his opinion; Datuk Seri recalled that he had been slightly skeptical before when he was interviewed directly after her appointment. He was unsure of how TRH Tengku Maimun would fare as the Chief Justice, believing that she **"*has to be seen*"**.

Safe to say that today, TRH Tengku Maimun had proved Datuk Seri wrong.

"In our history, we have not had a better Chief Justice than Tengku Maimun and that includes all that had preceded her, with no disrespect to Tun Suffian and Raja Azlan Shah. No disrespect meant to them, but I think she is the best man for the job. We are very, very lucky to have her. She is very competent. She is decisive, knows what she is doing."

That being said, Datuk Seri stated firmly that ***"the Bar should and must be one hundred percent supportive of our current Chief Justice in her efforts."***

Datuk Seri went even as far as to say that his biggest regret is that he is ***"not sitting in the Federal Court today with TRH Tengku Maimun, to provide her the support which she requires. It would have been a great joy for me,"*** were his exact words.

Such dynamics would have been interesting to watch unfold. Imagine what an impactful duo they could have been, on the bench fighting for justice together!

Advice to Young Lawyers

Being such a senior member of both the Bar and the Bench, it was to no one's surprise that this question was directed towards Datuk Seri **- *what would be his advice to young lawyers these days?***

And he had answered in full confidence,

"Work. Work hard. Arm yourself with knowledge. As your brain grows richer, so will your pocket. Knowledge is the greatest power."

A piece of simple advice, really! But it is a piece of advice coated with substantial truth. It is a truth coupled with the notion that we must constantly be thinking on our feet. Whether it is for our files and cases, or just the law. Thinking is always good.

For aspiring lawyers who wish to one day be on the bench, Datuk Seri's advice is to commit yourself, and be absolutely *in love* with the law; the love for the law is the best acumen to be appointed into the judiciary.

"No distractions. The law is a naughty lady," he joked with a laugh, ***"you must pay full attention to her. If you ignore her, she will dump you and throw you into the volcano and go off for you to burn. But if you look after her and nurture her, she will take you to the heights, to the sky, and the summit of your profession."***

His Proudest Moment

To end this article on a lighthearted note, Datuk Seri recalled fondly the proudest moment of his life.

Many years ago, during the height of ***Asean Securities Paper Mills Sdn Bhd v CGU Insurance Bhd,***[7] Datuk Seri had gotten into a taxi on his way to the Palace of Justice. The taxi driver struck a conversation with him, asking if he was working there. Datuk Seri had humorously replied, **"*Yes, as a clerk."***

The taxi driver proceeded to say that he has no trust in the judiciary except for one fellow.

"*Nama dia, Sri Ram. Dia bagus.*"

Datuk Seri had calmly responded, **"*Oh, you think so?*"**

When he was dropped off at the back of the Palace of Justice, the taxi driver could not understand why the policemen had rushed to open the door for Datuk Seri, quick salutations in hand.

Datuk Seri laughed merrily, stating that, that was truly the best compliment he has ever got.

* The Penang Bar Publication Subcommittee sincerely extends their gratitude to Datuk Seri Gopal Sri Ram for his time and hospitality in conducting this interview.

7 [2006] 3 MLJ 1 (COA),[2007] 2 MLJ 301, (FC)

CHALLENGES FACED BY MALAYSIAN WOMEN WITH CHILDREN BORN OVERSEAS DURING THE COVID-19 CRISIS

"Malaysia is one of the twenty-five countries that deny women and men the equal right to confer nationality on their children. Malaysian men have the right to confer nationality on children born abroad through registration. Malaysian women lack this same right and must apply for their children to acquire citizenship, often waiting for years for a response and with the possibility of rejection without explanation. Malaysia is one of the three countries that deny men equal rights with women to confer nationality on a child born outside of legal marriage. It is also one of approximately fifty countries that deny women equal rights with men to confer nationality on a non-national spouse. Gender discrimination in nationality laws is a root cause of statelessness in Malaysia and countries around the globe."

Statement by Foreign Spouses Support Group, which leads the Malaysian Campaign for Equal Citizenship.

1. Malaysian woman with a stateless child:

A Malaysian woman living overseas with her stateless child is facing difficulties overseas as they are not receiving support from the foreign Government. She also cannot return to Malaysia due to her child being stateless. She fears that if she returns to Malaysia, her child will not be given the same rights as other Malaysian children, especially in terms of access to healthcare and education.

2. Pregnant Malaysian women overseas:

Pregnant Malaysian women are facing difficulties entering Malaysia during this Movement Control Order (MCO) to deliver their children in Malaysia. Children born overseas to Malaysian women are not automatically Malaysian citizens upon registration (unlike children born overseas to Malaysian men), which also means that these children will not get Malaysian citizenship. Furthermore, during this time, it is also difficult for their non-citizen husbands to accompany them to Malaysia.

Anyone entering Malaysia during the Movement Control Order (MCO) would also be required to be quarantined in the Government centres for 14 days. During this period, visas are not being issued to foreign husbands of Malaysian women to return to Malaysia with them, making the situation difficult.

Cases in point:-

- A Malaysian woman overseas has to undergo her pregnancy alone as she neither has any female family member in Dubai to care for her nor can she invite her Malaysian mother to travel to Dubai due to restrictions.
- Similarly, another Malaysian woman who has been struggling with anxiety during

her pregnancy has given birth overseas as her husband, who is not on the spouse visa, would not have been allowed to enter Malaysia during the MCO period.

- Another Malaysian woman overseas who is pregnant says, "I was planning to give birth in Malaysia but because of the Coronavirus, travels are restricted. I might not have a choice to give birth in Malaysia, which is a pity for my baby. Because Malaysian women are not able to obtain automatic Malaysian citizenship (upon registration) for their own children, this is just getting more and more impossible."

Laws that are gender-discriminatory make women more vulnerable during times of crisis. In the case of Malaysia's discriminatory citizenship law, women are left with no choice but to give birth overseas at the cost of not being able to automatically confer citizenship on their children and having to rely on a tedious application process fraught with delays and rejections, without any guarantee to Malaysian citizenship.

3. Non-Malaysian children born overseas to Malaysian women who are not able to acquire Malaysian citizenship are not given long term visas if the child's foreign father is not present during the registration.

This has resulted in an unfortunate situation during this Covid-19 pandemic whereby Malaysian women are choosing to stay back in countries with rapid cases of Covid-19 such as Italy, South Korea, and the USA with their children. They rather do this than return to Malaysia, due to the fact that their non-citizen husbands and children will only be provided short term visas, which are not available during the travel ban.

3.1. Spouses of Malaysians overseas not allowed to return to Malaysia:

According to the initial clarification by the Government of Malaysia, spouses and children of a Malaysian resident are allowed to enter Malaysia on condition that they have a long term social visit pass (LTSVP), and are required to undergo 14 days of self-quarantine. However, the announcements that followed included stringent measures such as mandatory quarantine in the Government quarantine centres.

As the conditions put forth by the Government require that spouses and children have an LTSVP, many Malaysian women living overseas have reported that their children and husbands would not be able to enter the country should they decide to return as a family.

A Malaysian woman living overseas with two children said: "Both my children are Malaysians. My husband does not have a residence pass. We have no choice but to stay in Kenya (although) our preference would have been to be in KL at this time."

In certain cases, the foreign husbands of these Malaysian women may be working overseas as they face restrictions in terms of securing job opportunities while being on a spouse visa in Malaysia. As the order only allows for spouses with a spouse visa to enter Malaysia, there may be a case of family separation in this situation.

3.2. Malaysian woman unable to repatriate with her child:

A Malaysian woman chose to remain in Italy instead of repatriation to Malaysia although the Covid-19 situation was escalating there. This was because of the uncertainty surrounding the legal identity of her daughter; her daughter does not hold Malaysian citizenship as she was born overseas but has an application that is currently "in process". She says staying in the foreign country provides more security for her child and herself, as they are allowed to be there on a long term basis unlike in Malaysia where her non-Malaysian daughter gets shorter term visas.

4. Divorce - Vulnerability to Domestic Violence

The Covid-19 situation and MCOs also make it more difficult for women to leave abusive relationships. A Malaysian woman living overseas who is undergoing a divorce shared her experience; she said *"... my spouse attempted to sell the house and move us out (during the pandemic). I have to resist lots of pain and constant verbal abuse and humiliation in front of our kids. (I had) asked for protection but courts are closed, (hence) there is a delay in the procedure."*

As her children are non-Malaysians, the limited options for her as a Malaysian woman to confer citizenship on her children born overseas creates additional barriers for her in times of crisis as she is forced to rely on her foreign husband for citizenship of her child.

5. Special Needs Child

A Malaysian woman with a 4-year old non-Malaysian child with development delay cannot resume occupational therapy due to the MCO. Her child relies on therapy from a private institution as they cannot access public therapy due to her status as a non-Malaysian.

6. Application for Government aid during Covid-19 crisis: Bantuan Prihatin Nasional (BPN)

The BantuanPrihatinNasional (BPN) is a Government aid as part of the Prihatin Rakyat economic stimulus package by the Malaysian Government. However, the eligibility requirements for Malaysians in transnational marriages are unclear, which include Malaysian women married to foreign men with children born overseas.

While the applications of some women were approved, most other women currently await the result of the application. Some women however were unable to apply via the online portal as they were notified to make a manual application at the counter (which would not be possible during the MCO).

Recommendations

A. The Government of Malaysia should allow Malaysian women to confer citizenship on their children and spouses on an equal basis as Malaysian men, especially to children born overseas during the MCO as a temporary measure until full equality is enshrined in the citizenship law.

B. Review issues pertaining to Long Term Visas of non-citizen children and accept Malaysian mothers as equal guardians without the requirement of the presence of the foreign father for visa approval or renewal.

C. Offer Permanent Residence (PR) status to children of Malaysians, once the child is on the Long Term Social Visit Visa. This facility should be approved within six (6) months of submission of application and granted until the age of 18. This will enable the children to access to health care and education on an equal basis as Malaysian children.

Sourced from Global Campaign for Equal Nationality Rights. Retrieved from: https://equalnationalityrights.org/news/105-challenges-faced-by-malaysian-women-with-children-born-overseas-during-the-covid-19-crisis#:~:text=Malaysian%20men%20have%20the%20right,possibility%20of%20rejection%20without%20explanation

Compiled by Ooi Tat Chen

COVID-19: FRUSTRATION & CONTRACTS OF EMPLOYMENT

Introduction

Ramifications of an unfair dismissal claim can be far-reaching, and in some cases, catastrophic to the business. In Malaysia, some 100 Malindo Airways staff have reportedly filed a representation with the Industrial Relations Department for unfair dismissal after their contracts were prematurely terminated during the movement control order (MCO). Under **Section 20 of the Industrial Relations Act 1967**, an employee who is dismissed or who considers their dismissal to be without just cause or excuse may file a written representation to the director-general of industrial relations within 60 days of the date of their termination or during the period of their notice of dismissal.

Courts are generally reluctant to find that an employment contract has been frustrated, largely because the doctrine allows employers to sidestep statutory protections afforded to employees. Nevertheless, unprecedented times call for unprecedented measures and frustration may become a useful tool in certain employers' fight against the disruption caused by the COVID-19 pandemic. A key question is **whether an employer can rely on the doctrine of frustration in the absence of a force majeure clause in the employment contract.** In this article, the author will focus on Malaysian jurisprudence in this regard.

What is the Force Majeure clause?

A force majeure clause expressly anticipates that there may be a supervening event beyond the control of the parties, which might affect the performance of a contract. This could be a change of factual circumstances such as a pandemic causing staff to be ill and unable to work or a legal change such as the government's guidance on isolation, social distancing, and shielding.

A typical force majeure clause may be worded as follows:

"A party to this contract shall not be liable for any losses and damages caused by any delay or for the consequences of any delay in performing any of its obligations under this contract if such delay is due to any acts of God, strikes, fire, pandemics, riot, strikes, lockouts or by any other causes which are beyond its reasonable control, and it shall be entitled to a reasonable extension of the time for performing such obligations."

It is rare for a force majeure clause to be drafted into a contract of employment but not impossible. Therefore, careful consideration of the contract and any associated incorporated (or other) documents should be undertaken. It is more common in commercial contracts to include epidemic or pandemic as a term of the contract. It is very unusual to see these clauses in employment contracts unless the employee is senior in the organisation. Such clauses often require notice to be given by the other party as soon as possible of the difficulty or impossibility of performing the contract.

What is the Doctrine of Frustration?

Employers would want to rely on the common law doctrine of frustration as there is no dismissal in law when the employment contract has been frustrated as decided in **Raj Joseph Appadorai v Linde Malaysia Sdn Bhd [2019] 2 ILR 449**. In the absence of a force majeure clause in the employment contract, the affected party may have the option to rely on the doctrine of frustration. In comparison with force majeure where it is an agreement as to how outstanding obligations should be resolved upon the onset of a foreseeable event, the doctrine of frustration concerns the treatment of contractual obligations from the onset of an unforeseeable event (see **Glahe International Expo AG v ACS Computer Pte Ltd [1999] 2 SLR 620**).

The doctrine of frustration is embodied in **Section 57 of the Contracts Act 1950** where a change in circumstances has rendered the contract impossible to perform. Specifically, **section 57(2) of the Contracts Act 1950** states, "[a] contract to do an act which, after the contract is made, becomes impossible, or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful."

The doctrine of frustration has a similar effect as a force majeure clause, in the sense that it relieves a party from his contractual obligations if an intervening event has disrupted the continued performance of the contract. However, the Courts are generally reluctant to disturb the bargain between the parties and thus, circumstances resulting in the frustration of a contract are narrowly construed. The Federal Court in **Pacific Forest Industries Sdn Bhd & Anor v Lin Wen-Chih & Anor [2009] 6 MLJ 293** held that a contract is not frustrated merely because its performance has been rendered more difficult to perform.

When a contract is frustrated, it ends automatically by operation of law and is rendered a nullity, thus discharging the parties from further obligations under it. The parties cannot elect to keep it alive. There is neither a dismissal on the part of the employer nor resignation on the part of the employee. Accordingly, the employee: a) cannot claim unfair dismissal; b) is not entitled to any notice or payment in lieu. This consequence is more drastic as compared to a force majeure event, which only suspends the performance of the contract for the period that the event subsist, unless the contract provides for automatic termination or is terminated by the counter party exercising its right to do so under the contract.

Can an employer rely on the doctrine of frustration?

The elements in determining whether a contract has been frustrated were set out by the case of **Guan Aik Moh (KL) Sdn Bhd & Anor v Selangor Properties Bhd [2007] 4 MLJ 695**:

1. The event relied on must be one for which no provision has been in the contract. If a provision has been made, then the contract must govern;

2. The event relied upon must be one for which the party is not responsible. Self-induced frustration is ineffective; and

3. The event must be such that renders it radically different from that which was undertaken by the contract. The court must find it practically unjust to enforce the original promise under the contract.

Arguably, the first and second elements can be satisfied in light of the implementation of the MCO due to the COVID-19 pandemic. Nevertheless, it may be difficult to prove that the event has rendered the performance to be radically different or impossible under the contract. If the employees are able to work from home, it is unlikely that an employer will be able to rely on the doctrine of frustration during this period. This would not render the contract entirely impossible to perform.

In the Hong Kong case of **Li Ching Wing v Xuan Yi Xiong [2004] 1 HKLRD 754**, it was argued by a tenant that his tenancy agreement was frustrated during the outbreak of SARS, as he was not allowed to stay in the premises for 10 days due to an isolation order issued by the Hong Kong Department of Health. The District Court held, inter alia, that the tenancy agreement was not frustrated because the isolation order was only for a short duration in the context of the lease at issue, i.e.10 days out of a 2-year tenancy, and such event did not significantly change the nature of the contractual rights and obligations from what the parties could reasonably have contemplated at the time of the execution of the tenancy agreement.

In the case of **V Kandiah v. The Government Of The Federation Of Malaya [1952] 1 MLJ 97**, the court accepted that the employee's contract of service with the Government of the Federated Malay States was terminated by reason of frustration due to the occupation of Malaya by the Japanese Forces for 3 and a half years. Similarly, in the case of **Sathiaval Maruthamuthu v. Shell Malaysia Trading Sdn Bhd [1998] 1 CLJ Supp 65**, the doctrine of frustration of contract was applied as the period of non-performance by the employee was at least 2 years given his detention at the rehabilitation centre.

Hence, with respect to COVID-19, for individuals and businesses that wish to rely on frustration, the main hurdle to overcome would be the ability to demonstrate that the changes to the nature of contractual obligations are *permanent, and not just temporary or transient*. Most effects of the COVID-19 such as illness, quarantine, travel restrictions, shuttering of businesses and schools, or working from home, seem temporary. However, if time is of the essence for the performance of a fundamental term in a contract, and such performance is utterly prevented by the pandemic, the parties may have a case.

In contrast to normal employment contracts, particularly for the aviation industry, it is argued that COVID-19 has rendered both employers and employees physically or commercially impossible to fulfil the obligations set out under the contract or it changed the nature of the contractual obligation from what was initially agreed upon under the contract. The COVID-19 pandemic has had a significant long-term impact on the aviation industry due to travel restrictions and a slump in demand among travellers. Significant reductions in passenger numbers have resulted in flights being cancelled or planes flying empty between airports, which in turn massively reduced revenues for airlines and forced many airlines to lay off employees or declare bankruptcy.

It is thus submitted that the case of **Li Ching Wing** could be distinguished here because the

changes to the nature of contractual obligations in the aviation industry are not just temporary or transient as it is hard to predict when will the travel restrictions be lifted globally. Also, the contract is now extremely expensive to perform due to changes in economic conditions. Thus, COVID-19 has rendered long-term frustrating events. Following the cases of **V Kandiah** and **Sathiaval Maruthamuthu**, it is submitted that the COVID-19 pandemic prevents employees in the aviation industry from working, so arguably the doctrine of frustration can be applied in this case. Whilst frustration might not be available this may result in redundancy issues.

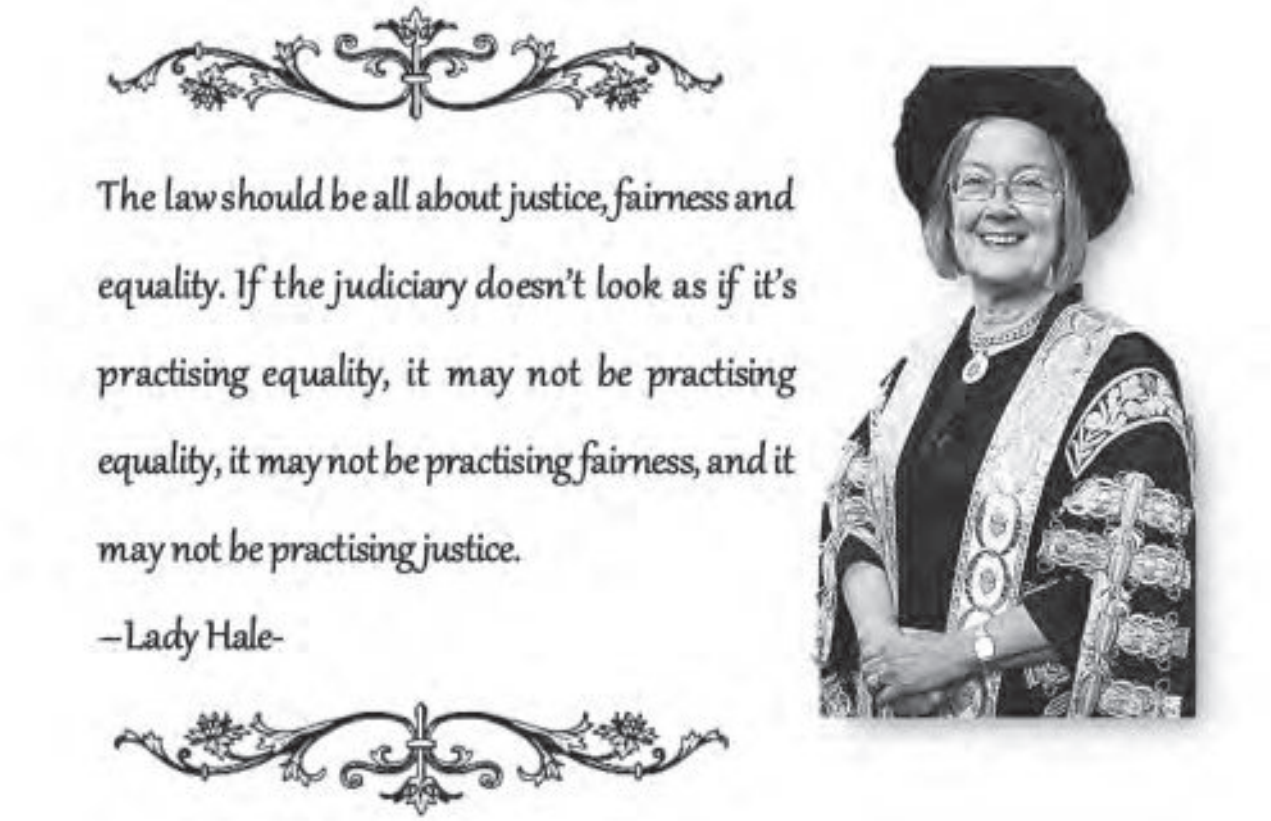
Conclusion

Establishing a contract has been frustrated is not an easy task. In order for employers to successfully defend an unfair dismissal claim under the IRA 1967, employers will have to prove that the dismissal is "with just cause and excuse". As such, alternative 'defences' to a COVID-19-related unfair dismissal claim would be to argue that such employees were fairly dismissed by way of capability, redundancy or, SOSR, depending on the circumstances.

The Industrial Court also takes into account "procedural fairness", so it is also entirely possible that an employer may have good grounds for dismissal but still lose the unfair dismissal case because the dismissal was procedurally unfair or against the rules of natural justice. Accordingly, it would still be advisable to follow a fair process before ending an employee's contract. Hopes should not be solely pinned on the doctrine of frustration.

Sourced from Chong Wei Li (August 13, 2020) Covid-19: Frustrations & Contract of Employment. Retrieved from: https://www.mylegalresponse.com/post-hlaqc/covid-19-frustration-contracts-of-employment.

Compiled by Clarie Ann Malar Jochaim



THE TWO CONTRACT APPROACH REVISITED

by Kandiah Chelliah
Selangor Bar

The Federal Court's decision in ***Malaysian Motor Insurance Pool v Tirumeniyar A/L Singara Veloo (2019) 1 LNS 1564 ("Tirumeniyar")*** on 15 October 2019 laid down the principle of the Two Contract approach in motor accident claims involving employees being carried in the Course of or in pursuance of their Employment in the Employer's motor vehicle and driven by their Authorised Driver.

Further, has *Tirumeniyar,* to some extent, shot some holes in Letchumanan's case decided by the Court of Appeal on 14 April 2011?

1. At the outset, it must be mentioned that an employee being carried in a motor vehicle belonging to his Employer and who is also the Insured, (*i.e*. one who paid and taken out the motor insurance policy for the vehicle) with the vehicle driven by another employee and is involved in an accident with or without involving another vehicle, faces an uphill task to claim indemnity *i.e*. damages for bodily injuries or his family if he dies, for dependency or loss of support, from the said vehicle's Insurers.
2. The Insurers will conveniently refer to one standard clause in their policy of insurance which states:

   "The Insurers shall **NOT be liable** in respect of:
   i) *death or bodily injuries to any person in the employment of the Insured arising out of and in the course of such employment.*
   ii) death or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the motor vehicle..."
3. In *Letchumanan Gopal v Pacific & Orient Insurance Co (2011) 5 CLJ 866*, the family of Kanisan, the deceased, secured judgment in the Sessions Court. But the Insurers claimed they are not liable and the family members *i.e.* Plaintiff then filed a Recovery Action against the Insurance Company, which was granted in the Sessions Court but the High

Court and Court of Appeal rejected their claim and referred to the clause in the policy which is as follows:-

'Death of or bodily injuries to any person (other than a passenger carried by reason of or in pursuance of a contract of employment)…"

NOTE: It is also further assumed that other clauses are similar to the standard policy clauses and terms in a Commercial vehicle policy in *Letchumanan*'s case since the Court of Appeal did not refer or note down other clauses/terms.

4. No further leave to appeal to the Federal Court was undertaken. It is a fact in *Letchumanan*'s case, that the deceased, Kanisan, was carried on the motor lorry belonging to Jagoh Angkat Sdn Bhd by its driver, one Katurajah. Kanisan and the others seeking casual/daily work would usually wait around the Exit/Entrance gate of the facility/factory seeking the driver's consent to carry them to the lorry's destination to unload the bags of cement and they would be paid by the consignee/buyer of goods and not Jagoh Angkat, the lorry owner nor its driver.

5. In *Saw Poh Wah v Ooi Kean Heng & Anor (1985) 2 MLJ 387,* the plaintiff, being carried in the motor vehicle, suffered injury as a result of the negligent driving of the authorised driver. Both the Plaintiff and authorised driver were employees of the second Defendant, the owner of the vehicle. The question before the High Court was whether the third-party insurer of the vehicle was liable to cover the losses suffered by the Plaintiff. The standard clauses appeared in the insurance policy issued to the vehicle.

6. The High Court Judge Syed Agil Barakbah allowed the Plaintiff's claim on the principle there were two separate coverages in his 1985 decision. The judge stated that while the coverage against the employer fails due to the Plaintiff being an employee, but there existed a separate cover for the authorised driver. Since the Plaintiff is not an employee of the authorised driver, the learned Judge followed *Richards v Cox (1942) 2 All ER 624*, and two Singapore judgments in arriving at his decision, BUT he was reversed by the Federal Court, and no grounds of judgment were written, thus the Federal Court's reasons or arguments for its decision are unknown.

7. *Saw Poh Wah* ruled supreme from 1985, hence the injured or family of the deceased are precluded from claiming against the employer's vehicle Insurers, but must look at alternative indemnity venues, like SOCSO Personal accident policies, Workmen's compensation (in Singapore), etc.

But fortunately, with *Tirumeniyar*'s decision in the Federal Court, the position has been drastically changed.

Issues in *Tirumeniyar*

8. The serious issue that arose in *Tirumeniyar* was whether as per the usual/standard clauses in a motor vehicle insurance policy and the statute especially Section 91 (1) (aa) and (bb), Road Traffic Act 1987 ("RTA 1987"), the authorised Driver being negligent (in causing injuries/death) ought to be indemnified for the damages suffered by an employee of the Insured (*i.e.* employer) or those carried in the motor vehicle, on the finding that they are not employees of the Authorised Driver. As per the clauses and the Statutory provisions, the injured employee or family of the employee who died is barred from claiming against the employer who is also the insured owner of the motor vehicle, since alternative means or statutory provisions for compensation for such employees/claimants exists, as seen above.

OR, as per the House of Lords decision in *Digby v General Fire & Life Assurance Corporation Ltd (1942) 2 All ER 319*, is it settled authority that in a policy such as that in

question, there is not one contract of insurance only but there is one with the policy holder and one also with each person driving on his order or with his permission.

9. In *Tirumeniyar*, the five (5) member panel of the Federal Court subsequent to an exhaustive study of several English authorities especially *Richards v Cox (1942) 2 All ER 624* ('Richards') and *Digby v General Fire & Life Assurance Corporation Ltd (1942) 2 All ER 319* ('Digby') AND the Malaysian case of *Saw Poh Wah v Ooi Kean Heng & Anor (Asia Insurance Co Ltd as Third Party) (1985) 2 MLJ 387*, plus two Singapore ones, which are *Chan Kum Fook & Ors v The Welfare Insurance co Ltd (1975) 2 MLJ 184* and *China Insurance co Ltd v The Lain Lee (1977) 1 MLJ 1* concluded that there are indeed, two contracts in such vehicle insurance policy.

10. The Federal Court appreciated that the High Court Judge Syed Agil Barakbah in *Saw Poh Wah* relied on *Richards v Cox* and the two Singapore cases referred above *i.e. Chan Kum Fook* and *China Insurance*. But the Federal Court, on appeal reversed the learned Judge's correct approach. No written judgment is available except for some editorial notes. It is indeed significant that the Federal Court in *Tirumeniyar* did declare this earlier decision of the Federal Court is no longer good law. (*See para 91 of the grounds of judgment*).

    And without a written judgment, the reasons for the Federal Court's reversal of the High Court's decision of *Saw Poh Wah* are unknown. Further, the Supreme Court in *United Oriental Assurance S/B v Lim Eng Yew (1991) 3 MLJ 429*, declined to follow the Federal Court's decision in *Saw Poh Wah*.

    It can be presumed that there was some agitation against *Saw Poh Wah*, earlier on, *i.e*. years ago in 1991.

11. The Federal Court in *Tirumeniyar* thus found the present position as follows:-

    (the paragraph numbers are as per the Grounds of Decision).

    "The Malaysian Position"

    "(45) In our view, the 'two Contract approach adapted by the Court of Appeal in *Richards (supra)* and the House of Lords in *Digby (supra)* is correct, in that there may be two separate enforceable coverages in respect of the policyholder on the one hand and the authorised driver on the other, though the overall coverage must still be subject to the limitation and exceptions contained in the policy."

    (46) We think the starting point in addressing why the "two contract approach" ought to be considered correct is based on Section 91 (3) of the RTA which read:

    "(3) *Notwithstanding anything ……. shall be liable to indemnify the person or class of persons specified in the policy, in respect of any liability……"*

    (47) The effect of the above provision is to by-pass the requirement of privity of contract. Before the existence of such a provision, such an arrangement vis-à-vis an authorised driver would have been unenforceable for want of privity. (See *Vandepitte v Preferred Accident Insurance Corporation of New York (1933) AC. 70)* at pages 81-82. However, after the introduction of the above provision, an authorised driver gained the right to claim indemnity notwithstanding that he has paid no consideration towards the policy. See: *Tatersall v Drysdale (1935) 2 KB 174 on* page 182. *5) 2 KB 174 on* page 182. That is the general rule."

12. The sole question put to the Court was as follows:-

    "*Where a Contract of Insurance reproduces or substantially incorporates the exclusion of liability provided for under clauses (aa), (bb), (cc) of the proviso to Section 91 (1) RTA 1987, are those exclusions to be interpreted as applying equally to authorised drivers without the need for express exclusion of such liability*".

(*see para 3 of the grounds of judgement*)

13. It must be noted, on the Court of Appeal's decision, in allowing the recovery action, the Insurers concerned by Consent Judgment paid the judgment sum to the injured Plaintiff i.e. *Tirumeniyar*.

14. The issue, the Federal Court declared, is the following:

"(11) …….. *the issue before this Court in relation to the question of law posed, is whether the Plaintiff is liable to indemnify the 1st Defendant (Insured company and owner of the m/lorry) in the light of the exceptions under the Insurance Policy read together with the statutory exceptions under the RTA*."

15. The Court referred to the various clauses in the policy, which are *parimateria*/ common clauses, found in all motor insurance policies. In *Tirumeniyar*, the Insurers were Malaysian Motor Insurance Pool.

"Section II – Liability to Third Parties

1. The Pool will, subject to the limits of liability, indemnify the Insured in the event of an accident caused or arising out of the use of the motor vehicle…….which the insured shall become legally liable to pay in respect of:
   a) death of or bodily injury to any person
   b) damage to property
2. In terms of, and subject to the limitations of and for the purposes of this Section, the Pool will indemnify any Authorised Driver who is driving the Motor vehicle provided that such Authorised Driver;
   i) Shall as though he were the Insured observe and fulfil and be subject to the terms of this Policy in so far as they can apply.
   ii) is not entitled to Indemnity under any other policy.

Exceptions To Section II

The Pool shall NOT be liable in respect of:

ii) death of or bodily injury to any person in the employment of the Insured arising out of and in the course of such employment.

iii) death or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment) being carried in or upon entering or getting on to or alighting from the motor vehicle……"

16. The Court then observed the relevant Sections in the RTA 1987, especially Section 91(1).

"91(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which:-
   a) is issued by a person who is an authorised insurer….
   b) insure such person or class of persons as may be specified in the policy…….

   Provided that such policy shall not be required to cover:-
   aa) liability in respect of the death arising out of and in the course of his employment of a person in the employment of a person insured by the policy or of bodily injury sustained by such a person arising out of and in the course of his employment: or
   bb) except in the case of a motor vehicle in which passengers are carried for hire or reward or by reason of or in pursuance of a contract of employment, liability in respect of the death of or bodily injury to persons being carried in or upon or entering……."
   cc) any contractual liability.

17. It is rather explicit that Sections 91(1) (aa) and (bb) are similar to clauses *i.e.* Section II AND Exceptions to Section II in most insurance policies issued to motor vehicles.

18. In *Tirumeniyar*, the Federal Court proceeded with the issue, that the case is concerned only with Exception (II) of the Insurance Policy which corresponds with Section 91 (1) (aa) (*Para 15 of the grounds of decision*).

19. As observed earlier, the court considered favourably Syed Agil Barakbah's decision of *Saw Poh Wah* in the High Court and the two (2) Singapore decisions of *Chan Kum Fook* and *China Insurance*. Briefly, in *Chan Kum Fook*, the facts were the first and second Plaintiffs were employees of the company i.e. the Insured. They were injured as a result of the negligence of one Yong Chan Seng – the authorised driver who was also an employee of the Insured Company. The policy excluded any indemnity to employers. The main issue that arose was whether the insured was liable to indemnify the 1st and 2nd Plaintiff *vis-à-vis* the authorised driver.

    Tan Ah Tah J, stated that it is clearly stated in Clause 2 in Section II of the policy that the Insurance Company will indemnify any Authorised Driver.

20. In *China Insurance* too, the facts were similar with similar clauses in the policy. The policyholder was the employer of both the authorised driver and the other person riding in the motor vehicle. The other person died due to the negligence of the authorised driver. The Singapore Court of Appeal following *Richards v Cox* affirmed the High Court's decision that Insurers are liable to indemnify the authorised driver, as the said other person (who died) was not his employee.

21. In consequence, the integrity of the Federal Court's decision in *Saw Poh Wah* and the absence of written grounds has rendered it, not good law anymore. *Tirumeniyar*, it could be safely concluded has absolutely reversed the Malaysian Position *vis-a-vis Saw Poh Wah* which held us enthralled, all these years in the face of well-reasoned U.K and Singapore judgments.

    The case of *Letchumanan Gopal v Pacific & Orient Insurance & Co Sdn Bhd (2011) 5 CLJ 806*

22. The salient facts in Letchumanan are :

    a) The issue before the Court of Appeal was a Recovery Action. The claimants (*i.e* the family/dependents of Kanisan, the deceased) succeeded in the Sessions court in securing damages against Syarikat Jagoh Angkat Sdn Bhd the motor lorry owner (insured) and their driver one Katurajah, subsequent to full trial.
    b) The Insurers, the defendant herein, refused to settle the judgment sum, on the grounds that they are not liable, as per policy terms/clauses, thus recovery action was filed naming the Insurers of the motor lorry as the defendant.
    c) The Sessions Court allowed the Recovery action but the High Court and Court of Appeal held in favour of the Insurer.
    d) The facts, briefly are as follows:
    Jagoh Angkat's driver one Katurajah, had taken onto his motor lorry, one Kanisan, on the way to the buyer/consignee of his load of bags of cement. Kanisan and other casual/daily workers would often wait at the Exit/Entrance gate of the cement factory, waiting to be taken on board the lorry to unload the cement bags at its destination. Wages for unloading would then be paid by the buyer/consignee and NOT Jagoh Angkat, who too, have no knowledge of Kanisan nor his work.
    e) Along the journey, the motor lorry met with an accident and Kanisan died. His family members sued for dependency etc against Jaguh Angkat Sdn Bhd and the Lorry driver Katurajah.

23. The defendant Insurers resisted the claim against them by pointing out Clause (III) under Exceptions to Section II.

"…….. that P & O shall not be liable in respect of :

Death of or bodily injury to any person (other than a passenger carried by reason of or in pursuance of a contract of employment)"

NOTE: it is presumed that all policy terms and clauses are similar here and as in *Tirumeniyar* due to the strict statutory provisions as per Section 91 (1) (aa), (bb), and (cc) of the RTA 1987, which all insurance policies ought to provide for commercial vehicle policies.

AND FURTHER NOTE:

The Court of Appeal did not refer to or note down any other clauses, in the relevant policy with the exception of the above, since they referred to the policy annexed in the Record of Appeal.

24. The High Court and later, on 14 April 2011, the Court of Appeal agreed with the Insurer's contention and dismissed the claimant's appeal.

25. Admittedly, the deceased Kanisan was not an employee of Jagoh Angkat Sdn Bhd, the policy holder, whereas the Plaintiff in *Tirumeniyar* was one. But in pursuance of the two-contract principle enunciated in *Tirumeniyar*, as seen above, why couldn't the authorised driver, Katurajah herein, assume the role of the policyholder too? Katurajah, willingly allowed Kanisan to come aboard his motor lorry and was carrying him to its destination i.e to the buyer of the load of cement bags when the accident occurred.

Notwithstanding the fact that Kanisan is certainly not an employee of Jagoh Angkat Sdn Bhd which owns the motor lorry, the Authorised Driver willingly consented to Kanisan being carried. Obviously, the deceased Kanisan is not an employee of the Authorised Driver.

26. The Federal Court in *Tirumeniyar* made the following findings (in the following paragraphs numbered as per its grounds of judgement)

"[69] A plain reading of section 91 (1) (aa) indicates that section is intended to exclude liability to employees. We will address the rationale behind this shortly. It expressly excludes death or bodily injury of a person insured by the policy whereby such death or injury arose 'out of and in the course of his employment. This suggests that the person suffering death or bodily injury was for all intents and purposes an 'employee' of the insured.

[70] Section 91(1)(bb) however is less than clear. Reading it carefully, it exempts coverage for the death of or bodily injury to persons being carried in or upon or entering or getting onto or alighting from the motor vehicle at the time of the occurrence of the event out of which the claims arise. But the said section contains an exception to the exception. So, under (bb), coverage must still be afforded to passengers carried:

(i) for hire or reward; or

(ii) by reason of or in pursuance of a contract of employment

[71] The stark difference between sub-subsections (aa) and (bb) is that the former deals with persons 'actually' in the course of employment of the insured policyholder while the latter deals with those persons carried by the insured in pursuance of a contract of employment but who may or may not necessarily be in the employment of the insured. It should also be noted that subsection (aa) does not at all use the word 'passenger' whereas (bb) does.

[72] Thus far all the cases we have cited in support of the interpretation of the present Insurance Policy dealt with what we consider actual employees of the policyholder. They concerned the contractual counterpart of section 91(1) (aa) in Exception (ii) *Izzard v Universal Co Ltd (1937) 3 All ER 79 ('Izzard')* is an apt illustration of Exception (iii) which is considered the contractual counterpart of section 91 (1) (bb).

[73] The facts in *Izzard*, though complicated, were shortly these (as modified from the headnotes); the assured owned a motor vehicle insured against commercial risks but not against passenger risks. The policy contained what is essentially Exception (iii) of the present Insurance Policy which was also a reflection of section 36(1)(b)(ii) of the English Road Traffic Act 1930. That statutory provision is materially the same as our section 91(1) (bb) of the RTA 1987.

[74] The controversy arose in the following way. The assured agreed to do haulage work for a company of builders. The agreement was that the assured agreed to transport the builders from the workmen's homes on the condition that the assured was to be paid for each journey notwithstanding whether the workers were actually transported or not. It so happened that in one of those journeys, the assured met with an accident resulting in a workman's death. The widow was awarded damages against the assured resulting in his bankruptcy. The widow then made a claim for indemnity against the insurance company.

[75] As is apparent from the facts the workman was clearly not an employee of the policyholder. In this sense the English equivalent of section 91(1)(aa) would not have been applicable. That is why the House of Lords turned their attention to our equivalent of section 91(1)(bb). The argument by the insurers was that based on the facts of this case, the phrase 'contract of employment' ought to be limited to instances where there was a contract of employment with the insured and not with some other party. Their Lordships logically rejected this view because doing so would render the distinction between the two Exceptions superfluous in that there would essentially be no difference between the two provisos. To quote Lord Wright (at *page 83*), the distinction between what is essentially our provisos (aa) and (bb) is as follows and it warrants the most careful consideration:

"It seems clear that provisos (b) and (c) [respectively and substantively Exceptions (ii) and (iii)] of the policy are intended to reproduce and follow the statutory terms. The former of these provisos seems calculated to exclude the necessity of covering claims which would fall within the Workmen's Compensation Acts, though it is true that these Acts would not embrace every case of death or injury to an employee arising out of or in the course of the employment. For instance, there might be such cases where the employee, by reason of the amount of his wages or salary, or otherwise, was outside the provisions of the Acts. It may be that, for some reason, the legislature thought and these cases were infrequent and might be disregarded. But the second proviso is on a different footing. The general purpose of that statutory provision is to exclude from the compulsory insurance passenger risk in general with the exception in the first place of passengers carried for hire or reward. This is the form of passenger risk which, as already explained, is offered in the respondent company's proposal form under the heading of passenger risk. It need not be further discussed here. But the meaning of the other head is that on which the dispute here has turned."

[Emphasis added]

27. In Letchumanan the COA, decided in the headnotes as follows:-

"(1) The modern test in determining if one is under a contract of service is dependent on whether the person is part and parcel of an organisation, in other words, whether the person is employed as part of the business. The deceased was not under a contract of service to Jagoh. The deceased was then a mere passenger. P & O could thus not be liable for his death.

(3) The liability and recovery action were distinct from each other. The former was a claim founded in tort whereas the latter was based on a statutory right provided under the provisions of the RTA. For this reason alone it would be unjust to bar the insurers from raising afresh the issue of its liability even to the extent of adducing evidence on the same issue at the recovery action stage.

(4) P & O was not a party in the liability action. Thus a final determination of this issue could not be said to have been made by the trial judge in the liability action……"

28. It is submitted that the quorum in *Letchumanan* comprising Abdul Hamid Embong JCA; Kang Hwee Gee JCA, and Abdul Malik Ishak JCA; failed to consider the serious issues involved on employer-employee position, when superimposed on the policy clauses and the relevant statutory provisions of the RTA 1987, especially on the contentious issue of a person who is not an employee being carried on the motor vehicle by its Authorised Driver, and who is later injured/dies, which gives rise to the claim.

However, it must be admitted that the COA panel, was deliberating a 'Recovery Action' against Insurers, and the issue of the employer-employee situation and the position of the Authorised Driver carrying a person to work to unload the load at its destination ought to have been seriously deliberated.

Abdul Malik Ishak JCA, went on an exhaustive exercise in deliberating the employer-employee and independent Contractor's position and referred to several local and English decisions on this subject, but missed the wood for the trees.

It could be ventured to state, that the law on this issue was not placed in its proper perspective and *Letchumanan* continues to place serious obstacles to legal practitioners, who are seeking clarity and finality.

29. *Para 71* of this Federal Court's grounds are rather explicit. The significant words are: "……. *While the latter deals with those persons carried by the insured in pursuance of a contract of employment but who may or may not necessarily be in the employment of the insured*."

30. It is the submission of this writer that the clear implications now after *Tirumeniyar*'s decision are that *Letchumanan's* claim against the Insurers ought to have been allowed. The COA went to great lengths to explain the employer-employee situation *vis-a-vis* the contract of employment position but failed to bring their attention to the issue at hand *i.e.* the two-contract situation in a commercial vehicle insurance policy.

In short, the Authorised Driver, under the two contract principle has assumed the position of the policy holder and thus enjoys rights similar to the policy holder *i.e.* he is authorised to carry any person he deems fit and proper, in pursuance of a contract of employment and could seek to be indemnified by the Insurers if any claim for damages is directed against him or his employer.

31. In one 1991 decision (*United Oriental Assurance Sdn Bhd v Lim Eng Yew (1991) 3 MLJ 429*) the Supreme Court did take cognizance of the two policies in one document approach. In this claim, the Plaintiff at the time of the accident was being carried as a passenger in the

said lorry pursuant to a contract of employment between him and the lorry owner. Here the Insurers of the lorry were held liable for the damages to be paid to Plaintiff, as a result of the negligent driving by the lorry driver.

32. Subsequent to referring to the clauses and terms in the commercial vehicle policy, and *Richards v Cox (1942) 3 All ER 624* Gunn Chit Tuan SCJ, who wrote the grounds of judgement quoted as follows (at page 5).

    "*It was held that there are in effect two policies in one document, a policy insuring the owner of the vehicle and a policy insuring the driver. The owner of the vehicle would not have been able to recover against the underwriters because the policy did not cover his liability to his own servant, but as the terms of the policy insured the driver himself, and as the injured person was not a servant of the driver, nevertheless the driver was covered by the policy and was entitled to an indemnity by the insurance company against the damages which he had to pay*".

33. Gunn Chit Tuan, SCJ also pointed out that Lord Goddard CJ, in *Lees v Motor Insurers Bureau (1952) 2 All ER 511*, had followed *Richards v Cox* and affirmed it as the correct position subsequent to referring to the English Road Traffic Act 1930 which was in parimateria with our earlier Act of 1958 (Sec. 75 (1)(b)(i)(ii) and the present 1987 Act i.e. Section 91(1) (aa) and (bb)) read together with the clauses in the insurance policy which are in the common format for all commercial vehicle policies, as set out and examined earlier.

34. The Supreme Court Judge also referred to *Izzard v Universal Insurance Co Ltd (1937) AC 773* and agreed with the findings of Lord Wright of the House of Lords which were:

    "*I think the Act (the language of which is the same as that of the policy) is dealing with persons who are on the insured vehicle for sufficient practical or business reasons and has taken a contract of employment in pursuance of which they are on the vehicle as an adequate criterion of such reasons*."

35. But in *Tan Keng Heng's case (1978) 1 MLJ 97,* the Privy Council pointed out on the facts as found, the deceased forester who was taking a lift was certainly not on the lorry for business reasons but for personal reason i.e for his own personal convenience. In that case, there was no term of the forester's contract of employment, express or implied, which required or entitled him to travel on appellant's lorry and therefore the Insurers were rightly held not liable under the policy.

36. Based on the above discussion, we can conclude that *Letchumanan* has to some extent shot down:

    a) It is rather explicit now, that the two-contract approach has been well settled and *Saw Poh Wah* has been relegated to the dustbin.
    b) The question is, whether the lorry driver Katurajah has assumed the role of policyholder in the same terms as his employer (*i.e*. the lorry owner and Insured) when he consented & took Kanisan (deceased) onto his lorry to carry out the work of unloading the cement bags at the buyer's / consignee's shop or store, who in turn will pay Kanisan for his services.
    c) It must be understood that Kanisan (deceased) was not an employee of the lorry owner nor the lorry driver.
    d) But more importantly, the fact remains, Kanisan was carried on the lorry for employment purposes by the lorry driver i.e more pertinently "……. In pursuance of a contract of employment."
    e) The Federal Court in Tirumeniyar quoting Lord Wright in Izzard v Universal Co Ltd (1937) 3 All ER 79 stated: (para 76)

"(76) At the same page, Lord Wright continued to opine (at line 5)

……I think the Act is dealing with persons who are on the insured vehicle for sufficient practical reasons, and has taken a contract of employment in pursuance of which they are, on the vehicle as an adequate criterion of such reasons. But there is no sufficient ground for holding that this criterion should be limited to employees of the insured person. Such employees, if injured or killed, would ordinarily fall under exception (i), though I am not prepared to say that there might not be, in certain events, an employee of the assured who could claim as a passenger."

37. The Federal Court as observed earlier in *para 71* Supra at line 3, after distinguishing subsection (aa) & (bb) opined:

"……*while the latter deals with those person carried by the Insured in pursuance of a contract of employment but who may or may not necessarily be in the employment of the Insured. It should also be noted that subsection (aa) does not use the word 'passenger' whereas (bb) does*".

38. In *Izzard (supra),* the assured agreed to do haulage work for a Company of builders. The agreement was that the assured agreed to transport the builders from the workman's home when the assured met an accident resulting in a workman's death. The widow was awarded damages against the assured resulting in bankruptcy. The widow then made a claim for indemnity against the insurance company.

As is apparent from the facts the workman was clearly not an employee of the policy holder. (*See para 74 and 75 in Tirumeniyar*)

39. Taking Lord Wright's words in *Izzard (supra)* Our Supreme Court in *United Oriental Assurance v Lim Eng Yew (1991) 3 MLJ 429*, readily accepted:

"*I think the Act is dealing with persons who are on the insured vehicle for sufficient practical or business reasons and has taken a contract of employment in pursuance of which they are on the vehicle, as the adequate criterion of such reasons*."

And it was further expounded in *Tirumeniyar* (*para 88*) "…… where the Privy Council held in *Tan Keng Heng v New India Assurance (1978) 1 MLJ 97*, that the words "*by reason of his contract of employment" must be read in conjunction with the words in pursuance of*."

An exhaustive examination of the above clearly indicates that in Letchumanan's case the widow or family members ought to succeed in their claim against the lorry driver, who in turn should succeed in seeking an indemnity from the Insurers of the lorry.

Conclusion

Puan Alizatul Khair Osman FCJ, did an extraordinary and immense analysis of the earlier Malaysian cases and the English decisions prior to applying all the relevant principles, the statutes, and the common law, prior to writing the well-reasoned out, grounds of judgment in *MMIP* vs *Tirumeniyar*.

It is a creditable effort indeed by the learned FCJ.

Compiled by Ooi Tat Chen

Garis Panduan Menandatangani Dokumen-dokumen dan Borang Pindahmilik untuk Syarikat yang Digulung atau Dibubar (9 Mar 2021)

Signing Virtually or In Person: A Discussion (30 Apr 2021)

Lament For A Late Lord President

(Tun Dr. Mohamed Salleh Abas: 1929-2021)

To call you a mere 'Legal Giant' is but an
Understatement; you were much more, a no-
Nonsense beacon of impeccable principles;

Distinguished by a strict adherence to the
Rule of law, justice, and the Constitution ....

Minion of politicians and chief executive
Officers in high places, you never were!
Holding your head up high, resolutely battling
Autocrats and their mincing cronies bent on
Making a mockery of an independent judiciary;
Ending prematurely your tenure as Lord President
Distorting and denigrating your life & legacy ....

Suffian (Tun) said, on your removal, "I was
Ashamed of being a Malaysian for the first time in my
Life" – as did all law-loving citizens who mourn your
Loss today but celebrate your rich contributions;
Exemplified by an unswerving integrity in your
Heroic defense of a then beleaguered judiciary.

As we reminisce, remember, take stock and look
Back on your tumultuous legal journey
And the sacrifices you made for our country
Silently we salute you - Tun Dr. Mohamed Salleh Abas – RIP

- Cecil Rajendra

SINKING FUND VS MAINTENANCE FEE IN MALAYSIA: WHAT'S THE DIFFERENCE?

Owners of strata property (condominiums, apartments, serviced apartments, and flats) will be familiar with the monthly maintenance fees and sinking fund they pay. For those unfamiliar with these terms, find out what they are, how they are calculated, why high-rise owners need to pay for them, and what happens if they don't.

Strata properties come with common facilities that are used by all of the residents within each building. These include lifts, walkways, swimming pools, gyms, and community halls, all of which require proper maintenance and management.

This is where the monthly maintenance fee and sinking fund come in. It is used to maintain the common property and pay for services.

These funds are collected and managed by the Joint Management Body (JMB) before the issuance of strata title and by the Management Corporation (MC) after strata titles are issued.

What is a sinking fund?

Recurring costs such as **security services, cleaning services, utility bills, and lift servicing** are predictable and can be factored into the monthly expenses.

What if the basement car park gets flooded during a thunderstorm? Or a large crack appears on the building wall and needs to be urgently fixed? Will the management have enough cash flow to cover the costs? In most cases, they probably don't.

When owners contribute to the sinking fund, they are putting money into a reserve fund to cater to such emergencies and to carry out major works such as painting or refurbishment works.

What is a maintenance fee?

It costs a lot to manage and maintain a property, whether it is to hire security and cleaning services or to pay for the electricity and water used to run the building. Don't forget, even the management and administrative staff need to be paid.

The maintenance fee, or service charge, that you pay every month is used for these recurring costs, for the upkeep of facilities, and any minor repair works on common property.

How much maintenance fee do you have to pay?

The maintenance fee is shared among unit owners so the maintenance cost will be divided among the units. This fee differs from one property development to another.

Some of the factors that determine how much each unit owner pays are:

- Parcel size: the amount of maintenance fee you pay is dependent on the size of your unit.

- Usage type: in mixed development properties, retail units incur higher fees than residential units.
- Access to facilities: the more facilities you have access to (for example lifts and air-conditioning in the common areas), the more you pay.
- Number of units: owners with units in a high-density development will pay less than owners in an exclusive low-density development.

How to calculate maintenance fees in Malaysia?

The cost of maintenance depends on various factors, among them:

- Type of services: this typically includes security, cleaning, lift servicing.
- Type of facilities: basic facilities usually include a swimming pool, gymnasium, and an event area. More facilities will incur more maintenance costs.
- Size and type of common area: the bigger the area, the more cost to clean and maintain the area. The cost also depends on the services needed to maintain it. For example, a garden with intricate landscaping and water features could cost more to maintain than a community hall of the same size.
- Acceptable level of service: residents and owners need to decide what is deemed as "acceptable". Will they agree to the corridors being swept only once a week or having one less security guard for each shift?

The formula for calculating maintenance fee is as follows:

Operating expenditure ÷ Total share units in condo development
= Maintenance fee to be paid

Effective management will be able to provide a good level of maintenance while keeping costs down by negotiating good rates with service providers. However, do remember that good services do not come cheap so it might be worth paying a higher price for services that matter.

How much sinking fund do you have to pay?

A sinking fund is calculated at 10% of the maintenance fee. The JMB or MC can change this amount only during an annual general meeting (AGM) but it should be no less than 10% of the maintenance fee.

However, the JMB or MC may increase the rate of sinking funds by more than 10% of the maintenance fee. This rate can only be implemented if everyone agrees to it during the JMB's or MC's general meeting.

Do you have to pay for the maintenance fee and sinking fund?

The straightforward answer is yes, you have to pay the maintenance fee and sinking fund if you are a unit owner of a strata property. There are provisions under the Strata Management Act 2013 for management bodies to determine, impose and collect these charges.

What happens if you don't pay your building's maintenance fee?

Since you are obliged by law to pay the maintenance fee, the building management can take legal action against you. Before bringing you to court, the management can also forcibly enter your unit and seize moveable properties to be auctioned off.

You will also lose your rights to vote during the Management Corporation's AGM.

Local councils, which manage public housing in Malaysia, are starting to take this issue seriously. In a landmark case in July 2020, the Subang Jaya Municipal Council became the first local council to pursue legal action against a defaulter. The defendant, who owns a unit at Pangsapuri Putra Walk in Seri Kembangan, was fined for defaulting on his maintenance fees.

In fact, always remember to pay your maintenance fees on time or your condominium management will have the right to force their way into your home.

Can you dispute the maintenance fee?

If you find that the services provided are not up to standard or you suspect that the funds are being mismanaged, you can question the management. As a unit owner, you have the right to view the statement of accounts. If all else fails, you can apply for a review with the Commissioner of Buildings (COB).

Can you sue your management if your building is run down?

In short, yes. There's a reason why you pay for the monthly maintenance fee and sinking fund and that is to ensure that the building you're living in is well-maintained. So if you find your building is in a less-than-ideal state, you can, of course, bring it up to the management office. That's one way of doing that. But what happens if your complaint is not taken seriously and the management continues to neglect the state of your building? Instead of visiting the management office on a daily basis and not having things done, you can choose to sue your management.

Section 48(1) of the Strata Management Act 2013 states that:

A developer shall, during the preliminary management period and subject to the provisions of this Act, be responsible to maintain and manage properly the subdivided building or land, and the common property.

That Act clearly states that the management is responsible to look after the building's condition, make sure it's liveable and that all of its facilities like lifts and CCTVs are functioning. If they fail to do so, then the next part of the Act will explain what kind of penalty they will get.

Section 48(4) of the Strata Management Act 2013 states that:

Any developer who fails to comply with subsection (1) commits an offence and shall, on conviction, be liable to a fine not exceeding two hundred and fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both.

What it means is that if your management neglect their duties, they can be fined up to RM250,000 or imprisonment up to 3 years of both! Yes, this is a serious matter and you should hold your building management accountable if they fail to do their job. After all, you did pay a huge sum of money to the building maintenance, it's only fair to expect them to do their job and upkeep it.

Now that you know everything there is to know about the maintenance fee and sinking fund, you will need to learn what is a Schedule of Parcel and how to use the share unit formula to calculate your maintenance fee.

Sourced from Karr Wei (13 Nov 2020) Sinking Fund vs Maintenance Fees – What's the Difference? Retrieved from: https://www.iproperty.com.my/guides/sinking-fund-vs-maintenance-fee-malaysia-whats-the-difference/?utm_source=taboola

Compiled by Ooi Tat Chen

DOES ISLAM ENCOURAGE POLYGAMY?

by Abu Bakar Kugaselva Bin Abdullah

Since time immemorial, polygamy is a practice observed by Kings and Aristocrats irrespective of culture or creed. It is the offence of bigamy which brings about the misconception that the practice of Polygamy is associated with Islam. In this article, I propose to limit the subject of Polygamy to one man having more than one wife. There is also the practice of polyandry in which a woman has more than one spouse. I take note that the practice of polyandry is beyond my prudence due to the fact that when a woman gets pregnant, it would be a cumbersome task to ascertain the paternity of the child, although DNA testing is available.

In Al-Quran, which is the main source of Muslim Law and philosophy, there are two verses in Surah An Nisa, in which the subject of Polygamy is mentioned:

First in **Surah An Nisa Verse 3**;

"If you fear that you shall not be able to deal justly with orphans, marry women of your choice, ***TWO, THREE OR FOUR*** *but if you fear that you shall not be able to deal* ***justly*** *with them then marry only* ***ONE****..."*

This verse was revealed to our Prophet Mohammad immediately as an **aftermath** of the Uhud war, in which many children became orphans and a single mother could not afford to bring up her children. This verse comes with the condition of marrying a widow who has to fend for her children or some young child who has reached puberty or for a wealthy man in the **pursuit of benevolence** to marry more than one female.

This Quranic verse has been misused as a license for those with uncontrolled **LUST**, thus causing cruelty to the existing wife or wives.

In another verse, **Surah An Nisa Verse 129**, Allah stipulates, *"You are never able to be far as just between women."*

In the **Surah An Nisa Verse 3**, Allah allows men to marry up to four women if they can treat the women justly.

In the **Surah An Nisa Verse 129**, Allah stipulates that *"you can never be fair between women."*

Taking into account both these verses we can draw the following conclusion:-

1. You can marry more than one wife if you are able to treat them fairly.
2. It is the innate nature of men to favour one wife over another.

The practice of Polygamy should be treated with caution. In our Shariah Courts, four points have to be proven before an application for polygamy is allowed.

Firstly, there must be evidence that it is **PROPER or SUITABLE** to have more than one wife.

Secondly, can the applicant sustain a decent income to provide for his wives?

Thirdly, can the applicant be fair to all his wives?

Fourthly, does the act of the applicant cause cruelty to any of his existing wives?

Generally, this would be an uphill task for any man who wishes to have more than one wife. So in conclusion, Islam does not encourage polygamy but allows polygamy to a restricted number of four and if possible marry only **one** and be faithful to her.

Mysteries excite any individual, regardless of age. Our own land has her fair share of age-old unsolved mysteries, which warrants a Sherlockian detective to solve it. Imagine the excitement boarding a plane ends in a tragedy; the farewell bid by a loved one was the last. This edition carries another unsolved mystery that would leave you reflecting on the feelings and fear of those perished victims in the crash.
Heavy to the heart!

MH653, MALAYSIA'S FIRST HIJACKED AIRPLANE

by Nurul Hidayah binti Tajuddin

4 Dec 1977— Flight MH653, a Boeing 737-2H6 that was built by Boeing Aircraft Corporation was scheduled to take off from Penang Airport at 7:15 pm en route to Subang Airport. Amongst the passengers were a couple of VIPs, then Malaysian Minister of Agriculture, Datuk Seri Ali bin Ahmad, who was returning from a visit to Perlis, and the Cuban ambassador to Japan, Mario Garcia Inchaeustegui, who was in Malaysia on a farewell visit and was given an audience with the Yang Di-Pertuan Agong.

The day started with a controversy when one of the minister's bodyguards was found to be allegedly carrying a firearm that he refused to give up prior to boarding the airplane before they were eventually allowed to be on board. The plane took off without a hitch; nothing particular happened, except until the captain of the flight, G.K Ganjoor pulled out his landing gears when he heard a knock on the cockpit doors. The recording from the black box suggested that some unknown person had barged into the cockpit.

"Out! Cut all radio contact! Cut all radio contact – now!"

It was the hijackers. As panicked as one could be, the brave captain did not even show it on his visage but maintained a calm demeanour while handling the situation. With a fuel tank that contained only half the fuel left, Captain Ganjoor obliged when the hijackers urged him to inform the airport authorities that they were heading to Singapore. With the plane now heading over Malacca and approaching Batu Pahat, there was no doubt that the hijackers were restless and panicking. They started becoming paranoid; afraid that the pilots had lied to them and signaled the authorities about the hijack. Some details of the cockpit recorder were made public, and among them was the recording of the pilot, begging for his life.

"No, please! Don't! -- *gunshot* No… please, no… *gunshot* please, oh…"

Sounds of alarms and notifications were going off right in the cockpit after the sounds of the gunshots. Witnesses claimed that they saw the plane going upwards and downwards in sharp angles repeatedly. The black box seemed to suggest that the hijackers might have failed to take control of the plane after killing the pilot. Three minutes was all it took for the plane to finally crash in Tanjung Kupang, Johor. Several eyewitnesses came forward to tell that they saw an explosion before it hit the ground. The Armed Forces were in full force, searching for any possible survivors but all met with a devastating end. Bags, flesh, charred body parts, clothes, paper, and burnt aircraft bodies were found scattered all over the place, along the path in the swamp and on trees at one village in the area.

Up to this date, no one knows who those hijackers were despite theories surfacing from time to time. Some alleged that it could be Vietnamese militants, as Singapore had, at that time,

arrested three of the militants responsible for a hijack of an Air Vietnam plane. Some said it could be Cuban terrorists as the Cuban ambassador was on board. Apart from that, the best theory one could come up with, which became the strongest theory, was that the plane was hijacked by the Japanese Red Army, a militant group formed in 1971 to overthrow the Japanese government and monarchy, as well as wanting to ignite a world revolution. Another theory was indeed a hot topic; it involved the bodyguard of the minister that was eventually allowed to carry the firearm on board. This theory was even discussed in Parliament.

According to Aircraft Accident Report 1/78 which was published a few months after the incident, the hijackers adamantly did not wish to land at Kuala Lumpur, and by their actions and words, they showed that they would not hesitate to shoot to kill if a landing at Kuala Lumpur was made. Despite the lengthy explanations on the need to maintain ATC radio contact for flying safety, and for fuel reasons, the hijackers remained threatening and suspicious, although the crew complied with their instructions throughout the flight. Once the captain was incapacitated, the aircraft carried out some unusual pitch-up and pitch-down terminal maneuvers under the influence of the hijackers, which finally led to the aircraft hitting the ground. There was no explosion prior to impact.

It was worth noting that back in the days, the Penang Airport was never known for having good security so much so that it was listed as "criminally deficient" by the International Federation of Airline Pilots' Association. Investigations were done and they, in fact, found the security in place was "hopelessly lax", with the gate of cargo and VIP access open with no guards in sight. Fencing around the airport runway was also open due to the construction of a new airport terminal going on at the time. The tragedy, along with great investigative work that exposed the flaws and weaknesses of the airport was what led to massive changes in the Malaysian aviation industry. Airport security started becoming a lot tougher, with more thorough checks on passengers and cargo occurring, and the VIPS were no longer exempted from checks before boarding.

This was the tragedy that spurred the establishment of an Aviation Security Unit which is responsible for safeguarding domestic and international civil aviation against acts of unlawful interference, a change that saved a lot of people in the decades since. As for the family members of MH653 victims, they have learned to cope with their grief, although the tragedy will always remain fresh in their memories and lives.

Sources:

1) *6 Mysterious, Unsolved Cases that Took Place on Malaysian Soil (World of Buzz)*
2) *MH653, The air disaster that hijacked Malaysia, New Straits Times (15 September 2020)*
3) *MH370 imbau tragedy MH653, Sinar Harian (8 December 2018)*

New Straits Times

Minister among 100 on board

Hijack MAS jet crashes in Johore

We may boycott Unctad meetings: Musa

A frontpage report on the incident in the New Straits Times on 7 December 1977.

A picture taken that shows some of the plane's debris.

CORPORATE DUE DILIGENCE IN MALAYSIA: HEAVIER BURDEN ON LEGAL PRACTITIONERS POST COVID

by Quiin Hng Huey Koon

INTRODUCTION:

The COVID-19 pandemic resulting in social distancing norms and nationwide lockdowns has led to an inevitable flux in the use of digital technologies. Organisations across the globe have had to adjust to new methods of business management and operation for survival. While we recognise numerous benefits of digitalisation, there are also drawbacks to this such as public dependence on untrue information which permits the spread of false information for manipulative purposes, and the risk of being hacked.

With the global pandemic transforming how companies conduct business nowadays, a heavier burden is inevitably shouldered by the corporate legal practitioner, be it an in-house counsel or a practicing lawyer, to help ensure their clients are at all material times in compliance with the ever-changing regulatory and legal obligations. Accepting that the usual due diligence procedures may now no longer be satisfactory to protect a client's best interest by allowing a client to make a business decision based on the high quality of information, it is pertinent for a legal practitioner to tighten and expand their due diligence checklist for their client, from the initial due diligence stage until its completion.

On 25 March 2021, Devlin Aaron Fisher, Global Sales Support Manager for CT Corporation as well as an Attorney at Law from Pennsylvania shared, via a podcast titled "2021 outlook for law firms with global clients" which an excerpt is quoted as follows:-

"It is extremely difficult to track these ongoing changes as they themselves change in almost every jurisdiction around the world. But it's really understanding the way these laws and regulations will impact your clients. That will be the one thing that will set your law firm apart from others."

FUNDAMENTAL KNOWLEDGE ABOUT CORPORATE DUE DILIGENCE

Corporate due diligence is a process of investigating, analysing, and assessing all relevant information about a target company inclusive of the background of all related individuals in the company with the objective to reveal any potential risks hidden within the company.

The scope of due diligence is wide and depending on the business nature and industry sector of the target company, it can be categorised into the following: -

(a) Financial due diligence;
(b) Legal due diligence;
(c) Tax due diligence;
(d) Operational due diligence;
(e) Intellectual Property due diligence;
(f) Commercial due diligence;
(g) Information Technology due diligence;
(h) Human resource due diligence;
(i) Regulatory due diligence; and
(j) Environmental due diligence.

Due diligence usually starts after the execution of a preliminary term sheet or memorandum of understanding by, and between the Seller and the Purchaser, but before a written contract or agreement is signed. Having said that, there are parties who are more comfortable commencing investigation prior to signing any documentation to avoid any binding effect against them.

Typically, a due diligence exercise is commenced by the Purchaser's lawyer forwarding a due diligence questionnaire listing queries about the target company to the Seller's lawyer.

The Seller will answer the questions in the questionnaire and furnish supporting documents to the Purchaser's lawyer. A "data room" or "cloud computing system" may be created by the Seller at this stage to allow the Purchaser to gain access to the documents concerning the target company. Provided that it is not contrary to any governing law and legislation, all material contracts, including partnership agreements, licensing agreements, guarantees, and loan and bank financing agreements may be requested by the Purchaser's lawyer with an undertaking not to reveal to any third party by the Purchaser, and the Purchaser's lawyer subject, however, to the Seller's authorisation to the Seller's lawyer to disclose.

Upon receipt of documentation from the Seller, the Purchaser's lawyer will start the investigation exercise by scrutinising the documents to pinpoint the risks, weaknesses, and strengths of the target company. This is to ensure that the shares or assets intended to be acquired do not cause unforeseen harm to their client. Generally, a due diligence report will be prepared by the Purchaser's lawyer at this stage to make available in-depth knowledge about the target company to the Purchaser before the Purchaser can make an informed decision whether or not to proceed with the acquisition regardless of whether the Purchaser intends to obtain a controlling or minority interest in the target company.

ENHANCED DUE DILIGENCE

Traditional checking method of management accounts and past financial information remains essential, but in a post COVID world, traditional monikers of financial stability may not be an accurate indication of a target company's future profitability. An additional level of scrutiny may be required by the Purchaser's lawyer in order to truly assess the long term financial stability of the target company.

Extracting a company search report from the Companies Commission of Malaysia may be the first fundamental step to review basic corporate information such as the directors' list and shareholders' list of the target company. Memorandum and articles of association (also known as the constitution) of the target company, minutes of shareholders, and directors' meetings may also be in the basic bucket list. Additionally, the following is an enhanced checklist that may be used as a reference to complete a detailed due diligence exercise:

Publicity	Press releases or publications about the company within the last three years.
Outsourced Professionals	A list of all independent professionals (accountants, lawyers, and consultants) that have worked with the company within the past five years.
Insurance Coverage	➢ A copy of insurance claims over the past two years. ➢ A schedule of insurance coverages.
Litigation	➢ A list of unsatisfied judgments. ➢ A list of pending litigation. ➢ A list of threatened litigation. ➢ Documents about injunctions or settlements.
Product and Services	➢ Current market share values. ➢ Lists of products and services offered.

	➢ Lists of products and services in development. ➢ Summary of complaints. ➢ Summary of warranty claims. ➢ A list of major customers and product applications. ➢ Profitability and cost structure, especially expense trends over the past five years. ➢ A list of fixed assets (if a company owns many fixed assets, it may show a reactive approach to market trends.)
Customer Information	➢ A list of business partners or joint ventures. ➢ A list of existing customers. ➢ A list of lost customers and an explanation. ➢ A list of suppliers. ➢ A list of competitors. ➢ The company's credit policies. ➢ The company's purchasing policies. ➢ Supply and service agreements. ➢ Surveys and market research on company products. ➢ Current ad programs, marketing budgets, and printed marketing materials. ➢ A list of distribution channels, marketing opportunities, and marketing risks. ➢ The research report on strategies to get new business. ➢ A list of coordination protocols between the sales and marketing departments. ➢ Description of after-sales service.
Tax Information	➢ Detailed explanations of general accounting principles. ➢ Audit reports. ➢ A list of tax liens. ➢ A list of undisclosed tax liabilities. ➢ Tax settlement documents over the past three years. ➢ Employment tax filings for the past three years.
Materials Contracts	➢ Agreements and relationships with any subsidiaries, partnerships, or joint ventures. ➢ Copies of contracts between the company and directors, officers, affiliates, and shareholders. ➢ Loan agreements. ➢ Non-disclosure and non-compete agreements. ➢ A list of mortgages, collateral pledges, indentures, and security agreements. ➢ Guarantees involving the company on any level. ➢ Warranty forms. ➢ Distribution, sales, marketing, and supply agreements. ➢ Contracts, transcripts, or letters of divestitures from any merger or acquisition within the past five years. ➢ Options and stock purchase agreements affecting company operations. ➢ Power of attorney agreements. ➢ Exclusivity agreements. ➢ Franchise agreements. ➢ Indemnification agreements.

Licences and Permits	➢ All business related licences and permits. ➢ The validity of all relevant licences and approvals required, *i.e.* compliance with guidelines issued by regulatory bodies.
Real Estate	➢ A list of all owned properties. ➢ A list of all leased properties.
Physical Assets	➢ A list of fixed assets/equipment. ➢ A list of leased assets/equipment.
Intellectual Property	➢ A list of foreign and domestic patent applications. ➢ A list of copyrights. ➢ A list of trademarks and trade names both domestic and abroad.
Financial Information	➢ Audited financial statements for the last three years. ➢ Unaudited financial statements. ➢ Company credit report. ➢ A list of unrecorded liabilities. ➢ A list of collateral for a debt. ➢ A schedule of depreciation and amortization methods over the past five years. ➢ Analysis of gross margins. ➢ Analysis of fixed and variable expenses. ➢ A list of the company's internal control procedures. ➢ A list of assets and liabilities. ➢ The general ledger. ➢ Analyst reports. ➢ Breakdown of sales and gross profits by geography, channel, and product type ➢ Planned projection vs. actual sales chart. ➢ Capital structure. ➢ A list of non-operational expenses. Many companies put operating expenses in this category to pad their earnings. ➢ Public filings.
Revenue Streams	➢ Recurring revenue stream. ➢ Backlog showing decreasing or increasing revenue trends. ➢ Pricing philosophy. ➢ Estimating philosophy.

CONCLUSION

In furtherance to the above list, there are many additional areas that can be investigated extensively as part of the corporate due diligence in Malaysia. All in all, the burden lies on a prospective purchaser to ascertain the quality of a product and/or service that he or she is purchasing. A party should only proceed with any transaction or investment or acquisition after taking into consideration, all available professional analysis and advice on the risks, weaknesses, and strengths of the target company. Lengthy time may be required to complete the entire due diligence process before an intending purchaser satisfies himself or herself on the quality of shares or assets or products, but such practical exercise is paramount to avoid costly litigation.

In any event, instead of mourning about the negative impacts that the pandemic may have caused to the commercial world, looking at a positive perspective point of view, it has implicitly enhanced the quality of corporate due diligence procedure overall to an absolute improved level.

LEGAL MOVIE REVIEW

THE PEOPLE v. O.J. SIMPSON

by Ramesh Rajadurai

On the morning of June 13, 1994, two years after the 1992 LA riots, **Nicole Brown Simpson** and Ron Goldman are found stabbed to death outside Brown's Brentwood condominium. Brown's ex-husband, NFL player, broadcaster, and actor **O.J. Simpson**, becomes a person of interest in their murders.

The People v. O.J. Simpson is an anthology series centered around America's most notorious crimes and criminals.

The People v. O.J. Simpson: American Crime Story is a limited series that takes you inside the O.J. Simpson trial with a riveting look at the legal teams battling to convict or acquit the football legend of double homicide. Based on the book The Run of His Life: The People v. O.J. Simpson by Jeffrey Toobin, explores the chaotic behind-the-scenes dealings and maneuvering on both sides of the court, and how a combination of prosecution overconfidence, defense shrewdness, and the LAPD's history with the city's African-American community gave a jury what it needed: reasonable doubt.

What is the argument on the other side? Only this. That no case has been found in which it has been done before. That argument does not appeal to me in the least. If we never do anything which has not been done before, we shall never get anywhere. The law will stand still whilst the rest of the world goes on: and that will be bad for both.

–Alfred Denning, Baron Denning-

Attorney Humour

Compiled by Guhapria Kumaravellu

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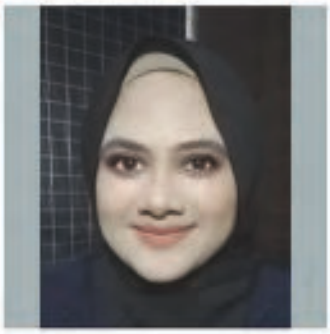

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The Penang Bar Committee welcomes letters, articles, views and news (including photographs) for possible inclusion in the newsletter. Kindly forward any comments and contributions to voixdadvocat@gmail.com.

However, the Penang Bar Committee and the Editorial Board reserve the right not to publish them or to edit those published as regards content, clarity, style and space considerations.

Contributions from individuals that are published contain the personal views of the writers concerned and are not necessarily the views of the Penang Bar.

"No distractions.
The law is a naughty lady,
you must pay full attention to her.

If you ignore her, she will dump you
and throw you into the volcano and
go off for you to burn.

But if you look after her and nurture her,
she will take you to the heights,
to the sky, and the summit
of your profession."

- Datuk Seri Gopal Sri Ram