

VOIX D'ADVOCAT

THE SAME VOICE, A LAWYER'S VOICE



ISSUE 02/2021

FOR MEMBERS ONLY

**NEW YEAR,
NEW HORIZONS**

Penang Bar Committee

2021/2022



Chairman: Ravi Chandran Subash Chandran

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- | | |
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A WORD FROM THE EDITOR

The year 2021 is coming to a close while still being entangled with COVID-19. Let us take time from our hectic lives as lawyers and ruminate on how the year has treated us. Each one of us is embracing the current situation and devising ways to live with our new normalcy, which seems to be, ceaselessly, haunting us.

Undeterred by all the struggles, we, the members of the Penang Bar made it through the legal year like soaring eagles.

Moving forward, amid all the chaos, my team and I proudly present the 2nd edition of the year, fulfilling our commitment to provide our readers an edition that quenches the thirst for knowledge. In this edition, apart from the regular informative and thought-provoking segments, we have included a eulogy in honour of the late Dato' Ghazi bin Ishak, the Senior Partner of Messrs Ghazi & Lim, who passed on 13 August 2021. Our departed brethren at law, who had contributed in upholding and maintaining the administration of justice, are not forgotten. A column, In Memoriam, has been dedicated, especially in honour of them as a sign of homage.

The Editorial Board congratulates the recipients of the Legal Aid Champion Certificate. The event, held on 27 November 2021, was organised by the Malaysian Bar in conjunction with the 40th Anniversary of Legal Aid in Malaysia. Mr. Sukhindarpal Singh a/l Joga Singh, Mr. Ravi Chandran Subash Chandran, and Mr. Ahmad Munawir b. Abdul Aziz were conferred the certificate for their tireless efforts in ensuring that access to justice is available to those in need. The outstanding and exemplary contributions to provide access to justice through the Bar Council Legal Aid Scheme in Malaysia warrants appreciation. A true inspiration to the members of the Penang Bar!

Time and again, our Penang Bar members are urged to contribute to the continuity of Voix d' Advocat. Contributions are highly welcomed and required to ensure the progression of Voix d' Advocat. I would also like to take this opportunity to welcome a new member of the Editorial Board, Roshunraj Rajendran. I sincerely thank my team members for tirelessly putting in their effort in creating another edition to be enjoyed by the Penang Bar members.

Wishing everyone a Merry Christmas and Happy New Year!

*"Celebrate endings -
for they precede new beginnings"*

*Jonathan Lockwood Huie
Author*

Warm Regards,

Krishnaveni Ramasamy

Editor

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EULOGY

DATO' GHAZI BIN ISHAK

by Kimberly Lim Ming Ying



When asked to describe the late Dato' Ghazi bin Ishak in a few words, Dato' Kumaraendran had paused to think of the words which would best describe his close friend of more than three decades.

"A jewel of a man,"

He had said after a short pause with a smile laced with fondness. Recollecting the memories they had shared together over the years, the interview with Dato' Kumaraendran has given us an impression that was telling of the person the late Dato' Ghazi had been - that beyond the brilliance

of his career mapped out since 1971, Dato' Ghazi was also a man of great character.

Dato' Ghazi's journey commenced when he returned from the United Kingdom in 1971 after being called to the Bar of England and Wales at the Honourable Society of Lincoln's Inn. Before venturing into private practice, he had joined the legal service as a Magistrate in Kuala Lumpur and subsequently in the Sessions Court of Malacca and Kuala Kubu Bahru as Acting President.

In 1975, Dato' Ghazi was appointed to be a Deputy Public Prosecutor ("DPP") in Penang. It was during this time that he met Dato' Kumaraendran for some number of criminal cases, and a gentle rapport of a friendship had started between the two men. Dato' Ghazi's reputation as a DPP was something we could all emulate; he was a formidable, fearless opponent and a man ridden with fairness and integrity.

"When we made representations for the charges to be reduced or withdrawn, he was prepared to consider it on the merits of the law. And in some cases he allowed it. He was very amiable to any representations by lawyers provided that the law and the facts were properly given to him,"

Another notable trait of the late Dato' Ghazi was that he was extremely courteous and respectful in court and to fellow counsels. According to Dato' Kumaraendran, court etiquette to him was an important aspect of being a lawyer; it is something lawyers of this generation should strive to emulate as a sign of respect not just to the Court but to their fellow learned friends.

Two years later, Dato' Ghazi then went into private practice, becoming a partner in Messrs. Presgrave & Matthews from 1977 until 1992.

In between that period of time, Dato' Kumaraendran recalled that Dato' Ghazi was approached to become a judge by YAA His Royal Highness Almarhum Raja Azlan Shah FCJ (as HRH then was). Steadfast to his principle, however, Dato' Ghazi had decided to respectfully decline the offer, as he felt it would not be proper to leave the partnership of his then firm. Eventually, after a number of years though, Dato' Ghazi decided to set up his own firm, Messrs. Ghazi & Lim in 1992.

As a practitioner, Dato' Ghazi had been involved in various areas of practice and high-profile cases. One of these cases included the inquest of the cause of death of Loh Kah Kheng, the son of the deceased Penang tycoon Tan Sri Loh Boon Siew. To date, the death of the late Loh Kah Kheng in 1987 remains a mystery in Penang. Dato' Ghazi was the counsel for the deceased's estate, and he had put forth an argument that Section 122 of the Evidence Act 1950 dealing with disclosure of communications between spouses should have applied in this scenario and that the testimony of the widow of Loh Kah Kheng should not have been disclosed to and accepted by the Magistrate.

Another notable case where Dato' Kumaraendran had worked together with Dato' Ghazi had been one involving the demise of a Cambodian maid. They had acted as counsels for the two accused, appealing to the apex court, where the then Chief Justice, Tun Md Raus Sharif had convicted the accused to a lesser sentence instead of the death sentence.

There is no doubt that the achievements of Dato' Ghazi as a lawyer would be engraved in history for a long, long time. "*He was a true lawyer,*" said Dato' Kumaraendran, one who had always given his best to fight for his clients. Dato' Ghazi's approach had also been humane for some cases that warranted such a decision; for example, one that involved a hospital's assistant who had been negligent and had ended in a settlement between both parties.

But above that, like all of us, Dato' Ghazi had his own interests and hobbies. Aside from the love he had for the law, he was a car enthusiast and collector. His generosity and willingness to share, however, led to him selling one of his favourite *Alfa Romeo* cars to Dato' Kumaraendran, one which he would for sure cherish forever.

The Penang Bar Committee would like to take this opportunity to convey our sincere condolences to the family of the late Dato' Ghazi. His legacy will surely live on for generations to come.

We would also like to thank Dato' Kumaraendran for his time for this interview and the recollection of his favourite memories with Dato' Ghazi.

CORPORATE RECOVERY AND RESTRUCTURING

by Quin Hng Huey Koon



Restructuring is a significant decision as it may be a major process that involves alterations in both the internal and external structure of a company inclusive but not limited to legal, procedural, operational, management, and departmental adjustment.

While restructuring may be via certain conventional strategies such as cost-cutting, divestiture,

repositioning, and/or recapitalization, including several corporate rescue and restructuring mechanisms available in Malaysia under the Companies Act 2016, this article focuses on the following options: -

1. Corporate Voluntary Arrangement
2. Scheme of Arrangement
3. Judicial Management

In essence, the company's Board of Directors continues to take control of the company under a Corporate Voluntary Arrangement and Scheme of Arrangement. On the other hand, under Judicial Management, the management of the company will be handed over to a judicial manager, *i.e.* an insolvency practitioner.

CORPORATE VOLUNTARY ARRANGEMENT ("CVA")

CVA is a new corporate restructuring and rescue mechanism in Malaysia introduced by the Companies Act 2016 made available for private companies with no secured debt. CVA is known as a quick and cost-effective restructuring process, permitting a company to propose to its creditors a voluntary arrangement.

There are however barriers to the utilization of CVA amongst businesses in Malaysia. It does not extend to public listed companies and companies which have created charges over their property. Companies that are regulated under the purview of the Central Bank of Malaysia or the Capital Markets and Services Act 2007 are not beneficiaries of this scheme as well.

Below summarises the procedure of a CVA: -

1. The company directors prepare the CVA proposal;
2. The company directors appoint a Nominee (an insolvency practitioner);
3. The Nominee reviews and approves the CVA proposal;
4. If the Nominee approves the CVA proposal, the application can be filed in Court;
5. Upon the filing of all relevant papers in Court, the Company enjoys an automatic moratorium for 28 days. (During this period, creditors are barred from taking legal action against the Company);
6. Within 28 days from the filing date in Court, the Nominee shall summon a shareholders' meeting and a creditors' meeting to vote on the CVA proposal;
7. If the shareholders' meeting collects majority votes and the creditors' meeting records 75% creditors' approval, the company is entitled to a further extension for 32 days of moratorium subject to the Nominee's consent; and
8. Once the CVA proposal is approved, it binds all creditors of the Company.

Relevant sections: Sections 395 – 402 of the Companies Act 2016.

SCHEME OF ARRANGEMENT (“SOA”)

SOA, one of the corporate rescue mechanisms stipulated under Section 366 of the Companies Act 2016, permits the company to enter into a binding agreement with its creditors, pursuant to court orders, to restructure its debt with them.

The key procedural structure of a SOA is as follows: -

1. Obtain leave to summon a company meeting between its members and/or creditors by making an application to the court under Section 366 of the Companies Act 2016;
2. Concurrently, may apply for a restraining order pursuant to Section 368 of the Companies Act 2016 to stop all further proceedings in any action or proceeding against the company;
3. Once the order in paragraph 1 has been granted by the court, hold meetings of different classes of creditors and/or members to approve the proposed SOA; and
4. With the approval of the proposed SOA by a 75% majority of the total value of creditors (or class of creditors) or members (or class of members), a further application is made to the court to sanction the proposed SOA.

Relevant sections: Sections 366 and 368 of the Companies Act 2016

Relevant Case Laws:

1. Re Top Builders Capital Bhd & Ors [2021] 10 MLJ 327
2. Mansion Properties Sdn Bhd v Sham Chin Yen & Ors [2020] MLJU 1969; [2021] 1 MLJ 527
3. AirAsia X Bhd v BOC Aviation Ltd & Ors [2021] MLJU 189

JUDICIAL MANAGEMENT (“JM”)

JM is another method of corporate restructuring and rescue mechanism provided under Section 392 of the Companies Act 2016. Unlike CVA and SOA, under JM, the control of the company is completely taken away from the directors and will instead vest with the judicial manager, *i.e.* an insolvency practitioner. Similar to CVA, the company is entitled to an automatic moratorium that allows the company to avoid any legal proceedings and/or winding up actions.

The procedures of JM are as follows: -

1. Filing of a court application by proving: -
 - a. The company is insolvent or close to insolvency;
 - b. The survival of the company as a going concern;
 - c. The approval of compromise between the company and its creditors; and
 - d. A more advantageous realization of the company’s assets would be effected than on a winding up.
2. An automatic moratorium order for 180 days upon the filing of court application;
3. Once the JM order is granted, the restructuring plan must be tabled at the creditors’ meeting within 60 days; and
4. The restructuring plan must be approved by 75% of the creditors accepted by the Judicial Manager for it to be binding on all creditors.

Note however that any secured creditor can veto the judicial management application. In some exceptional circumstances, unsecured creditors may apply to intervene in a judicial management application under the Rules of Court 2012 instead.

Relevant sections: Sections 403 – 430 of the Companies Act 2016.

Relevant Case Laws:

1. Leadmont Development Sdn Bhd v Infra Segi Sdn Bhd [2019] 8 MLJ 473
2. Million Westlink Sdn Bhd [2019] MLJU 1721
3. Goldpage Assets Sdn Bhd [2020] MLJU 723
4. Spacious Glory Sdn Bhd v Coconut Three Sdn Bhd [2020] MLJU 1827
5. Twin Unitrade Sdn Bhd v TSK Hardware Sdn Bhd [2020] MLJU 2326

6. Vision Development Concept Sdn Bhd v Low Sheh Ling [2020] MLJU 2387
7. Best Re (L) Ltd v Chubb Samaggi Insurance Public Co Ltd [2021] MLJU 310
8. Monday-Off Development Sdn Bhd [2021] MLJU 915.
9. Loh Teck Wah v Fintree Capital Sdn Bhd [2021] MLJU 995

IN A NUTSHELL

More often than not, when employees hear of the news that their company is restructuring, their focus on the actual work tends to divert, while some may begin to search for new employment. This may worsen the company's performance and productivity in its entirety. For public listed companies, investors' insecurity can result in dropping stock prices. Hence, it is pertinent for a company to promote transparency to its corporate team members and investors with sufficient details about the restructuring. After all, completion of restructuring may place the company in a better position for achieving its goals through smoother business operation, greater production efficiency, and most importantly better organization to suit the latest market's needs.

Reference:

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PRENUPTIAL OR POST NUPTIAL AGREEMENTS

A Prenuptial Agreement (hereinafter known as “prenup”) is a contract entered into prior to marriage. It defines the terms which help determine how money and assets are to be divided in the event of a divorce.

Several terms can be laid down in a prenup:-

- The division of any property and assets;
- Alimony payments for child maintenance; and
- Guardianship of children (if any).

Prenuptial Agreements are more prominent in cases of second marriages and so on, particularly as to whether they can protect the interests of the parties and any children that are involved from the marriages.

Are Prenuptial Agreements Valid in Malaysia?

The law doesn't specifically state if it is illegal. Under Section 56 of the Law Reform (Marriage & Divorce) Act 1976 (hereinafter “the 1976 Act”), parties may refer to agreements with regard to matrimonial proceedings to the High Court

of Malaya. However, the validity of the prenup is **still subject to the court's discretion**.

As long as it does not contradict any section in the 1976 Act, the courts will consider the prenup and *uphold* the agreement based on several factors such as the conduct of the parties and the absence of duress or fraud.

Here is an excerpt of **Section 56** of the Act (in part):

“ Provisions may be made by rules of court for enabling the parties to a marriage, or either of them, on application made either before or after the presentation of a petition for divorce, to refer to the court any agreement or arrangement made or proposed to be made between them... if any, in the matter as it thinks fit.”

Post Nuptial Agreement

Post Nuptial Agreements are also known as agreements made **after marriage**. These types of agreements are more commonly seen in Malaysian courts. They may comprise of the Deeds of Separation and Maintenance Agreements made after getting into a marriage. There are perks to Post Nuptial Agreements as well.

Some of the perks include;

- **To define the property/assets** – Whether they are held jointly or individually;
- **To establish and divide debt settlements** – Who takes responsibility in settling debts incurred;
- **To establish maintenance of ex-spouses/children** – How much is allocated for spouses and custody of the children can be laid down;
- **Upon death** – How much is allocated to parties and an update of any will or future estate planning.

Of course, at the end of the day, the discretion remains on the courts to decide if they want to take the agreement into consideration, as stated under **Section 76 of the 1976 Act**:

(1) The court shall have power, when granting a decree of divorce or judicial separation, to order the division between the parties of any assets acquired by them during the marriage by their joint efforts or the sale of any such assets and the division between the parties of the proceeds of sale.

Conclusion

Prenuptial/Post Nuptial Agreements may be useful in the distribution or management of assets by minimizing any risk caused by unexpected financial claims or to circumnavigate any mishaps such as death.

The information in this article is sourced from Ask Legal (16 Jan 2019) “90% Of Malaysians Do Not Sign This Important Contract Before They Get Married”

Retrieved from <https://asklegal.my/p/prenuptial-agreements-malaysia-husband-wife-couples-marriage-marry>

Compiled by Ooi Tat Chen.

Don't Quit

When things go wrong as they sometimes will,
When the road you're trudging seems all up hill,
When the funds are low and the debts are high
And you want to smile, but you have to sigh,
When care is pressing you down a bit,
Rest if you must, but don't you quit.

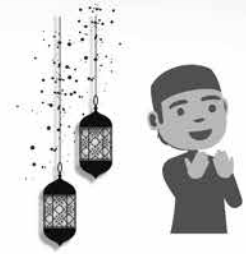
Life is strange with its twists and turns
As every one of us sometimes learns
And many a failure comes about
When he might have won had he stuck it out;
Don't give up though the pace seems slow—
You may succeed with another blow.

Success is failure turned inside out—
The silver tint of the clouds of doubt,
And you never can tell just how close you are,
It may be near when it seems so far;
So stick to the fight when you're hardest hit—
It's when things seem worst that you must not quit.

For all the sad words of tongue or pen
The saddest are these: "It might have been!"

~John Greenleaf Whittier
(1807-1892)

SYARIAH IN A NUTSHELL



THE MISCONCEPTIONS OF ISLAMIC LAW

by Abu Bakar Kugaselva Bin Abdullah

Arguably, since our media is largely controlled by the West, there have been many misconceptions about Islamic Law which are generally perceived to be rigid, arbitrary, and stagnant.

Is Islamic law rigid?

In order to understand the flexibility of Islamic Law, all we need to do is to study the punishment for the crime of murder according to the main source of Islamic Law that is the AL-QURAN.

The principle which is ‘*an eye for an eye.*’ is enshrined in *Surah Al Maidah* verse 45 which stipulates:

‘We ordained therein for their life for a life, nose for a nose, ear for an ear, and a tooth for a tooth.’

In *Surah an-Nisa* verse 92 and 93, the punishment for murder is mentioned in detail:

‘Never should a believer kill a believer. If one kills a believer by mistake, it is ordered that he should free a slave and pay compensation.’

In the same verse, it is stated that:

‘A fast of two months together with repentance is recommended for the accidental killing of a human being.’

In verse 93, it is stipulated that the punishment for intentional murder is death but in *Surah AnNahl* verse 126 states that:

‘If thee wants to retaliate, make sure that the retaliation is equal to the crime committed or be patient and forgive.’

The degree of flexibility is also demonstrated in *Surah Al Maidah* verse 42:

‘Human beings are fond of listening to rumors and falsehood and if you judge, judge in equity and fairness.’

Some Western scholars have labelled Islamic Law with unfair quotations not befitting the nature of Islamic Law. Max Weber has used the term ‘qadi justice’ as if Syariah judges are able to pass judgment according to their whims and fancies. Islamic law is not arbitrary.

According to an authentic narration of a Sunnah, Prophet Muhammad had asked a companion who would be selected as a judge as to how he would decide a case. He said, *'First, I would refer to the Al Quran. If there is doubt, I will refer to the Sunnah (words, deeds, and acts of silence) of the prophet. Eventually, I will resort to Ijtihad (personal reasoning).'*' Prophet Muhammad agreed to this method.

In another Sunnah, the Prophet Muhammad also emphasised that when you give a judgment, always listen to both sides of litigating parties.

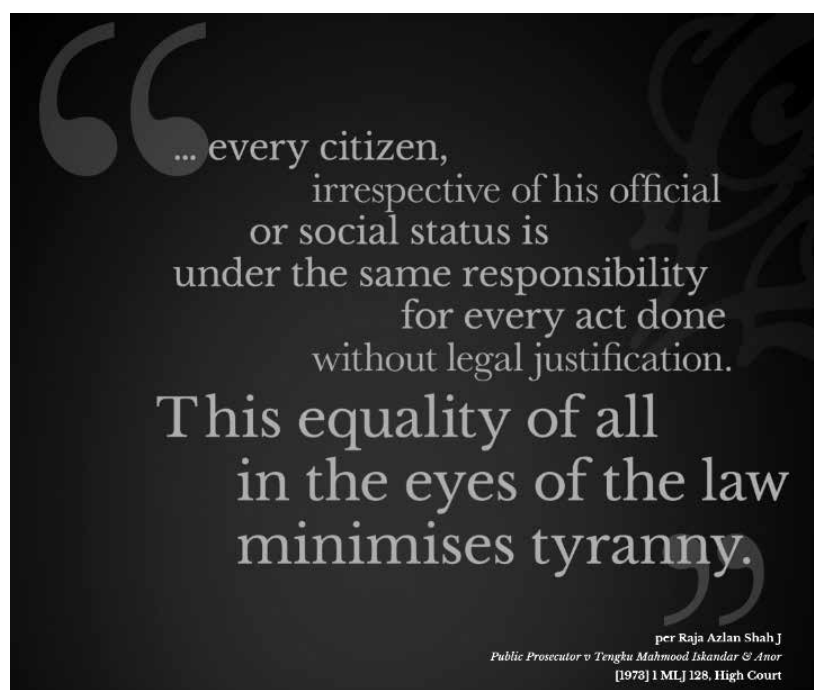
Since Islamic Law was born during the time of Prophet Muhammad, has it vanished in legal principles after the demise of the Prophet? In fact, the Institution of FATWA is an example of living legislation of Islamic Law.

For example, *'Is divorce pronounced via SMS valid according to Islamic law?'*

The principle is that divorce can be pronounced 'directly' or 'indirectly' (Sarih or Kinayah). Muslim scholars have jointly agreed (Ijma) that divorce via SMS is valid, subject to the principle of Islamic Law of evidence. Although cellular devices were not available during the time of Prophet Muhammad, the principles laid down through analogical deduction can provide answers to the social ills of the present.

Islamic Law is derived from a 'text-oriented approach', unlike the development of English Common law in which principles are derived through *stare decisis* and judicial precedents.

In defining right or wrong in Islamic Law, it is not subject to the minds of the judges but by strict adherence to the principles stated in the Al Quran.



CRIMINAL JUSTICE



Mysteries excite any individual, regardless of age. Our own land has her fair share of age-old unsolved murders, which warrant a Sherlockian detective to solve them. A ruthless murder of a child that shook the nation lifts the veil of this edition. An unforgivable beastly action on an innocent child!

A SCAR THAT NEVER HEALS: THE MURDER OF NURIN JAZLIN *by Nurul Hidayah Binti Tajuddin*

The story started with an innocent visit to the night market.

Nurin Jazlin, an 8-year old girl ran down to the neighborhood's night market to buy hair clips for herself. Never did it occur to her mother that a simple "okay" would change her life forever.

Nurin ventured to the place alone, without any adult supervision, taking a stroll through the bustling atmosphere of the night market like everyone would do; unaware that a predator was on the hunt for a potential victim close by. There was nothing out of the ordinary, and the only witness to have seen the abduction assumed that the innocent child was taken home by someone she knew. She never returned as the night was getting late.

The concerned father, Jazimin Abd. Jalil knew something had happened. It was his gut feeling telling him that his daughter might have gone missing, and he immediately went out to search for her with the help of relatives and neighbours. They asked around, but no one could give a definite answer of her whereabouts. Frustrated, Jazimin lodged a police report approximately seven hours after the search.



A photo of Nurin Jazlin and her Missing Poster.

Nurin's disappearance made it into the local newspapers and made headlines on the front cover. It was only right for the sole eyewitness to step forward to give a clue about the missing child.

Nurin was seen last with an unknown man who had persuaded the child to follow him into a white van. That was the clue that they needed, but even with that information, the search that was conducted soon after turned up empty.



Police photofits of a man and woman believed to be connected to the 8-year-old's murder and disappearance.

Camera footage that they found showed that the young child was forcefully dragged into a white van on the night of her disappearance, thus confirming her abduction. For parents to lose a child in such a way is surely devastating. What would have happened to her, what more when the poor child was suffering from some diseases that needed special attention and care; Nurin had kidney problems and high blood pressure that required daily medical attention. Her parents were desperate to have the poor child returned to them safely.

Nothing came to light until the morning of 17 September 2007, almost a month after her abduction when a company supervisor stumbled across a large Diadora sports bag outside of its premises. There was no one around to claim ownership of the bag when she saw it, and when the general manager of the company arrived, he inspected what was inside. Much to his horror, there was a body cramped inside such a tiny bag.

The body found in the bag was a female child, aged between 6 and 8; sexually assaulted and strangled. The body had bruises all over the neck, confirming that she had been strangled. Not only that, there were signs of bruises on her hands, and worst of all, the post mortem report confirmed a finding of a cucumber and brinjal inside the victim's genitals.

The post-mortem conducted on the body confirmed that the victim had been dead for more than six hours before the discovery of the body. Jazimin and his wife were alerted to the discovery and rushed to the hospital for identification. To be told that their child might have been found dead was any parent's worst nightmare, and that was what happened to both Jazimin and his wife. The parents refused to accept the truth that the body might have been their daughter and the severe physical changes on the body made it hard for them to recognize her.

Surely, in their darkest hours, there was still hope in them that their daughter might still be alive and the body was that of a foreign child. However, the DNA report confirmed that the identity of the child was indeed Nurin Jazlin.

On 1st October 2007, four men and a woman were arrested in connection to the case. The suspects between the ages of 27 and 35 were released almost immediately after the investigation team had failed to connect them to the case; except for the woman. The woman was said to have swallowed a SIM card when she was brought to court for remand, and the police revealed later that the card was allegedly used to send text messages to the police hotline number that Nurin was with her. Even with such a lead, there was still no trace of the murderer. After nearly a month of investigations, the police released CCTV footage that showed a man carrying the same kind of bag, leaving it at the same spot where the body was found; along with footage of a woman in a red dress and three other men. However, even with the enhanced footage, they still could not trace the identities of those people as well as the license plate of the motorcycle that was used by the man to transport the bag.

It is devastating to know that up to this day, the murderer is still out there roaming about freely.

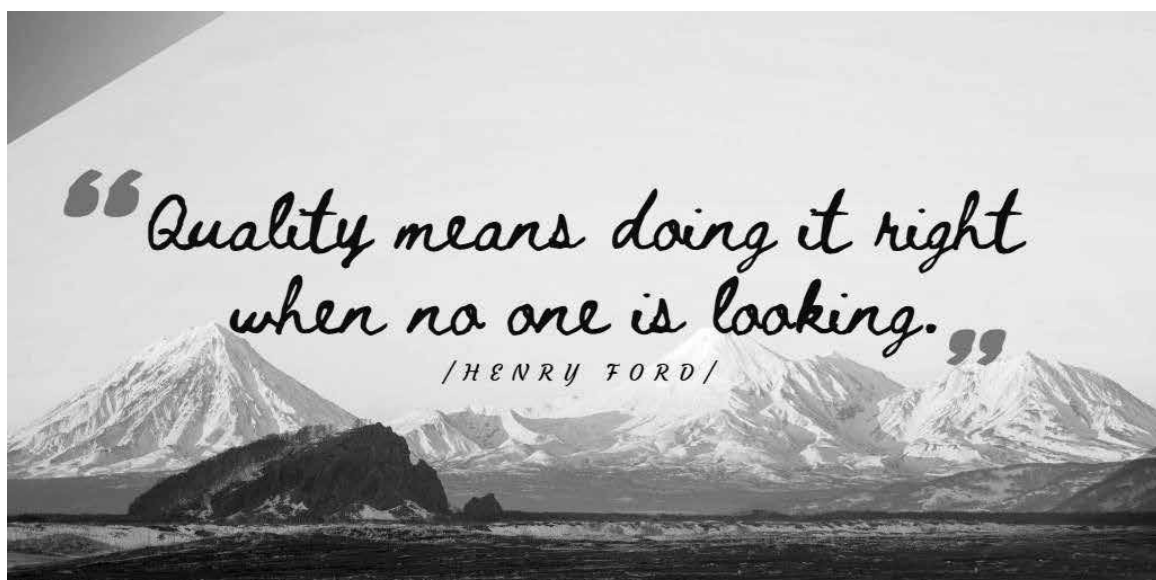
Nurin's murder case opened the public's eyes and served as a reminder to parents and guardians to always keep track of their children. We do not know of potential predators who might just be lingering out there, waiting for an opportunity to strike. Although it has been years since the case came to light, the case remains hauntingly fresh to Nurin's parents and all Malaysians.

May Nurin's soul rest in peace.

Source :-

Luka Yang Tidak Pernah Sembuh (iamlejen.com)

Identiti Pelaku Masih Misteri (Harian Metro)



EVOLUTION OF THE LEGAL PROFESSION: MOVING TOWARDS ELECTRONIC LAW PRACTICE

by Jing Yao Lee



The unprecedented COVID-19 and Movement Control Orders (“MCO”) by the Malaysian government overextended months had crippled traditional legal practice as it was no longer safe nor advisable for any person to congregate in groups, be it large or small. Naturally, the legal profession was forced to adapt,

because with a nod to the legal maxim that says *‘justice delayed is justice denied’*, it was impractical for legal practice to be grounded to a halt for such extended periods. While every lawyer is well aware that the law grows and evolves at a slow and steady pace, especially in Malaysia which has inherited the common law legal system that defers to precedent (*stare decisis*), this does not affect the capabilities of the legal profession as a whole to evolve and meet the demands and methods of practising law.

Naturally, we have seen a huge shift for heavier reliance on information technology (IT) in legal practice. From 13th May 2020 onwards, the Judiciary vide the ‘Guidelines of Court Operations During the Conditional Movement Control Order Period and Post-Movement Control Order’ dated 8 May 2020 encouraged the use of the e-Kehakiman System to dispose of certain matters. This was echoed in the Press releases of 11th May 2020, in ‘The Judiciary’s Standard Operating Procedures (SOP) During The Covid-19 Pandemic’ and ‘Court Operations Beginning 13 May 2020’ which emphasised greater utilisation of the e-Kehakiman System. Meanwhile, statutes like the Court of Judicature Act 1964, Subordinate Courts Act 1948, and Subordinate Court Rules Act 1955 have all been amended and gazetted to incorporate and advocate for matters to be dispensed with by remote communication technology. On 7th January 2021, the Judiciary released the ‘Practice Direction 1 of 2021: Management of Civil Case Proceedings Conducted by Long-distance Communications Technology for all Courts in Malaysia’ setting out guidelines and principles for stakeholders to view. It is clear that the Judiciary is committed to shifting the legal practice into the modern era.

Amongst lawyers, there is naturally a mixed response towards the direction that the legal practice is progressing towards. Foremost, it shall be said that the legal profession is privileged as our commodity and worth is based on information and knowledge. Information and knowledge are concepts and thus lawyers are not necessarily bound by their physical locations to perform roles. A shift towards electronic law practice affects the style and methods of how lawyers carry out their

practice, not the nature of practice. Having said that, the below should lay out some challenges and benefits which have been encountered by lawyers in adapting to this shift towards electronic law practice.

Working Remotely from Office

An assumption shall first be made that most lawyers carry out drafting works via computers. On that note, there should frankly be little difference whether such works are carried out on a computer in the office or in the comforts of their home. Instead, the challenge lies in accessing the necessary documentations which are saved on the office computers or law firm servers. Therefore, the first challenge for many law firms is to have the necessary IT infrastructure and/or platforms to support lawyers working remotely. On that note, it should be argued that the price to maintain such IT infrastructure is a necessary expenditure as the benefits outweigh the costs. The key here is flexibility, allowing lawyers the ability to complete work at times and locations convenient to them.

Having work saved online further promotes better and efficient file storage. A good IT system can easily house the entire database of a law firm's works which could be valuable precedents for each generation of lawyers contributing to the firm. Having proper and efficient storage further reduces the need and time period for law firms to incur expenses to preserve and maintain completed physical files which, if fortune favours, are in magnitude.

On the flip side, staff working remotely would make it harder for managing partners to monitor work performances. It is often said that discipline is key for employees who wish to work from home and thus it is not suitable for every lawyer. In relation to support and administrative staff, working from home may not be viable either as most administrative work requires the staff's physical presence.

Cost vs Efficiency

As has been iterated in the paragraph above, moving towards a more electronic law practice will definitely incur costs. Maintaining a database or IT infrastructure will incur costs for any law firm, and this is a cost not many partners, especially those from a more traditional practice, may be willing to invest in. There is also the factor of investing in proper electronic equipment for office usage. This author is willing to bet that most offices utilise computers which are frankly out of date and close to obsolete. At the same time, any computer bought today may frankly be considered old technology in a couple of years and it is a financial burden for law firms to keep updating software.

Research options like subscribing to online legal libraries and databases may also seem redundant and unnecessary, especially for law firms that had invested in a traditional library for the office. However, for smaller and newer law firms,

investing in a few reputable legal libraries is actually a much more cost-effective way to access valuable legal materials. Online portals are also able to reveal the latest and updated legal developments in a way that traditional libraries are unable to do.

Nonetheless, although costs will always be a huge factor in the running of a sustainable law firm, investment in the right technology will make a huge difference to a lawyer's legal practice. The examples raised here barely scratch the surface of what the right innovative technology can bring to lawyers and arguably, it would be much more beneficial if the right technology is available to streamline their legal practice.

Technologically Inept

In this modern age, being technologically inept can be challenging. It should also be noted that being technologically inept does not discriminate by age. While it will not be denied that senior practitioners may be more vocal about finding the shift for legal practice to move towards remote communication technology more challenging, the inability to use any technology will still affect any person who is unwilling to learn or adapt.

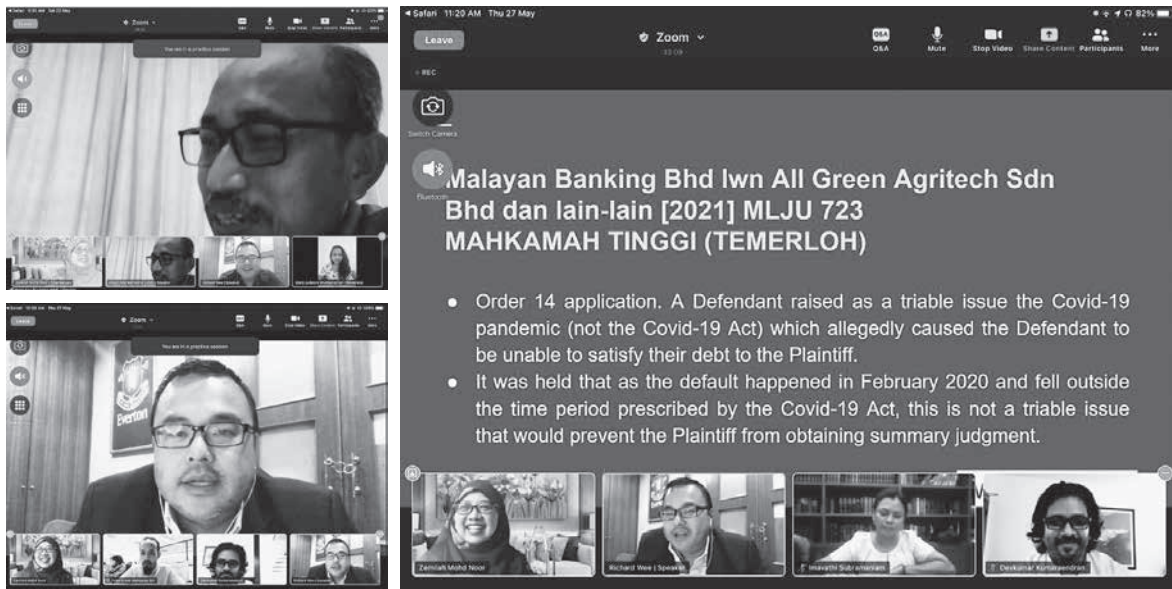
The benefits of incorporating technology into our legal practice should not be ignored. The best example lies in the e-filing system found within the e-Kehakiman System itself. Arguably, this was a game-changer for many lawyers as no longer will they be cursed with long queues, traffic jams, and closed counters in the mad rush to file documents with the Registry. The introduction of hearings by way of remote communication technology has also allowed the disposal of cases that are reliant on the borders of countries' reopening. For instance, a witness located overseas can easily give evidence from beyond the Malaysian border, a feat which if not allowed by the Honourable Courts, would mean the case has to be put on hold for several months, even years.

To conclude this article, the above just showcases a few examples of how legal practice has evolved. Such changes have already been running in the background and COVID-19 and the MCO, coupled with the changes made by the Judiciary have brought these issues into the limelight. In a way, these are exciting times as the transition is ripe for any enterprising lawyer to innovate and change the legal practice. The legal practice cannot exist in isolation and given how technology has radically changed other industry practices, it is without a doubt that the legal profession shall be forced to undergo evolution and transformation or face going by the way of the dodo.

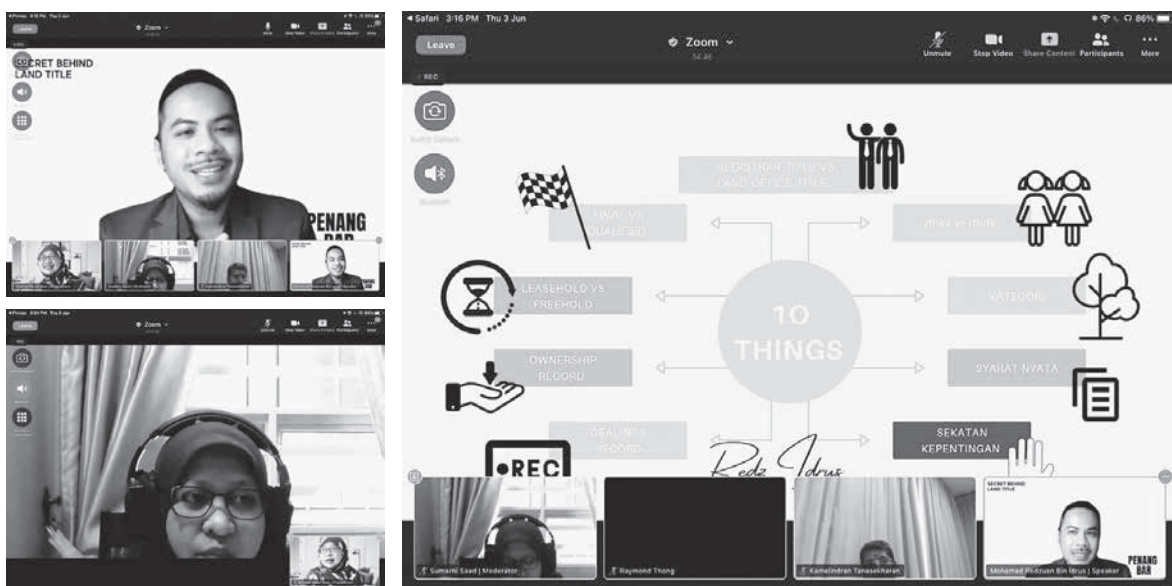


Medley of Moments

Understanding the Covid 19 Act 2020 and Issues Arising (27 May 2021)



The Secrets Behind Your Land Title (3 June 2021)



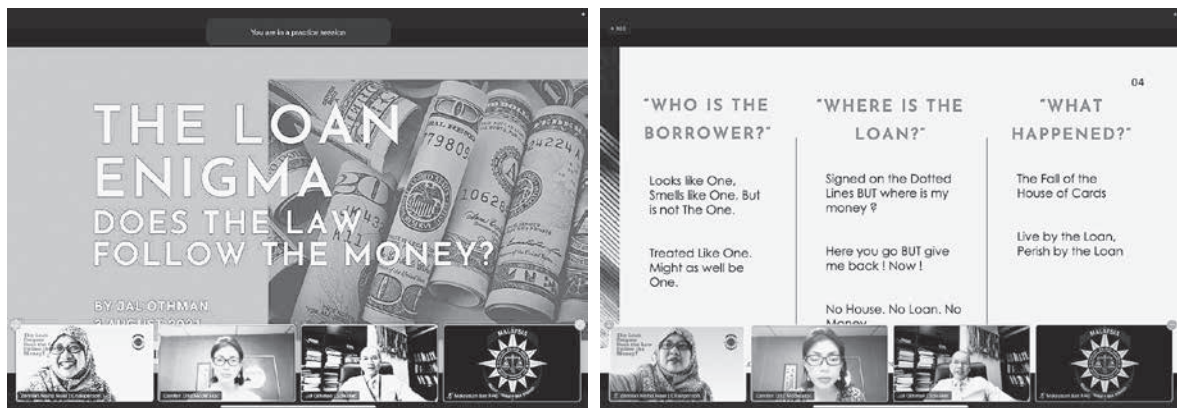
Is Islamic (Equity Based) Banking the Solution to Conventional Banking Problems?

(24 June 2021)



The Loan Enigma: Does The Law Follow The Money?

(3 Aug 2021)



A Clause-by-Clause Discussion on Commodity Murabahah/Tawarruq Documentation

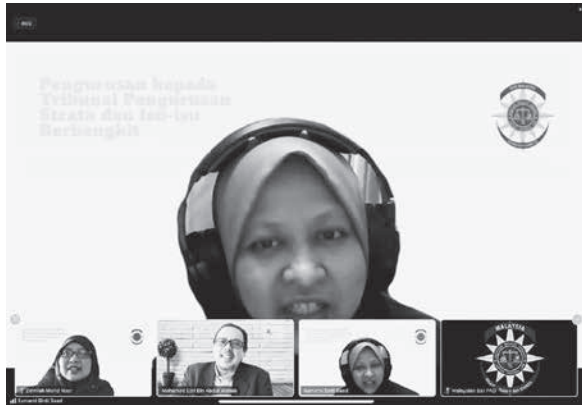
(27 Aug 2021)



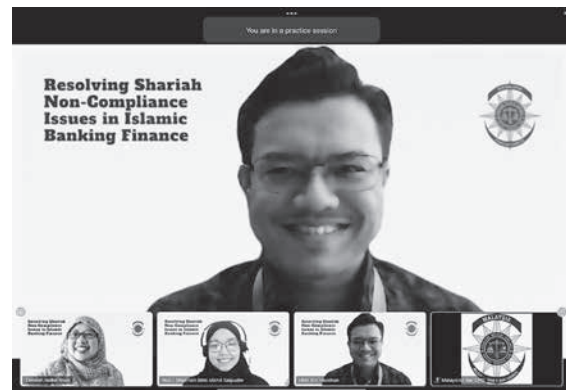
Penang Bar Committee's Food Bank Campaign (3 Aug to 3 Sept 2021)



Pengenalan kepada Tribunal Pengurusan Strata dan Isu-isu Berbangkit (10 Sept 2021)



Resolving Shariah Non-Compliance Issues in Islamic Banking Litigation (28 Sept 2021)



Shariah Compliance in IF Transactions

Islamic finance transaction must be based on mutual consent and free from elements of usury (*riba*), uncertainty (*gharar*), gambling (*maysir*), injustice/oppression (*zulm*) and anything that is forbidden (*haram*) under Shariah.

Islamic finance contracts

- Mutual Consent
- Lawful Contractual Objective
- Must avoid
 - Interest/usury (*Riba*)
 - Uncertainty (*Gharar*)
 - Gambling (*Maysir*)
 - Other prohibitions (pork, liquor, injustice/*zulm*)

AKRAM HIZRI AZAD & AZMIR
Advocates & Solicitors | Shariah Counsel | International Financial Regulator
Programmed & Programmers | Regulators | Regulators

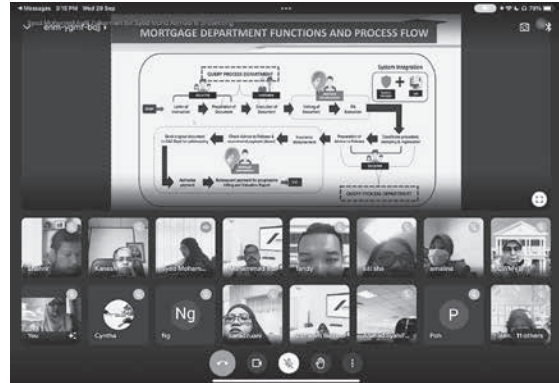
Resolving Shariah Non-Compliance Issues in Islamic Banking Litigation

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Malaysia Bar CPD

**Engagement Session:
Public Sector Housing Financing Board
(Lembaga Pembiayaan Perumahan Sektor Awam)
with Penang Bar Members
(29 Sept 2021)**



**Let's Celebrate the 58th Year of Malaysia Day
(16 Aug to 30 Sept 2021)**



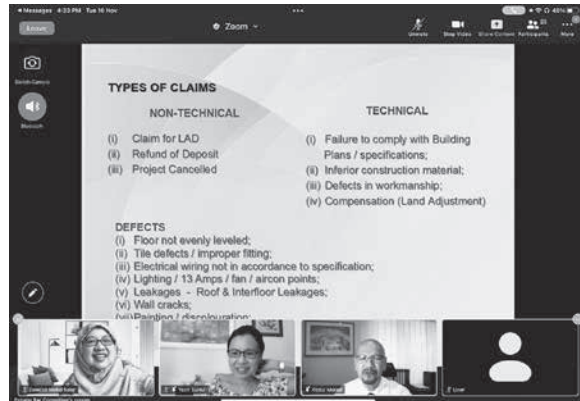
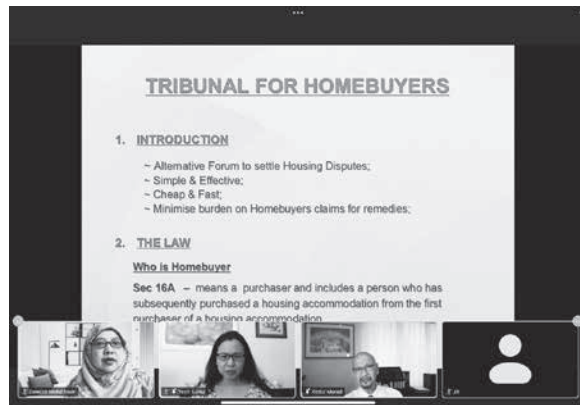
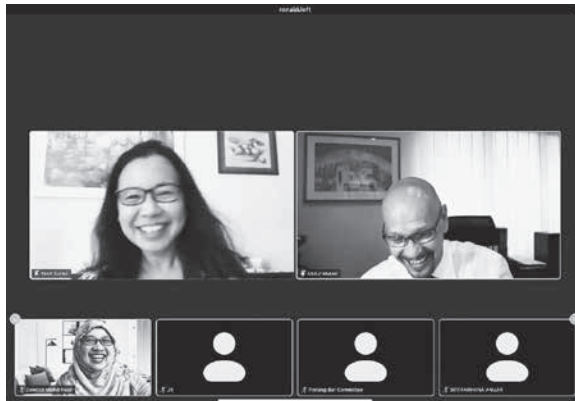
Leases & Tenancies – A Practical Guide (8 Oct 2021)



Kelantan Bar's Visitation to Penang Bar (12 Nov 2021)



Introduction to Tribunal for Home Buyers & Related Issues (16 Nov 2021)



Farewell Courtesy Call to YA Dato' George Varughese (23 Nov 2021)



Farewell Courtesy Call to YA Tuan Wong Hock Chong (25 Nov 2021)



Legal Aid Champion Certificate, 40th Anniversary of Legal Aid in Malaysia (27 Nov 2021)





THE EXTENSION OF A LEASE

Introduction

There are two types of land title in Malaysia as far as land tenure is concerned, that is freehold or leasehold.

A freehold land title gives the owner ownership in perpetuity whereas a leasehold land title gives the owner ownership up to a maximum of 99 years according to *Section 76 of the National Land Code 1965* ('the Code').

It is important to bear in mind that the leasehold lands *belong* to the State, once the lease expired, the land will automatically be reverted to the State Authority in terms of ownership.

It is pertinent to note that Malaysia follows the Torrens system of land registration that 'the register is everything' which is assimilated into our National Land Code 1965, is our main source of land law applicable throughout the Peninsula of Malaysia.

What is the Extension of a Lease?

There is a legal process where the owner of the leasehold land may apply to the State Authority to extend the lease for a further period, e.g. 30, 60 or 99 years, normally.

The application should be made before the expiry of the term specified in the title, as most State Authority's circular will mention.

Why do we Extend a Lease?

The utmost reason is to ensure the security of tenure in the occupation of the land should the owner have a family consist of the younger generation who may continue to stay on the piece of land with a property erected thereon.

Besides, even if the owners are planning to sell off the leasehold land with a property erected thereon, it is wise to extend the lease for a longer period before selling it off so that the potential buyer will not have an issue of securing a loan from the financial institution due to lease expiring.

This is mainly because properties with a shorter lease (less than 30 years) have lower market value as compared to those with a longer lease.

How to Apply for the Extension of a Lease?

Under the National Land Code (“the Code”), there are 2 ways to extend the lease, namely:-

- (a) *Section 197 and Section 76 of the Code; or*
- (b) *Section 90A of the Code.*

Section 90A of the Code, as amended by National Land Code (Amendment) Act 2016, is the exact provision for the extension of a lease subject to an application which must be made before the expiry of the lease and provided the condition of land use remains the same and must not be violated during the tenure of lease.

This provision had started to be in operation from 1st June 2018 in the state of Selangor.

Section 197 and Section 76 of the Code, are technically not the provisions in the Code for the extension of a lease.

Both the applications need to be kicked start by submitting the relevant application form to the State Authority.

Once the approval has been granted, the applicant will be informed of which section under the Code will his or her application be processed as well as the premium payable.

What will be the Premium Payable for the Extension of a Lease?

It varies throughout the different States.

In *Selangor*, for example, once the application for the extension of a lease is approved, the applicant is required to pay an amount of premium calculated as follows in accordance to Pekeliling Pengarah Tanah Dan Galian Selangor Bilangan 6/2011:-

$1/4 \times 1/100 \times \text{adjudicated value of the land} \times (\text{term of the new lease} - \text{the balance of existing lease}) \times \text{area size}$

Payment of premium can be done in the following options:-

Pay full premium with 30% discount within the stipulated time given by the State Authority; or

Pay RM1000 with the condition that the owner shall not sell the property to others. Otherwise, the owner has to pay the full premium.

As land matters are under the jurisdiction of the State, the policies and regulations that should be observed might be varied from one State to another.

Therefore, it is best to find out the details prior to applying for an extension.

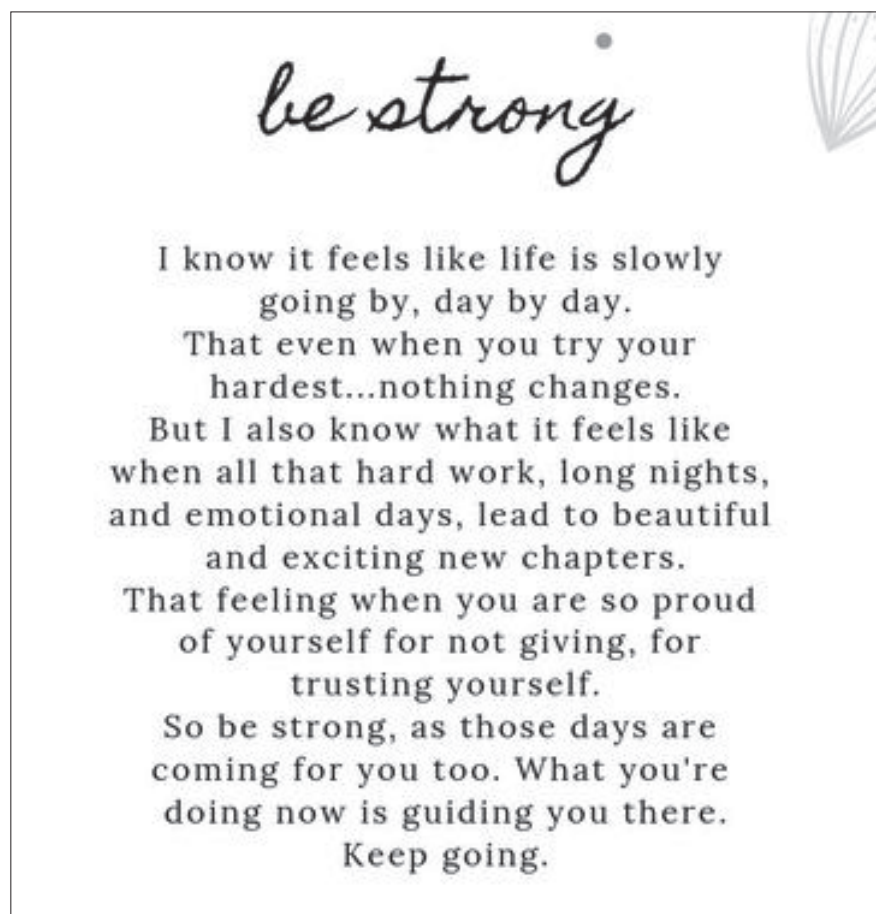
It is important to bear in mind that the State Authority has the full discretion to allow the extension or otherwise at the end of the day.

Conclusion

We opine the introduction of Section 90A to the Code is one of the most remarkable amendments ever introduced for the past decade. And it is now safe to say that the application to extend the lease shall be made before the expiry of the lease in order to secure the extension of the lease to a leasehold land title.

This article is authored by Chia Swee Yik and assisted by Ooi Zhuang Hong of Messrs. Chia, Lee & Associates and retrieved from <https://chiale.com.my/the-extension-of-a-lease/>

Compiled by Kimberly Lim Ming Ying





EMPLOYMENT LAW: PROBATION

Introduction

Probation is not a strange term in employment contracts.

It simply means that an employee is put on trial to prove his fitness for the job position for which he is employed in terms of his performance, conduct, and character.

Probationary Period

A probationary period is left to be agreed upon between the employer and the employee. There is no law governing the length of the probationary period.

Hence, a probationary period as stated in the employment contract shall be regarded as a contract of an agreed period or duration of the trial of a term certain.

Extension or Confirmation

At the end of the probationary period, it is encouraged that the employer either extends or confirms the employee's service by writing. Whether to extend or to confirm an employee's service is entirely at the discretion of the employer.

It is a well established legal principle that a probationer holds no lien on the post; which means he has no right of tenure to his job beyond the agreed contractual probationary period.

Hence, it is trite law as stated in the case of *K.C. Mathews v Kumpulan Guthrie Sdn Bhd* [1981] 2 MLJ 320 that 'If no action is taken by the employer either by way of confirmation or by way of termination, the employee continues to be in service as a probationer.', as confirmed in the case of *Wong Choon Moey v Practimax Sdn Bhd*, [2013] 2 ILJ 501.

Termination of Employee under Probation

The law recognizes that an employee on probation enjoys the same rights as a permanent or confirmed employee and his or her services must not be terminated without just cause and excuse.

The rationale of such position came from the fact that the definition of 'Workman' in Section 2 of the Industrial Relations Act 1967 ('IRA 1967') includes probationers, thus the dismissal of a probationer may be open to a claim for reinstatement under Section 20 of the IRA 1967 as well as to claim back wages for up to 12 months.

It follows, therefore that a probationer *cannot be dismissed* without just cause or excuse during the probationary period or its extension or continuation, whichever the case may be.

The Court in deciding whether a probationer has been dismissed with good cause and excuse will consider:-

1. there is an intrinsic distinction between the employees under probation and confirmed permanent employees. For instance, on the expiry of the probationary period of the employees, even if the works of the employees are satisfactory, it does not confer any right on them to be confirmed.
2. the employer, if reasonably satisfied that the employee is not suitable for the job he may be removed.
3. whether or not the probationer is suitable for the job, is not just based upon the performance of the employee but also on his conduct, behavior, aptitude, and attitude in relation to the job for which he is employed.
4. in case of inefficiency and unsatisfactory work performance leading to dismissal, the court has to be satisfied:-
 - *Firstly, as to the manner the worker has failed to perform;*
 - *Secondly, whether he was pre-warned or notified of his performances;*
 - *Thirdly, whether in spite of the warnings he still failed to perform; and*
 - *Lastly, the Company had acted in good faith and reasonable manner in its conduct towards the Claimant.*
5. As long as the company makes known to the employee his shortcomings, inefficiencies, and instances of unsatisfactory and poor performance in a proper, coherent and cogent manner, thereby ensuring procedural fairness, the court will regard the company as having met the test above.

In some cases, the court is satisfied that the Company had acted in good faith and reasonable manner in dismissing the claimant based on his/her poor performance and that he/she was adequately warned about poor performance; accorded sufficient opportunity to improve and had yet failed to improve performance sufficiently would hold that there was no unjust dismissal accordingly.

Remedies

Likewise in the case of unjust dismissal of a permanent employee, the court may resort to Section 30 of the IRA 1967, in which the court shall act according to equity, a good conscience, and the substantial merits of the case without regard to many technicalities.

In the event the industrial court satisfied that a probationer was unjustly dismissed, the court may award:-

1. Reinstatement

Note: if the court in the course of the hearing finds that the award of reinstatement is inappropriate, then the court may substitute the award to compensation in lieu of reinstatement. Such compensation is calculated based on the number of years of service of the employee or probationer, for every year of service, he will be compensated with one (1) month salary); and

2. Backwages

Such backwages are calculated from the date of dismissal until the last day of the court hearing, and it shall not exceed 24 months, whereas, for probationer, it shall not exceed 12 months.

This article is authored by Chia Swee Yik of Messrs. Chia, Lee & Associates and retrieved from <https://chiale.com.my/employment-law-probation/>

Compiled by Kimberly Lim Ming Ying

We must ever be mindful that written constitutions are mere parchment pieces.

It is important that there must be, in the hearts and minds of those who are entrusted to administer and uphold the Constitution, a belief in the values and principles that animate the august document.

HRH Sultan Azlan Shah
Fifty Years of Constitutionalism and the Rule of Law
Opening Address, 14th Malaysian Law Conference
29 October 2007, Kuala Lumpur



POSSIBLE OR NOT: LEGAL STATUS OF MANDATORY COVID-19 VACCINATION FOR EMPLOYEES IN MALAYSIA

Currently, the Malaysian government has not made Covid-19 vaccination mandatory. That being said, there is also no law that disallows mandatory vaccination policies to be imposed by employers. As the Covid-19 pandemic is relatively new, there are no reported court cases on the legality of mandatory vaccination policies in Malaysia.

There is a possibility for employers to make the Covid-19 vaccination compulsory for employees if there is a government imposed requirement, i.e. if the relevant Ministries make employee vaccinations mandatory or a pre-condition for the approval to operate.

Employers may also consider the following circumstance prior to imposing vaccination mandatory:

- Industry sector;
- Type of work performed;
- Vulnerability to the work force;
- Exposure to third parties;
- A possible alternative measure for business sustainability such as work from home, segregation of vaccinated and unvaccinated employees.

Employers must be cautious when making vaccination mandatory, as there are situations where an employee is unable to receive the Covid-19 vaccination due to an existing medical condition.

Can an employee refuse to take the Covid-19 vaccine?

Yes, employees have the right to refuse the vaccination. There are many valid reasons for an employee to refuse to be vaccinated, such as religious or medical grounds. Employees are encouraged to give supporting documents to justify their refusal, however, this is not compulsory.

Can disciplinary actions or termination be taken against employees for refusing to be vaccinated?

This issue has yet to be tested in the Malaysian courts. There are no legal prohibitions against an employer implementing a mandatory vaccination policy. There are many factors to be taken into account before considering disciplinary action against an employee who refuses to be vaccinated such as e.g. the following:

- Does the refusal result in a breach of duties, i.e. the employee's job function requires them to physically interact with third parties;
- Has the refusal caused loss or damages to the company or other employees;
- Does the employer's business involve high risk individuals;
- Is vaccination a pre-condition from the industry authorities for the employer to operate.

Where the employee has a medical reason not to take the Covid-19 vaccination, employers should explore other alternative measures to carry on business, such as transferring the employees to different roles before taking any disciplinary actions. If an employee does not have a reasonable reason to refuse vaccination, employers may view it as insubordination. Any disciplinary action for insubordination shall be proportionate and justifiable to avoid a claim from the employee.

Does the employer have a duty to provide a safe working environment?

Employers owe a duty to all employees to provide a safe and conducive working environment under the Occupational Safety and Health Act 1994 ("OSHA"). The OSHA imposes an obligation on the employer to take all reasonable and practical steps to ensure the health and safety of all employees at work. In order to satisfy this obligation, employers should conduct a Covid-19 risk assessment. Following the risk assessment, employers should decide whether it is necessary for their work force to be vaccinated. If the answer is affirmative, employers should have a Covid-19 vaccination policy drafted, and employees should be briefed on why it is necessary to have the policy in place. Employers would also be required to obtain consent for the Covid-19 vaccination from every employee.

Can employers introduce mandatory vaccination as a term and condition in employment contracts?

For new employees, employers should include the requirement to be vaccinated in the employment contract, so it would be considered as a condition to the employment. However, it is not the same for existing employees, consent from the employee is required for the insertion of a mandatory vaccination clause in the employment contract.

Conclusion

For high risk industries, employers are encouraged to conduct a Covid-19 risk assessment, and if the result of the assessment is medium to high, it is recommended to have a vaccination policy in place. The vaccination policy should be communicated to all employees and their consent to be vaccinated should be obtained.

This article is authored by Messrs. Rödl & Partner, published on 16 September 2021 in their Newsletter Issue Q3/2021, and retrieved from <https://www.roedl.com/insights/newsflash-asean/2021-03/malaysia-legality-mandatory-employee-vaccination>

IN MEMORIAM
We Will Miss Our Learned Friends
by Clarie Ann Malar Jochaim

Devasenathy Pathy Rajah

- ❖ We mourn the loss of Devasenathy Pathy Rajah who was the sole proprietor of Messrs. Rajah & Co on 1 February 2021.
- ❖ He was admitted as an advocate and solicitor of the High Court of Malaya in 1979.
- ❖ He was among the top 3% of the most senior Members of the Malaysian Bar for the past several years.
- ❖ Losing a veteran member is a great loss not only to his family and loved ones but also the legal fraternity.

Sankra Krishna a/l S Rama

- ❖ We are deeply saddened to hear that Sankra Krishna a/l S Rama who was the sole proprietor of Messrs. R Sankra Krishna & Co passed away on 3 February 2021.
- ❖ He was admitted as an advocate and solicitor of the High Court of Malaya in 1997.
- ❖ His passion for law and achieving justice would be remembered by those who came in contact with him.

Julie Khoo Joo Lee

- ❖ We mourn the loss of Julie Khoo Joo Lee who was practicing at Messrs. Annual & Foong who passed away on 29 July 2021.
- ❖ She was admitted as an advocate and solicitor of the High Court of Malaya in 1997.
- ❖ She created a place for herself in the legal profession over the past 24 years.
- ❖ Her warmth and kindness left its mark on many.

Datin Chye Ann Lee

- ❖ Datin Chye Ann Lee passed away on 9 September 2021.
- ❖ The Late Datin Chye was admitted as an advocate and solicitor of the High Court of Malaya in 1992.
- ❖ She was a well-known lawyer who had been practicing for almost 29 years.
- ❖ She was a partner at Messrs. Ann & Anuar at the time of her demise. We appreciate her hard work in her practice.

Lee Son

- ❖ We deeply regret the passing of Lee Son who was a partner at Messrs. Lee Son & Adreinne on 6th October 2021.
- ❖ He was admitted as an advocate and solicitor of the High Court of Malaya in 1994.
- ❖ He will be remembered as dignified and passionate about his work until the end.

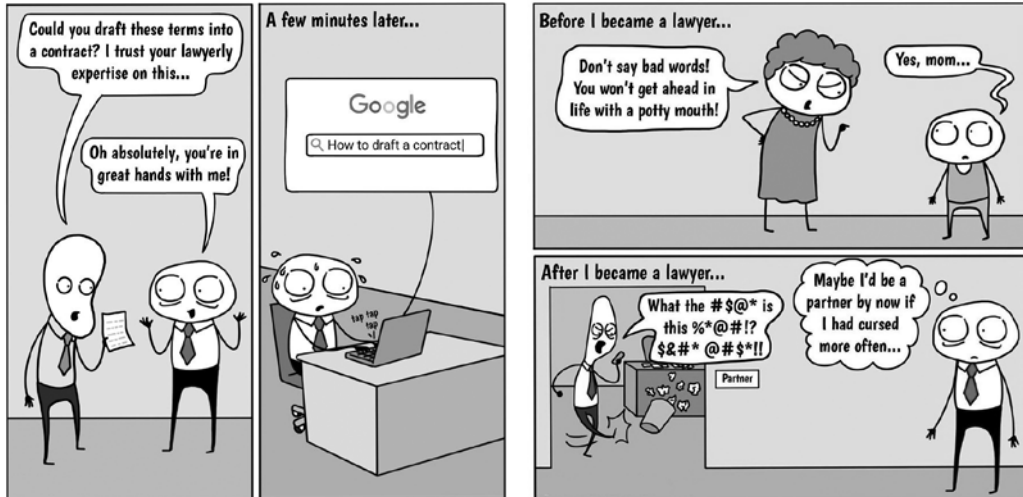
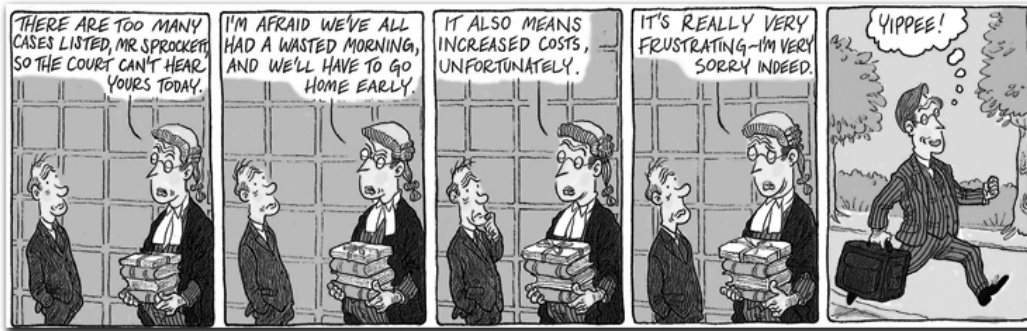
Rethinakumar a/l Subramaniam

- ❖ It is with great sadness that we record the demise of Rethinakumar a/l Subramaniam, who was the sole proprietor of Messrs S Rethinakumar & Associates on 23 October 2021.
- ❖ He was admitted as an advocate and solicitor of the High Court of Malaya in 1999.
- ❖ He was dedicated to the profession and access to justice.
- ❖ He will be missed by the legal fraternity as well as those who were fortunate enough to have known him.

The publication team of Voix d'Advocat mourns the loss of our brothers and sisters-at-law in the year 2021 and extends its heartfelt condolences and sympathies to their families and loved ones. May their souls rest in peace. We appreciate their contributions to upholding and maintaining the administration of law and justice.

Attorney Humour

Compiled by Guhapria Kumaravellu



LEGAL MOVIE REVIEW

-PRIMAL FEAR-

by Ramesh Rajadurai



Primal Fear, based on a novel by William Diehl, starred Richard Gere as a flamboyant Chicago Defence Attorney who chased defendants instead of ambulances and volunteered his services when a teenager from Kentucky was charged with murdering an Archbishop.

The Defence Attorney was named Martin Vail. In playing him, Gere created one of the best performances of his career, nuanced and smart, although the conventions of the thriller genre distract the viewers from how good the movie really was.



The Archbishop was murdered in a grisly scene, and the suspect, Aaron Stampler (Edward Norton), was captured a short time later after a foot chase with the police that was telecasted live. He was covered with the Archbishop's blood, and the headlines called him "The Butcher Boy of St. Mike's."

But did he commit the crime? A psychologist named Molly Arrington subsequently examines him for the court and thinks the question has no simple answer.



Gowri Subbaiyah

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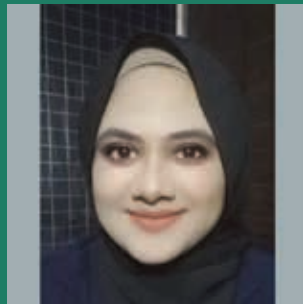
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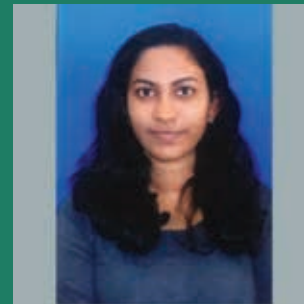
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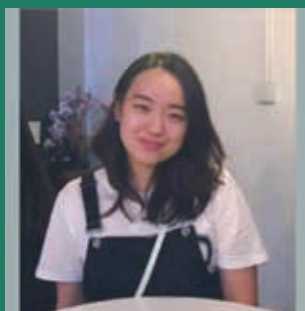


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The Penang Bar Committee welcomes letters, articles, views and news (including photographs) for possible inclusion in the newsletter. Kindly forward any comments and contributions to voixdadvocat@gmail.com. However, the Penang Bar Committee and the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

Note to self

1. treat myself better
2. laugh more
3. spread kindness
4. be optimistic

New Year,
New Me!

2022 resolution

Now is no time to think
of what you do not have.
Think of what you can
do with what there is.

ERNEST HEMINGWAY

1.

2.

3.