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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

There were a number of significant legal developments in the second quarter of 2016.

The first is the outcome of the Brexit referendum on 23 June 2016 where the United Kingdom voted to leave the European Union. This the first time since the EU was formed in aftermath of World War II that a member State has decided to leave the EU. The decision has cast uncertainty on the economic outlook of the UK and the EU. Although the separation process is expected to take at least two years, there is much for the UK Parliament and Government to do in the meantime – treaties, agreements, legislation and other legal documents have to be reviewed to de-couple the UK from Euro-centric requirements.

On the home front, three developments are noteworthy. First, the National Security Council Act 2016 came into force pursuant to Article 66(4A) of the Federal Constitution which provides that a Bill shall become law if the Yang Di Pertuan Agung does not assent to the Bill within 30 days of its being presented to him for assent. According to various legal sources, this is the first time that Article 66(4A) has been invoked in Malaysian legislative history.

In *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor*, a landmark decision delivered on 2 June 2016, the Federal Court introduced the tort of sexual harassment into Malaysian law. In doing so, the apex court followed the decisions by the courts in Singapore and Hong Kong.

The third significant legal development in Malaysia in the preceding quarter is the launch of the P2P Financing framework by the Securities Commission Malaysia in April 2016. The SC has also invited interested parties to submit applications for registration as P2P platform operators. It is reported that the P2P platforms will commence operations in early 2017.

We hope that you will enjoy reading the articles and case commentaries that we have lined-up for you in this issue of our newsletter.

With Best Wishes,

Kok Chee Kheong
Editor-in-Chief

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ANNOUNCEMENTS

CHAMBERS GLOBAL 2016

Chambers Global 2016 has ranked our firm in Band 1 for Corporate/M&A and Band 3 for Banking & Finance. Chambers have also ranked our Partners, Janet Looi, Quay Chew Soon and Cheng Kee Check as leading individuals in Corporate/M&A.

CHAMBERS ASIA-PACIFIC 2016

Chambers Asia-Pacific 2016 has ranked our firm in the Band 1 for Corporate/M&A, Projects, Energy and Infrastructure, Dispute Resolution and Intellectual Property. We congratulate our lawyers who were ranked by Chambers as leading individuals in the following practice areas:

Arbitration (International) and Dispute Resolution (Construction): Vinayak Pradhan
Competition/Antitrust: Faizah Jamaludin
Corporate/M&A: Janet Looi, Quay Chew Soon and Cheng Kee Check
Dispute Resolution: Leong Wai Hong, Ivan Loo, Lim Chee Wee and Lee Shih
Employment: Siva Kumar Kanagasabai and Selvamalar Alagaratnam
Intellectual Property: Lee Tatt Boon, Charmayne Ong and Khoo Guan Huat
Shipping: Siva Kumar Kanagasabai

MANAGING INTELLECTUAL PROPERTY AWARDS 2016

SKRINE has been awarded the Managing IP Malaysian Intellectual Property Firm of the Year 2016. This is the third successive year that the Firm has been given such honour.

SENIOR ASSOCIATES

The Partners extend our heartiest congratulations to Natalie Ooi Wan Qing and Zamir Hamdy Hamdan on their promotion to Senior Associates.

Natalie is a member of our Dispute Resolution Division. She graduated from the University of Malaya in 2011. Natalie's practice areas include corporate and commercial litigation.

Zamir is a member of our Dispute Resolution Division. He graduated from the International Islamic University, Malaysia in 2011. Zamir's practice areas include employment and industrial relations law and immigration law.

We have no doubt that Natalie and Zamir will continue to make invaluable contributions to the Firm.

MALAYSIA'S MATCH MAKING

Fariz Abdul Aziz examines the Securities

BACKGROUND

Peer-to-peer ("P2P") lending or sometimes also known as "marketplace lending" or "crowdlending", is the practice of matching lenders directly with borrowers via an online platform without the need of going through a traditional financial intermediary, such as a bank or other financial institution.

The P2P lending process will vary by platform, but it generally involves the following steps:

(1) a prospective borrower submits an application to the platform operator for consideration;

(2) the platform operator obtains a credit report on the applicant and uses this information to assign a risk grade to the proposed loan and sets an interest rate corresponding to the assigned risk grade;

(3) if accepted, a loan request is posted on the platform operator's website, where investors can review all loans or search for specific loans that meet their desired risk/return characteristics;

(4) if there are enough investors to fund the loan, the borrower sells investment notes associated with the specific loan to each lender that has agreed to fund the loan in the principal amount of that commitment; and

(5) the platform operator receives a fee on the loan, as well as origination and servicing fees.

P2P lending started in the UK and the first company to offer P2P loans was Zopa which targeted the personal loan segment. Since its founding in February 2005, Zopa has reportedly lent more than £1.42 billion in personal loans. Funding Circle was the first site to use the process of P2P lending for business funding in the UK and now operates in both the UK and US markets. As of January 2016, Funding Circle has reportedly facilitated over £1 billion in loans to small and medium-sized firms.

The stellar growth of the P2P lending industry globally has primarily been propelled by the comparatively lower overheads which P2P lending platforms are able to operate on as a result of operating entirely online and outside the traditional banking system. This results in P2P lenders being able to offer more attractive interest rates to borrowers *vis-à-vis* traditional financial institutions whilst still earning the same or higher returns compared to savings and investment products offered by banks - even after payment of the fee charged by the P2P lending platforms.

THE P2P FRAMEWORK

As part of its effort to nurture and facilitate market-based innovation in "FinTech" (finance technology) under its aFINity@SC initiative, the Securities Commission Malaysia ("SC") released the region's first comprehensive regulatory framework for P2P financing, the Guidelines on Recognized Markets ("RM

INDUSTRY IS OPEN FOR BUSINESS

Commission's peer-to-peer financing framework

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Guidelines") on 13 April 2016. The RM Guidelines supersede the 'Guidelines on Regulation of Markets' previously issued by the SC and will regulate the operation of both equity crowdfunding platforms and P2P financing platforms.

This article highlights some of the key requirements which an entity will have to comply with in order to be registered as a P2P platform operator ("P2P Operator") as well as the provisions that will apply in relation to raising finance on a P2P platform by an issuer ("Issuer").

The P2P Operator

A P2P Operator must be a body corporate established in Malaysia and have a minimum paid-up capital of RM5 million. The RM Guidelines imposes a number of obligations on the P2P Operator, including:

(1) ensuring that it has a risk scoring system in place relating to the loan;

(2) undertaking a risk assessment on prospective Issuers, including conducting background checks to ensure fit and properness of the Issuer, senior management and controlling owner. In this regard a P2P Operator is held accountable for the risk scoring mechanism and methodology employed;

(3) establishing one or more trust accounts in a licenced institution designated for the deposit of funds raised through the P2P platform and for monies received as payments to investors;

(4) ensuring the disclosure document lodged by an Issuer is verified for accuracy and made accessible to investors through the P2P platform; and

(5) having in place processes to monitor compliance with anti-money laundering requirements.

P2P Operators and their officers are expressly prohibited from providing any financial assistance to investors to invest through the P2P platform. P2P Operators are also prohibited from providing any financial assistance to Issuers although officers of a P2P Operator may invest in an Issuer through the P2P platform provided that appropriate controls are put in place to manage any potential conflicts of interest.

P2P Operators are also subject to the general rules relating to recognised market operators imposed under the RM Guidelines, such as the requirement that their directors and officers be fit and proper persons, the appointment of a responsible person and general reporting requirements.

Issuers

Only locally registered sole proprietorships, partnerships, limited liability partnerships, private limited and non-listed public companies are permitted to be Issuers. The following are expressly prohibited from being Issuers:

(1) commercially or financially complex structures;

(2) public listed companies and their subsidiaries;

(3) companies with no specific business plans or whose business is to acquire unidentified entities (i.e. a blind pool); and

(4) entities which propose to use funds raised to provide loans or make investment in other companies.

P2P platforms operated by the SC's registered P2P Operators only facilitate businesses or companies to raise funds and exclude individuals from seeking personal financing.

An Issuer is not permitted to be hosted concurrently for the same purpose on more than one P2P platform. However, an Issuer is allowed to list on a P2P platform and an equity crowdfunding platform subject to the appropriate disclosures being made.

Limits and restrictions on funds raised

Although there is no limit on the amount of funds which an Issuer may raise on a P2P platform, an Issuer is required to state an initial target amount and will only be able to keep the amounts raised if such amounts exceed 80% of the initial target amount. Any amount raised which exceeds the initial target amount shall not be kept by the Issuer.

P2P Operators are required to encourage retail investors to limit their investments on a P2P platform to a maximum of RM50,000 at any period of time. However, a sophisticated investor (i.e. any person falling within Part 1 of Schedules 6 and 7 of the Capital Markets and Services Act 2007) or an angel investor (i.e. an investor accredited by the Malaysian Business Angels Network as an angel investor) is not subjected to any investment limit.

Investors who invest through a P2P platform operated by the SC's registered P2P operators are buying securities in the form of an investment note or Islamic investment note, which will be issued by the businesses or companies. The issuer of the investment note or Islamic investment note is obliged to pay the investors over a time period, with interest or profit.

SOME POTENTIAL ISSUES

Default in repayment

Investors in P2P lending, like investors in other types of lending, are exposed to the risk of default by the Issuer in repayment.

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OUT WITH THE OLD, IN WITH THE NEW

Sheba Gumis discusses some key changes under the Companies Bill 2015

The Companies Bill 2015 ("Bill") was passed by the Dewan Rakyat and the Dewan Negara on 4 and 28 April 2016 respectively. The Bill is pending Royal Assent and will come into operation on a date to be determined by the Minister.

The Bill, which seeks to promote a more modern, simplified and business-friendly corporate environment, will introduce many significant changes to the company law regime in Malaysia. Several legal concepts which have been enshrined in Malaysian company law have been deemed archaic and have been omitted from the Bill.

ONE MEMBER AND DIRECTOR COMPANY

The Companies Act 1965 ("Act") expressly provides that a company may be formed by two or more persons and is required to have at least two Malaysian resident directors. The Bill will bring about changes to these long-standing requirements by allowing a single person to form a company (Clause 14(1)) and a private company to have only one Malaysian resident director (Clause 196(1)(a)).

> "A significant fatality of the Bill is the memorandum and articles of association"

THE CONSTITUTION

A significant fatality of the Bill is the memorandum and articles of association ("M&A"). The M&A, which are the constitutive documents of a Malaysian company, will be replaced by a constitution (Division 5 of Part II of the Bill).

In replacing the M&A with a constitution, Malaysia follows the example of Singapore, which in its Companies (Amendment) Act 2014 merged both the memorandum of association and the articles of association of a company into a constitution. The use of a constitution, instead of an M&A, has already been adopted in the United Kingdom, New Zealand and Australia.

Constitution Optional

Unlike the mandatory requirement to have an M&A under the Act, a constitution will be optional (Clause 31(1)). The constitution may be adopted by a company by way of special resolution, and shall be binding on the company, its directors and its members (Clause 32).

Rights, Powers, Duties and Obligations under a Constitution and the Bill

Where a company elects to forego a constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations as set out in the Bill (Clause 31(3)).

However, where a company chooses to have a constitution, the rights, powers, duties and obligations of the directors and members will be as set out in the Bill save insofar as they are modified (to the extent permitted under the Bill) by the constitution (Clause 31(2)). The Bill further provides that the constitution has no effect to the extent that it contravenes or is inconsistent with the provisions of the Bill (Clause 32 (2)).

Company Limited by Guarantee

It is mandatory for a company limited by guarantee to have a constitution (Clause 38(1)). The Bill further provides, *inter alia*, that a company limited by guarantee must be a public company (Clause 11(2)) and must prohibit the payment of dividend to its members (Clause 45(2)(b)).

Existing company

Clause 34(c) provides that for a company registered under the Act, its M&A will be deemed to be its constitution. It should be noted that the provisions of the M&A have no effect if they contravene or are inconsistent with the provisions of the Bill.

Power of Court to Amend the Constitution

Clause 37(1) confers power on the Court to amend the constitution of a company if it is satisfied, upon the application of a director or member of the company, that it is not practicable to do so using the procedure set out in the Bill or in the constitution.

The Act only confers power on the Court to amend the M&A of the Company in the event of oppression under Section 181.

CERTIFICATE OF INCORPORATION

The Bill provides that upon the incorporation of a company, the Registrar of Companies ("Registrar") will issue a notice of registration which is conclusive evidence that the company is duly registered (Clauses 15 and 19). Unlike the Act, a certificate of incorporation will only be issued upon application by the company and payment of a prescribed fee (Clause 17).

COMMON SEAL

The Bill will make it optional for a company to have a common seal (Clause 61(1)). The Bill provides for two methods of executing a document by a company, either by affixing a common seal, or by signature. If a company does not adopt a common seal, the manner in which it executes documents must comply with the provisions of the Bill (Clause 66(1)). A document is validly executed by a company if it is signed on behalf of the company by at least two authorised officers (one of whom must be a

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director), or in the case of a sole director, by that director in the presence of a witness who attests the signature (Clause 66 (2)).

CAPACITY

Upon the coming into operation of the Bill, a company shall have full capacity to carry on and undertake any business or activity and be capable of exercising all functions of a body corporate (Clause 21(1)). This represents a paradigm shift from the position under the Act where a company's powers and capacity are restricted to those specified in its memorandum of association.

CONSTRUCTIVE NOTICE

The doctrine of constructive notice will be abolished except in respect of documents relating to instruments of charge (Clause 39). In other words, a person will not be deemed to have notice of the contents of a company's constitution or any document (other than an instrument of charge) which has been registered by the Registrar or is available for inspection at a company's registered office.

NO PAR VALUE

The par value concept is one that has its roots in common law and has been gradually phased out in various common law jurisdictions. Australia, New Zealand, Hong Kong and Singapore have abolished this concept. Malaysia too will follow suit under the Bill.

Par Value and Authorised Capital

Par (also known as nominal value of shares) refers to the minimum amount of monies worth that is, or will be, paid to a company for a share. For example, where a company's share has a par value of RM1.00, the minimum amount that the company must receive for that share is RM1.00.

A corollary of the par value concept is that a company is prohibited from issuing, or agreeing to issue, shares at a discount (i.e. below par value). A further concept that flows from the par value concept is the concept of authorised capital which imposes a ceiling on the number of shares that can be issued by a company.

The Corporate Law Reform Committee ("CLRC") in its Consultative Document on Capital Maintenance Rules and Share Capital, considered whether the concepts of par value and authorised capital protected shareholders and creditors.

For example, authorised capital purportedly restricts the further issue of shares which may dilute existing shareholders' rights and the value of their existing shareholding. The authorised capital and the par value concepts purported to protect creditors because the company implicitly warrants that the authorised capital of the company is the amount of capital it has available to pay creditors.

These protections were debunked by the CLRC in the above Consultative Document. The CLRC concluded that the protections are only illusory in the present business environment. New shares can always be issued in excess of the company's original authorised capital subject to increase of the authorised capital by the shareholders. Additionally, the authorised capital is not indicative of the actual issued and paid-up capital of the company. Accordingly, the purported protection to the creditors and shareholders does not exist.

The CLRC also took the view that the concepts of par value and authorised capital complicated the workings of company law and misled shareholders and creditors into believing that because of a company's authorised capital and par value, the company will have reserves and will be able to pay its debts to creditors. Additionally, shareholders were under the perception that they were entitled to receive at the very minimum the par value of the shares held by them in the company upon winding up of the company.

In order to simplify and streamline share capital rules, the CLRC proposed that the concepts of par value and authorised capital be abolished.

Moving to the No Par Value Regime

Clause 74 of the Bill effectively removes the concept of par value by providing that all shares issued before or upon the commencement of this Act shall have no par or nominal value.

In order to aid the transition into the no par value environment, the Bill provides for transitional provisions relating to the abolition of par value (Clause 618). A company may, within 24 months of the commencement of Clause 74, use the amount standing to the credit of its share premium account for certain purposes. These include, *inter alia*, the provision of premium payable on redemption of debentures or redeemable preference shares, payment of balance unpaid on bonus shares and payment of dividends to be satisfied by the issue of shares to members, so long as the aforementioned events occur before the commencement of Clause 74.

Any amount standing to the credit of a company's share premium account and capital redemption reserve shall upon the commencement of Clause 74, become part of the company's share capital.

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TURNING THE TABLES ON PERPETRATORS OF SEXUAL HARASSMENT

Foo Siew Li explains the introduction of the tort of sexual harassment in Malaysia

The recent ruling of the Federal Court in *Mohd Ridzwan bin Abdul Razak v Asmah binti Hj Mohd Nor* [2016] MLJU 277 has introduced the tort of sexual harassment into our legal system.

BACKGROUND FACTS

Mohd Ridzwan bin Abdul Razak ("Appellant") and Asmah binti Hj Mohd Nor ("Respondent") were employees of Lembaga Tabung Haji ("Employer"). The Respondent was the subordinate of the Appellant and reported directly to him.

Following a complaint of sexual harassment by the Respondent against the Appellant, the Employer inquired into the matter and issued a strong reprimand to the Appellant.

Aggrieved by the complaint which the Appellant claimed to be defamatory of him and led to his contract with the Employer not being renewed, the Appellant commenced an action against the Respondent in the High Court seeking, *inter alia,* a declaration that he had not sexually harassed the Respondent and that he had been defamed by her.

> " The recent ruling of the Federal Court ... has introduced the tort of sexual harassment "

The Respondent filed her defence, detailing the vulgar words and other demeaning remarks she alleged were uttered by the Appellant, and relying largely on a psychiatrist's report, counterclaimed for damages predicated on sexual harassment.

DECISION OF THE HIGH COURT

The High Court made a finding of fact that the allegation of sexual harassment had been established and dismissed the Appellant's claim. The Court also entered judgment for the Respondent's counterclaim and awarded her RM100,000.00 as general damages and RM20,000.00 as aggravated and exemplary damages.

DECISION OF THE COURT OF APPEAL

The Court of Appeal dismissed the Appellant's appeal and affirmed the decision of the High Court. While the learned High Court judge did not state the cause of action relied upon when allowing the counterclaim, the Court of Appeal held that while not in accordance with the pleadings, the cause of action was the tort of intentionally causing nervous shock.

DECISION OF THE FEDERAL COURT

The Appellant was granted leave to appeal to the Federal Court on the following question of law:

"Is there a valid cause of action for a civil claim on the grounds of sexual harassment under the existing laws of Malaysia?"

The Federal Court considered the Code of Practice on the Prevention and Eradication of Sexual Harassment in the Workplace 1999 ("the Code"), which is not legally binding, and the Employment (Amendment) Act 2012 which introduced a new definition of sexual harassment and added new provisions into the Employment Act 1955 to deal with sexual harassment in the workplace. Their Lordships observed that the Code and the legislation did not confer a cause of action for a sexual harassment victim against the harasser. The Court further observed that there had been no reported case pertaining to the Employment Act 1955 where the individual victim has claimed civil remedies from an alleged perpetrator for sexual harassment.

After much deliberation, their Lordships "*arrived at a decision to undertake some judicial activism exercise and decided that it was timely to import the tort of harassment into our legal system with sexual harassment being a part of it.*"

> " their Lordships must be commended for consciously embarking on a course of judicial activism "

Their Lordships then proceeded to consider what constitutes sexual harassment. The Federal Court referred to section 2 of the Employment Act 1955, which defines "sexual harassment" as *"any unwanted conduct of a sexual nature, whether verbal, non-verbal, visual, gestural or physical, directed at a person which is offensive or humiliating or is a threat to his well-being, arising out of and in the course of his employment."*

Their Lordships were of the view that the definition in the Employment Act 1955 satisfies the three main elements of sexual harassment, namely: (i) the occurrence of conduct that is sexual in nature; (ii) the conduct being unwanted; and (iii) the conduct is perceived as threatening the victim's ability to perform her job.

After acknowledging that the law of tort in Malaysia is still very much based on English common law principles, their Lordships considered the approach taken in England, Singapore and Hong Kong. The Court concluded that while there is uncertainty in England as to the existence of the tort of harassment, this tort has been recognised in Singapore and Hong Kong in the Singapore cases of *Malcomson Nicholas Hugh Bertam v Naresh Kumar Mehta* (2001) 3 SLR (R) 379 and *Tee Yok Kiat v Pang Min Seng* (2013) SGCA 9 and the Hong Kong case of *Lau Tat Wai v Yip Kuen Joey* (2013) HKCFI 639 respectively.

After considering, *inter alia*, the above-cited cases, the Federal

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Court stated that "*the recognizable hallmarks of sexual harassment are that they are unwelcome, taking the form of verbal and even physical, which include sexual innuendos, comments and remarks, suggestive, obscene or insulting sounds, implied sexual threats, leering, oogling, displaying offensive pictures, making obscene gestures etc. These overtures all share similar traits, in that they all have the air of seediness and cause disturbance or annoyance to the victim (short of a recognized psychiatric illness or physical harm).*"

The Court noted that the Court of Appeal had agreed that the vulgar and sexually explicit words complained of by the Respondent would clearly amount to sexual harassment. Their Lordships were also satisfied that the lecherous behaviour of the Appellant would likewise constitute sexual harassment.

However, the Federal Court disagreed with the Court of Appeal's view that the acts of sexual harassment in the present case had caused sufficient adverse psychological effect to the Respondent to fall under the tort of intentionally causing nervous shock. Their Lordships held that even though a singular act is sufficient to establish a tort of intentionally causing nervous shock, being a more demanding tort, an aggrieved person must establish that she has suffered physical harm, which, on a balance of probabilities, was not proven in this case.

The Federal Court felt that by proceeding on the basis of the tort of intentionally causing nervous shock, the Court of Appeal had missed the opportunity to discuss the applicability of the tort of harassment.

Their Lordships reiterated that the introduction of the tort of harassment can be justified on the various grounds, including the following:

(1) the tort of sexual harassment had been pleaded and ventilated in the High Court;

(2) the tort of intentionally causing nervous shock was never pleaded in the counterclaim;

(3) there was insufficient evidence or reason to introduce and establish the tort of intentionally causing nervous shock; and

(4) there were more than ample evidence and sufficient reasons to import and establish the tort of sexual harassment.

Their Lordships then addressed the following related issues that were ventilated before the Court:

(1) the requirement for corroboration: Their Lordships held that there was no hard and fast rule that corroboration is required in a tort of sexual harassment case although like in any civil case, the rule of evidence must be stringently upheld;

(2) adequacy of the pleadings: The Court was satisfied that the cause of action of sexual harassment had been adequately pleaded by the Respondent; and

(3) entitlement to damages: Although the Court was not satisfied that the Respondent's suffering had attained the level of physical harm to qualify for the tort of intentionally causing nervous shock, their Lordships were of the view that it was reasonable in the circumstances for the High Court to award general and aggravated damages for the proven tort of sexual harassment.

The Federal Court, having freshly introduced the tort of sexual harassment, accordingly refrained from answering the leave question and dismissed the Appellant's appeal.

CONCLUSION

The Federal Court concluded its judgment by stating, *"Sexual harassment is a very serious misconduct and in whatever form it takes, cannot be tolerated by anyone. In whatever form it comes, it lowers the dignity and respect of the person who is harassed, let alone affecting his or her mental and emotional well-being. Perpetrators who go unpunished, will continue intimidating, humiliating and traumatising the victims thus resulting, at least, in an unhealthy working environment."*

This decision represents a high-water mark in Malaysian law. First, their Lordships must be commended for consciously embarking on a course of judicial activism to introduce the tort of harassment (which includes sexual harassment) into our legal system.

Secondly, the message from the apex court of Malaysia is loud and clear: sexual harassment at the workplace cannot and will not be tolerated. While the Code and the Employment (Amendment) Act 2012 were well-intentioned, the introduction of a civil remedy will enable victims of sexual harassment to potentially turn the tables on perpetrators of sexual harassment.

This landmark decision heralds a welcomed change and a step towards the creation of a safer working environment for the Malaysian workforce.

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A SNIPPET OF FAIRNESS

Alyshea Low and Joshua Teoh explain the Case on Google Books and the Google Library Project

INTRODUCTION

On 18 April 2016, the U.S. Supreme Court issued an order declining to review a decision made by the United States Court of Appeals for the Second Circuit ("Appeals Court") under Docket No.13-4829-cv in respect of a copyright dispute between a coalition of book authors led by the Authors Guild ("Plaintiffs") and Google, Inc. ("Google") over Google's initiatives in the Google Books and Google Library Project.

BACKGROUND FACTS

An Introduction to Google Books and the Google Library Project

In 2004, Google started building a digital search engine for books ("Google Books") by collecting and scanning books gathered from libraries, through its Google Library Project ("Library Project"). The Library Project involved bilateral agreements between Google and participating libraries such as the New York Public Library, the Library of Congress, and a number of university libraries.

> **"the search function and the snippet view of Google Books … fall within the meaning of transformative purpose"**

Pursuant to the agreement with Google, participating libraries would select books from their collections to submit to Google for inclusion in the Library Project. Google would make a digital copy of each book by scanning it. It then extracts a machine-readable text and creates an index of the machine-readable text of each book. Google retains the original scanned image of each book and allows the libraries that submitted a book to download and retain a digital copy. The agreement between Google and each of the participating libraries commits the library to use its digital copy only in a manner consistent with copyright law, and to take precautions to prevent dissemination of its digital copies to the public at large.

By relying on the information from the Library Project, users of Google Books may input a desired search term and Google Books will show exactly where the searched term appears in the text, as well as the number of times the term appears. In doing so, the "snippet" tool of Google Books will reveal one-eighth of a page containing the searched term and up to a maximum of three snippets containing the searched term. Google does not allow a user to increase the number of snippets through the same search term and makes permanently unavailable for snippet view one snippet on each page and one complete page out of every ten through a process it calls "blacklisting".

Procedural History

According to the Plaintiffs, Google had scanned more than 20 million books, of which about 4 million were still under copyright. As Google did not obtain permission from the copyright holders for the use of their copyrighted works, the Plaintiffs commenced a class action on 20 September 2005 on behalf of similarly affected rights-owning authors. The Plaintiffs alleged, *inter alia*, that Google committed copyright infringement by scanning books that were still in copyright and making them available for search without permission of the copyright holders.

After several years of negotiations, the parties reached a proposed settlement in October 2008 that would have resolved the claims on a class-wide basis. As this was a class action suit, the settlement required the approval of the presiding judge in the U.S. District Court in New York.

The proposed settlement included terms such as payment by Google to the owners of the books scanned without permission and payment to fund the Book Rights Registry, an organisation that would track down and distribute fees to authors. Google would be allowed to display out-of-print books to users and charge licensing fees for copyrighted works and be required to provide portals in every public library and more than 4,000 colleges and universities in the United States, allowing widespread access.

> **"its discontinuous, fragmentary and scattered nature is of little substitutive value"**

However, on 22 March 2011, the District Court rejected the proposed settlement as being unfair to the class members who relied on the named Plaintiffs to represent their interests, thus putting the parties back to action in court.

Decision of the District Court of New York

On 14 November 2013, the District Court of New York granted Google's motion for summary judgment and dismissed the suit against Google, holding that Google's use of the copyrighted works qualified as "fair use" and is protected by the U.S. Copyright Act of 1976 ("USCA").

The Plaintiffs appealed and the case went before the Appeals Court which also found in Google's favour on 16 October 2015.

THE APPEALS COURT'S FINDINGS

According to section 107 of the USCA, in determining whether a copying of copyrighted work qualifies as fair use, the factors to be considered include: (1) the purpose and character of the

 

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use, (2) the nature of the copyrighted work, (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and (4) the effect of the use upon the potential market for or value of the copyrighted work.

The use of copyrighted material may be considered fair use if it is "transformative" and does not impair the potential value or market for the copyrighted work. A transformative use is one that communicates something new and different from the original work or expands its utility. It differs from derivative works in that the latter involves transformations in the nature of *changes of form* to the original work.

The Appeals Court found that the search function and the snippet view of Google Books would serve a different function from the original work and would thus fall within the meaning of transformative purpose.

> **" the digitizing of copyright-protected works … amounted to non-infringing fair use "**

The snippet feature constructed by Google offers a limited viewing of the original work in a manner that substantially protects against Google's digitized copy from being an effective competing substitute of the original work. At most, the snippet view would only offer up to 16% of the original work and its discontinuous, fragmentary and scattered nature is of little substitutive value. Google's division of the page into tiny snippets is designed to show the user just enough context surrounding the searched term to help evaluate whether the book falls within his scope of interest. This enables the user to identify books of interest without revealing so much as to threaten the author's copyright interests.

Similarly, the Appeals Court also found that the copying of the entire book by Google was reasonably necessary to achieve the transformative purpose as *"the result of a word search is different in purpose, character, expression, meaning, and message from the page (and the book) from which it is drawn"*. The entire book copying was necessary because the search function would not otherwise be able to advise users reliably as to the number of times, if any, the searched term appears in a book. The Appeals Court noted that whilst Google makes an unauthorised digital copy of the entire book, the digital copy is not revealed to the public.

The Appeals Court also noted that the nature of the copyrighted work "*has rarely played a significant role in the determination of a fair use dispute*". While courts have suggested that the use of factual works may be more favoured than fictional ones, the distinction between factual and fictional works is not dispositive in a fair use determination. In addition, Google does not provide snippet view for types of books, such as dictionaries, for which viewing a small segment is likely to satisfy the searcher's need.

The Appeals Court rejected the argument that Google cannot rely on the defence of fair use because of its commercial nature and overall profit motivation and held that in absence of significant substitutive competition with the original, commercial motivation should not outweigh a convincing transformative purpose.

CONCLUSION

The Appeals Court, in the grounds, stated that "*while authors are undoubtedly important beneficiaries of copyright, the ultimate, primary intended beneficiary is the public, whose access to knowledge copyright seeks to advance by providing rewards for authorship*".

After carefully examining and scrutinising the doctrine of fair use, the Appeals Court found that Google had safeguarded from public view the digitized copies of the original works and instead, allowed the public to view a transformative work which provided limited information through the search function and snippet view. Thus, the Appeals Court concluded that the digitizing of copyright-protected works in the manner carried out by Google amounted to non-infringing fair use.

The decision by the Supreme Court to decline a review of the Appeals Court's decision means that the latter's decision is final. It marks the end of a decade-long dispute which, according to Judge Pierre N. Leval who wrote the judgment of the Appeals Court, "*tests the boundaries of fair use*" under the USCA. The decision also authoritatively resolves the question as to whether Google Books and the Library Project infringe the rights of copyright owners whose works are digitized.

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FAIR REWARD FOR AN HONEST YEAR'S WORK?

Phua Pao Yii discusses ways to mitigate the risk of non-executive directors being deprived of directors' remuneration

1. INTRODUCTION

In recent years there have been several instances where the shareholders of a company listed on Bursa Malaysia ("listed issuer") have refused to approve a resolution authorising the payment of directors' fees at the listed issuer's annual general meeting. For example, in late-March 2016, the shareholders of a listed issuer which had incurred losses in excess of RM40 million in its preceding financial year rejected a resolution to pay fees to its directors.

The effect of such a resolution being rejected by the shareholders may not be unduly drastic for an executive director as he would have received his salary and other benefits in his capacity as an employee of the company. However, for a non-executive director, including an independent director, this means that he will not be entitled to receive any fees for performing his duties as a director for the relevant financial year.

The questions that arise are whether such an outcome is fair to a non-executive director of a listed issuer and, if not, what steps can be taken to avoid such an outcome.

> **" directors are fiduciaries … they cannot as a general rule reward themselves from the company's assets "**

2. BACKGROUND

A non-executive director is not an employee of a company. In the absence of express provision in a company's articles of association or a separate contract with the company, he is not entitled to receive remuneration for his services as a director. Furthermore, as directors are fiduciaries of a company, they cannot as a general rule reward themselves from the company's assets.

In view of the above constraints, most companies include a mechanism in their articles of association to provide for payment of remuneration to their directors. For example, regulation 70 of Table A of the Companies Act 1965 provides, *inter alia*, that the remuneration of the directors shall from time to time be determined by the company in general meeting. Hence, the power to approve the payment of remuneration to directors rests with the shareholders of a company in general meeting.

3. CLASSIFICATION OF DIRECTORS

Broadly speaking, a board usually comprises three categories of directors, namely executive directors, independent directors and non-independent non-executive directors.

As mentioned earlier, an executive director is an employee of a company and is usually a senior member of the management team.

According to Paragraph 1.01 of the Main Market Listing Requirements ("MMLR"), an "independent director" is "*a director who is independent of management and free from any business and other relationship which could interfere with the ability to act in the best interest of an applicant or a listed issuer.*"

The Corporate Governance Guide (2nd Edition) published by Bursa Malaysia ("CG Guide") recognises that "*independent directors are essential for protecting the interest of minority shareholders*". To this end, Paragraph 15.02(1) of the MMLR requires every listed issuer to ensure that "*at least two directors or 1/3 of the board of directors of a listed issuer (whichever is the higher) are independent directors.*"

> **" independent directors are charged with the … responsibility of protecting the interests of minority shareholders "**

Paragraph 1.01 and Practice Note 13 ("PN13") of the MMLR set out and clarify several non-exhaustive criteria that have to be satisfied in order for a person to be an independent director of a listed issuer. Amongst these criteria are that an independent director cannot be (i) a major shareholder of the listed issuer; or (ii) an executive director of the listed issuer or its related corporations; or (iii) an officer (other than a non-executive director) of a listed issuer or its related corporations within the preceding two years; or (iv) a family member of an executive director, officer or major shareholder of the listed issuer; or (v) a nominee of a major shareholder (unless he satisfies the conditions set out in Paragraph 3.2 of PN13) or a nominee of an executive director of the listed issuer.

A non-executive director who does not fulfil the criteria to be an independent director is commonly described as a "non-independent non-executive director".

4. THE TRADITIONAL APPROACH

The most common practice among listed issuers is to seek the approval of their shareholders to pay a specified lump-sum as remuneration to their directors for directorship services provided by them during the *preceding* financial year. If this approach is adopted, the manner in which the fees will be divided amongst the directors will be determined in accordance with the articles of association of the listed issuer, or in the absence of express provision, in a manner agreed upon by the directors.

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This is an "*all-or-nothing*" approach as it does not distinguish between the remuneration payable to executive directors, non-executive directors and independent directors. It is possible that shareholders who are dissatisfied with the performance of a listed issuer or with its management team (including executive directors) may express their dissatisfaction by voting against the resolution. As mentioned earlier, a rejection of the resolution means that all directors will not be remunerated for the past year's services as directors of the listed issuer.

5. THE EVOLVING PRACTICE

Various practices have been adopted to avoid a situation whereby directors are deprived of remuneration for providing services as directors of a listed issuer.

There have been at least two instances whereby listed issuers have adopted a modified form of the "*all-or-nothing*" approach by obtaining the approval of their shareholders for payment of a specified lump-sum to their directors for the *current* (instead of the preceding) financial year. If such a resolution is rejected, the directors can decide whether they wish to remain on the board, knowing that they will not be remunerated for their services for the current financial year.

> **" independent directors derive little benefit from the success of a listed issuer "**

Certain listed issuers have sought *approval in advance* from their shareholders to pay specified amounts to their non-executive directors, for example, "that directors' fees of RM80,000 per annum be paid to each non-executive director of the company with effect from the financial year ending on 31 December 2015." A resolution passed on the aforesaid terms will continue in force for each financial year of the listed issuer until it is superseded by a resolution which varies the amount payable or is revoked.

A resolution to approve payment of directors' remuneration can be refined to cater for alternative scenarios. For example, a resolution can authorise the payment of a different (usually greater) amount to a non-executive chairman. Other resolutions can also be tabled to authorise additional amounts to be paid to non-executive directors who serve on committees of the board, such as the audit committee and nominating committee.

There have been at least three instances where the shareholders of a listed issuer have approved resolutions for payment of directors' fees to their non-executive directors on the bases described above.

In at least another two instances, similar resolutions were passed by listed issuers only for the current financial year and in one of these, the remuneration was to be paid to the directors on a quarterly basis.

6. PUSHING THE ENVELOPE FURTHER

Sometime in late-April 2016, a listed issuer proposed a resolution to authorise payment of fees not exceeding a specified amount to its directors collectively for each financial year commencing from its current financial year. This proposed resolution is an extension of the "*all-or-nothing*" approach highlighted earlier in that the resolution would remain in force until it is varied or revoked.

The proposed resolution was subsequently withdrawn after the listed issuer received feedback from its shareholders. It would have been interesting to see whether the resolution would have been carried had it been put to a vote by the shareholders.

7. CONCLUSION

While both independent directors and non-independent non-executive directors would benefit from adopting the resolutions in the forms described in section 5 of this article, it is submitted that the logic for adopting such resolutions for the benefit of independent directors is more compelling than for executive directors and non-independent non-executive directors for two reasons.

First, independent directors derive little benefit from the success of a listed issuer despite the heavy and time-consuming responsibility placed upon them as directors by reason that they have little or no financial interest in, or business dealings with, the listed issuer. Thus directors' remuneration is the only tangible return which they would receive for providing directorship services. Secondly, independent directors are charged with the additional responsibility of protecting the interests of minority shareholders under the CG Guide.

On the other hand, executive directors receive salaries and other benefits from their employment with the listed issuer while non-independent non-executive directors are usually nominees or family members or close associates of major shareholders or executive directors of a listed issuer and are appointed to the board either by reason of their relationship with, or to represent and safeguard the interest of, a major shareholder. By virtue of these relationships, it is possible that a non-independent non-executive director may derive benefits from their appointors

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CURTAINS FOR ROLLER SHUTTER PATENT

Melissa Long discusses a significant patent decision on dependent claims

THE ROAD TO INVALIDATION

As is wont to happen in cases involving the issue of patent validity, this case started off in the High Court with SKB Shutters Manufacturing Sdn Bhd ("SKB") suing the Defendants for infringement of SKB's Patent No. MY-128431-A ("Patent 431"). The Defendants raised the defence and counterclaim that Patent 431 was invalid for failing to be new and/or inventive in light of the prior art – these being necessary requirements for a valid patent under sections 14 and 15 of the Patents Act 1983 ("Act"). 'Prior art' is a term that more or less refers to all things published or disclosed in the world prior to the patent-in-suit.

The High Court decided in favour of SKB, both finding Patent 431 to have been valid and infringed.[1] The Defendants appealed to the Court of Appeal on various grounds, all relating to the High Court's determination of Patent 431's validity. This appeal was allowed and Patent 431 declared invalid.[2]

> "The scope of partial invalidation in Malaysia became a key issue in this case"

In a final turn, in what is said to be the first patent case where leave was given to appeal to the Federal Court, seven questions on patent invalidation were submitted for our apex court's determination. All seven questions were answered in the Defendants' favour, thus spelling the end of Patent 431.[3]

THE 'ROLLING DOOR' PATENT

To put this case in context (and at the risk of over simplifying a 20 page patent document containing 11 claims), the claimed invention in Patent 431 concerned panels to be used in the make-up of a rolling door of the type including a door curtain supported on a roller assembly – or in lay-speak 'roller shutters' that are generally employed to secure retail and commercial shop fronts during closed hours.

Patent 431's specification described and illustrated the preferred embodiment of the claimed roller shutter panels to incorporate long strips of transparent panes interconnected by engagement links so that the general public would be able to see through the shutters during closing hours.

Nonetheless, notwithstanding the illustrations or descriptions that may be set out in a patent specification, the Federal Court noted that it is the claims in a patent document that define an invention in terms of the technical features and that determine the patent's monopoly. To put this in context, Claim 1 of Patent 431, for example, dealt with various characteristics of the roller shutter panel and its engagement means, but made no mention that any portion of the panel is to be made up of transparent material. This last part came in Claim 9 and/or Claim 11.

Consequently the Federal Court held, *inter alia*, that the assessment of validity must be made by a comparison of the patent claims against the prior art. It would not do, as the Court of Appeal found the trial judge to have done, to merely compare a product embodiment of the patent against the prior art. This is because a patent holder's product may differ from the claims or may reflect only one of the possible embodiments of the patent claims which would result in an inaccurate assessment of a narrower form of the claims.

Photograph of 'see-through' roller shutter provided by SKB Shutters Mfg Sdn Bhd

BROAD v NARROW

Bear in mind that the narrower the scope of monopoly claimed, the more technical features that it likely contains, and more technical features equals a higher likelihood that at least some elements contribute to it being new or inventive. To use a hypothetical example: claiming a motorised vehicle would be broader in that it potentially applies to more things, whereas a claim for a motorised vehicle with twenty wheels and a dome shaped cap would be narrower.

Generally speaking, the broader the scope of the claim the higher the likelihood that it is not new or inventive. In our hypothetical example, the broad claim to motorised vehicles would not be valid if there are any motorised vehicles found published, disclosed or in use anywhere in the world, or if it was an obvious invention based on preceding vehicles that are out there.

This is usually balanced with a need to avoid being overly narrow with claims for fear that potential infringers might be able to easily engineer around the patent. Again in our hypothetical example,

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whilst is it less likely that a motorised vehicle with twenty wheels and a dome shaped cap would be found anywhere in the world or deemed 'obvious' – and is therefore more likely valid, yet a motorised vehicle with eighteen wheels and a triangular shaped cap would not infringe the narrow claim and may defeat the patentee's objective.

Attaining this balance of 'broad' and 'narrow' as a matter of practice is usually dealt with by setting out a hierarchy of claims relating to the same invention in a patent. Narrower claims which contain a reference to a preceding broader claim are known as dependent claims.

Patent 431 consisted of 11 claims: Claims 1 and 11 which were 'independent' and Claims 2 to 10 which were 'dependent'. Dependent claim 2 for example, was worded as follows *"A panel as claimed in claim 1 wherein the first arm includes an inwardly projecting nib which is received in a complementary groove in said elongated body member."*

> **" a finding that an independent claim is invalid would ... automatically invalidate any claims dependent on it "**

This hierarchy of claims affords some degree of assistance to patentees in jurisdictions such as the United Kingdom (since 1919 at least) where invalidation of some claims would not necessarily invalidate other claims. In such circumstances, patentees may be able to take some measure of risk by including slightly broader claims as well as narrower dependent claims in the knowledge that the potential invalidation of broader claims may still mean that dependent claims with more technical features are preserved.

Malaysia too recognizes, to an extent, partial invalidation of patents. Section 56(3) of the Act provides, *inter alia*, that upon the application by an aggrieved person to invalidate some of the claims or some parts of a claim in a patent, "*such claims or parts of a claim may be declared invalid by the Court*" and that *"the invalidity of part of a claim shall be declared in the form of a corresponding limitation of the claim in question"*. Section 56(3) not only applies to invalidation actions but also in cases of infringement where invalidation is raised as a defence under Section 60(3) of the Act.

The scope of partial invalidation in Malaysia became a key issue in this case as it was argued that the Court of Appeal had not assessed dependent claims 2 to 10 of Patent 431 before invalidating the patent.

THE FATE OF DEPENDENT CLAIMS

Pivotally distilling from the decision, is essentially the Federal Court's pronouncement that a finding that an independent claim is invalid would also automatically invalidate any claims dependent on it.

The Federal Court reasoned this to be because dependent claims incorporate all features of the independent claim upon which they depend, but are drafted to only make reference to the independent claim e.g. *"A panel as claimed in claim 1 wherein ..."* being the start of Claim 2 of the patent in question. Consequently, the Federal Court took the view that the only way for a dependent claim to survive is if it were redrafted to incorporate the features of the now 'invalid' independent claim.

The position in Malaysia, it reasoned, differed from that in the United Kingdom where a patent claim could be amended pending litigation in respect of its validity. It was also observed that Section 63 of the U.K. Patents Act 1977 expressly empowered the courts to enforce parts of a patent found to be valid, to which Section 56(3) of the Act could not be said to be an equivalent. Consequently, without a provision in the Act to allow for an amendment of a patent-in-suit, and with Section 56(3) merely stating that some claims or part of a claim may be declared invalid, the Federal Court held that this can only refer to the independent claims of a patent.

Two things seem stark in light of the Federal Court's interpretation of Section 56(3) of the Act. The first is that the Court took a restrictive view of the powers provided under said provision to make the declarations and corresponding limitations to claims in cases where partial validity is found.

The second is that the Court's observation of Section 56(3) being not equal to the express provision in the U.K. which empowers the courts there to enforce a partially valid patent, may be more perplexing than at first glance. Particularly because if this is the issue, then why would independent claims be treated any different to partially valid dependent claims? More worryingly, could the Federal Court unwittingly have opened the doors to entire patents being unenforceable upon any one claim, be it dependent or independent, being found invalid? After all, Section 63 of the U.K. Patents Act 1977 does not discriminate between independent claims and dependent claims, but empowers the court there to enforce a partially valid patent. If this lacuna in our Act is the issue, then Section 56(3) could not possibly be

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UNION BUSTER BUSTED

Zamir Hamdy Hamdan explains a recent "union-busting" case

Trade unions are often perceived as the bane of employers. This perception is understandable when one recalls the occasions when services and production lines have ground to a halt due to strikes and work-to-rule initiatives led by trade unions.

Added to that, it does not help that the early history of labour relations has occasionally been marred by violence and bloodshed. In 1892, workers led by the leaders of an iron and steel workers union engaged in a gunfight with security guards hired by the Carnegie Steel Company which resulted in the loss of several lives. Some 45 years later, security forces of the Ford Motor Company were alleged to have beaten-up representatives of the Union of Auto Workers at the former's River Rouge Plant in Detroit, U.S.A.

It is not in every instance that employers resort to heavy-handed tactics to thwart the activities of trade unions. Sometimes, more subtle tactics are employed. One such instance is the recent case of *Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia v Renesas Semiconductor KL Sdn Bhd* (Award No: 244 of 2016).

> **"the Court is satisfied with the veracity of the Union's witnesses and their evidence"**

THE BEGINNING

This case started sometime in 2009 when the Malaysian Government approved the unionisation of workmen in the electronics industry. The Director-General of Trade Unions approved the registration of workmen in the electronics industry on a regional basis in four regions.

A pro-tem committee was formed for the registration of Kesatuan Sekerja Industri Elektronik Wilayah Barat Semenanjung Malaysia ("Union") and one Wan Noorulazhar bin Mohd. Hanafiah ("Noorulazhar") was elected as its pro-tem president. Noorulazhar was an employee of Renesas Semiconductor KL Sdn Bhd ("Company"). The Union was registered on 1 December 2009 and submitted its claim for recognition to the Company on 18 January 2010.

The Company vide its letter of 8 February 2010 refused to grant recognition to the Union. What transpired thereafter became the subject matter of a reference pursuant to section 8 of the Industrial Relations Act 1967 ("IRA") arising out of a complaint of "*union busting*", i.e. activities undertaken to disrupt or prevent the formation of a trade union.

THE ALLEGED UNION BUSTING ACTIVITIES

During the proceedings in the Industrial Court, the Union's witnesses gave evidence that the Company had undertaken measures with a view of resisting the formation of the Union. These include:

(1) arrangements made by the Company for the Joint Consultative Committee ("JCC"), a body which served as a bridge between the employees and the management of the Company, to attend a seminar on the setting up of an in-house union;

(2) Noorulazhar being approached by a representative of the Company and offered the post of president of the in-house union, if he abandons the Union;

(3) Noorulazhar being informed by several representatives of the Company of the risk of being dismissed from employment by the Company;

(4) Noorulazhar being put in cold storage, in that he was assigned tasks which were below his job grade, and being closely monitored by the Company's Human Resources Department;

> **"the Company had … indulged in union-avoidance tactics and had violated section 4(1)"**

(5) a representative of the Company advising one of Noorulazhar's peers to disassociate himself from Noorulazhar and the Union;

(6) requests by representatives of the Company to Noorulazhar and other workers to withdraw the Union's application for recognition; and

(7) victimisation of active Union members, including Noorulazhar, through non-payment or reduced payment of incentives.

Noorulazhar was dismissed by the Company on 26 August 2011 pursuant to a domestic inquiry.

On the other hand, the witnesses who testified on behalf of the Company denied all the allegations made by the Union's witnesses.

THE INDUSTRIAL COURT AWARD

Having weighed the conflicting evidence led by each party, the Industrial Court Chairman, Dato' Mary Shakila G Azariah, concluded that:

"… the Company's witnesses, all still serving in the employ of the Company, are not to be believed. To state it slightly differently the Court is satisfied with the veracity of the Union's witnesses and

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their evidence some of whom are still employed by the Company and have risked their jobs to testify against the Company."

The Court then considered the actions taken by the Company in light of the relevant provisions of the IRA.

Section 4(1)

Section 4(1) of the IRA, *inter alia*, prohibits a person from interfering with, restraining or coercing a workman in the exercise of his rights to form, or assist in forming, and join a trade union and participate in its lawful activities.

On the evidence before her, Dato' Mary Shakila was satisfied that the Company had through its representatives, indulged in union-avoidance tactics and had violated section 4(1) of the IRA. According to the Court, the Company had embarked on a planned course of action to stop Noorulazhar and other witnesses of the Union from establishing the Union, which was already in the making. This, said the Court, was the reason why the Company refused to grant recognition to the Union when they first submitted a claim for recognition. The Court further opined that the timing of the seminar organised by the Company for the JCC, which included a briefing on the formation of an in-house union, "*leaves a lot to be said as to the motives of the Company in organising the same.*"

Section 4(3)

This provision states that no employer shall, *inter alia*, support any trade union of workmen by financial or other means with the object of placing the union under its control or influence.

The Court accepted the testimony of the Union's witnesses that some of the attendees at the seminar held for the JCC were members of the pro-tem committee of the in-house union which the Company proposed to be set up. This, coupled with the averment in the Company's Statement in Reply that it already intended to form an in-house union following the announcement that the Malaysian Government had approved the unionisation of the electronics industry on a regional basis, led the Court to conclude that the Company had, at the very least, supported the formation of the in-house union and had violated section 4(3) of the IRA.

According to Dato' Mary Shakila, "*The word "support" encompasses the giving of assistance, encouragement or approval to or to be actively interested in*", and the circumstantial evidence point to fact that the Company had supported and encouraged the formation of the in-house union in violation of section 4(3).

Section 5(1)(d)

Section 5(1)(d) of the IRA, *inter alia*, prohibits an employer and its agents from dismissing or threatening to dismiss a workman, or injuring or threatening to injure him in his employment, or altering his position to his prejudice, on the ground that the workman is or proposes or seeks to become a member of a trade union or participates in the promotion, formation or activities of a trade union. This provision, said the Court, protects union members from termination from employment, disciplinary action and discrimination without just cause.

The learned Chairman said that the evidence bore out that Noorulazhar had been by-passed for promotion and had received a lower incentive payment as compared to other employees. She added that the Company did not lead evidence to show that Noorulazhar was a poor performer or deny the latter's allegations that he had been sidelined. Events culminated in Noorulazhar being dismissed by the Company. On the foregoing evidence, the Court found that the Company had violated section 5(1)(d) in that it had carried out acts to injure or threaten to injure or alter or threaten to alter Noorulazhar's position because he had been active as the President and member of the Union which applied for recognition and had participated in its lawful activities.

The Court's Findings

Based on the evidence, facts and its pleaded case, the Court found that the Company had violated sections 4(1), 4(3) and 5(1)(d) of the IRA.

DEALING WITH UNIONS

The reality in industrial relations is that companies dislike unions. From a company's perspective, this dislike may arise from the perception that unions sometimes adopt a militant approach in negotiations for collective agreements and are sometimes unreasonable in their demands.

If a company observes fair labour practices and resolves employees' grievances expeditiously, it may not have to deal with problematic unions, as employees will not see a reason to unionise. Conversely, a company which adopts unfair labour practices may be extending an open invitation to the formation of unions - like a time bomb ticking towards self-destruction.

It is however possible for a company to defeat a recognition

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IS THE TIME FRAME IN RULE 30(2) IMMUTABLE?

Syafinaz Vani explains the Federal Court's decision on Rule 30(2) of the Companies (Winding-Up) Rules 1972

In the recent case of *Kilo Asset Sdn Bhd v Hew Tai Hong* [2016] 1 MLJ 785, the following question of law was posed to the Federal Court:

"*Whether a Winding Up Court has the discretion to accept an affidavit in reply to an affidavit in opposition to a petition which is filed more than three (3) days of the date of service on the petitioner of the said affidavit in opposition, contrary to provision of Rule 30(2) of the Companies (Winding-Up) Rules 1972.*"

THE WINDING UP PETITION

On 24 October 2012, Hew Tai Hong ("the Petitioner") filed a petition ("Petition") to wind up Kilo Asset Sdn Bhd ("Company") pursuant to sections 218(1)(f) and 218(1)(i) of the Companies Act 1965 ("Act") on the grounds that (a) the directors had conducted the affairs of the Company in their own interests rather than in the interests of the Company as a whole which appeared to be unfair and unjust to other members; and (b) it is just and equitable that the Company be wound up.

> **" it would not be right to adopt a purely mechanistic approach to the issue of time limits "**

On 6 December 2012, the Company filed and served two affidavits in opposition to the Petition. The Petitioner filed two affidavits in reply to the Company's affidavits on 7 January 2013 and a third affidavit in reply on 14 January 2013.

As the Petitioner's affidavits in reply were not filed within the time frame prescribed under Rule 30(2) of the Companies (Winding-Up) Rules 1972 ("Rules") which, *inter alia*, requires any affidavit in reply to an affidavit in opposition to a petition to be filed and served within three days of the date of service on the petitioner, the Petitioner applied to Court for an extension of time pursuant to Rules 193 and 194 of the Rules which respectively confer discretion on the court to allow enlargement of time and preclude proceedings from being invalidated by any formal defect or any irregularity, unless the court is of the view that substantial injustice has been caused.

The High Court dismissed the Petitioner's application for an extension of time on various grounds, including the following:

(a) compliance with the time frame prescribed in Rule 30(2) of the Rules in relation to the filing and service of an affidavit in reply is mandatory;

(b) the court has no discretion to extend or abridge the time specified in Rule 30(2) of the Rules; and

(c) the reasons given for the delay that there was insufficient time to obtain evidence and to meet with the client were inadequate to enable the court to exercise its discretion to grant an extension of time.

In view of the dismissal of the Petitioner's application for extension of time, the Petitioner's affidavits in reply were not accepted or considered by the High Court and the Petition was dismissed. Dissatisfied with the decision of the High Court, the Petitioner appealed to the Court of Appeal.

DECISION OF THE COURT OF APPEAL

The Court of Appeal unanimously allowed the Petitioner's appeal and remitted the Petition back to the High Court for a full hearing on, *inter alia*, the following grounds:

(a) the High Court had failed to consider the effects of Rules 193 and 194 of the Rules and should have considered the current approach to non-compliance with rules of procedure, namely, with regard to justice and not only to technical non-compliance; and

> **" the rigours of Rule 30(2) must be tampered by Rules 193 and 194 "**

(b) the High Court had erred in failing to consider the fact that a petition under Sections 218(1)(f) and 218(1)(i) of the Act stood on a very different footing from a petition under section 218(1)(e) of the Act - in an unfair prejudicial conduct case, such as the present, which involves equitable considerations, it will not be possible or advisable for the court to adopt a rigid approach on technical non-compliance.

The Company obtained leave to appeal to the Federal Court on the question of law which has been set out at the beginning of this article.

DECISION OF THE FEDERAL COURT

At the Federal Court, the Company contended that Rule 30(2) of the Rules is mandatory in nature as it uses the word "shall" and in the circumstances, the court has no power to extend or abridge time.

The Company relied on the decision of the Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v Development & Commercial Bank* [1997] 2 MLJ 756 which held that the similarly worded Rule 30(1) of the Rules which, *inter alia*, requires an affidavit in

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opposition to a winding up petition to be filed and served on the petitioner or his solicitor at least seven days before the hearing of the petition is mandatory in nature.

The Federal Court however took the view that although the wording of Rule 30(2) appears to be mandatory in nature, the general powers of the court to extend and abridge time pursuant to Rules 193 and 194 must be given due consideration. These Rules provide as follows:

"193 Enlargement or abridgment of time

The Court may, in any case in which it shall see fit extend or abridge the time appointed by these Rules or fixed by any order of the Court for doing any act or taking any proceeding.

194 Formal defect not to invalidate proceedings

(1) No proceedings under the Act or the Rules shall be invalidated by any formal defect or any irregularity, unless the Court is of the opinion that substantial injustice has been caused by the defect or irregularity, and that the injustice cannot be remedied by any order of the Court."

" in exercising the powers under Rules 193 and 194 … the courts … must weigh the interest of both parties "

The Court also referred to Section 221(2)(b) of the Act which reads as follows:

"(2) The Court may on the petition coming on for hearing or at any time on the application of the petitioner, the company, or any person who has given notice that he intends to appear on the hearing of the petition –

(b) dispense with any notices being given or steps being taken which are required by this Act, or by the rules, or by any prior order of the Court;"

The Federal Court held that Rules 193 and 194 of the Rules read with Section 221(2) of the Act clearly give the court power to exercise its discretion to extend or abridge the time prescribed in Rule 30(2) of the Rules. According to the Court, the Rules have to be read harmoniously and the rigours of Rule 30(2) must be tampered by Rules 193 and 194 and Section 212(2) of the Act.

The Court also referred to Section 355(1) of the Act which provides, *inter alia*, that no proceedings under the Act shall be invalidated by any defect or irregularity unless the court is of the view that substantial injustice has been or may be caused thereby which cannot be remedied by an order of the court.

The Federal Court pointed out that *Crocuses & Daffodils* did not consider the discretionary powers of the court under Rules 193 and 194 of the Rules and Section 221(2)(b) of the Act which empower the court to validate formal defects or irregularities. The Federal Court held that *Crocuses & Daffodils* is confined to the facts of that case which is a petition founded on inability to pay debts under a valid and enforceable judgment. Their Lordships also pointed out that in that case, there had been inordinate delay and blatant disregard of the mandatory time frame prescribed under the Rules.

Thus, the Federal Court agreed with the Court of Appeal that the High Court had erred in failing to consider the facts and circumstances relating to this case which is not a simple petition based on inability to pay debt under Section 218(1)(e) of the Act, and held that it would not be right to adopt a purely mechanistic approach to the issue of time limits and completely ignore the discretion of the court to extend time under Rule 193 of the Rules.

The Court also said that in exercising the powers under Rules 193 and 194 of the Rules, the courts must be wary of all the surrounding circumstances of each case and must weigh the interest of both parties in accordance with those facts and circumstances. Having done so in the present case, the Court concluded that no injustice, let alone substantial injustice, had been caused by the defect or irregularity and accordingly the irregularity could be safely condoned under Rules 193 and 194 of the Rules and Sections 221(2)(b) and 355 of the Act.

In view of the above findings, the Federal Court answered the question of law in the affirmative and dismissed the Company's appeal.

CONCLUSION

The decision of the Federal Court is a welcomed decision which moves away from the rigid and mechanical approach taken when dealing with technical non-compliance under the Rules. However, it must be noted that the decision of the Federal Court is in relation to a "just and equitable" winding up petition which

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TO-MAY-TOES, TO-MAH-TOES BUT NOT WHEN IT COMES TO "SEAT" OF ARBITRATION

A commentary on Government of India v Petrocon India Limited [2016] 3 MLJ 435 by Shannon Rajan

The importance of the terminological distinction between *"seat"* and *"venue"* in an arbitration agreement cannot be overstated. In this case, the lack of clarity in the arbitration agreement on this issue resulted in the parties litigating the issue for more than 13 years in three jurisdictions, namely Malaysia, India and the United Kingdom, with pronouncements being issued by the apex courts of Malaysia and India.

THE ARBITRATION AGREEMENT

The Government of India ("Appellant"), Petrocon India Limited ("Respondent") and three other entities were parties to a Production Sharing Contract ("PSC"). The arbitration agreement in question is found in Article 34.12 of the PSC, which reads as follows:

"34.12 Venue and Law of Arbitration Agreement

The venue of sole expert, conciliation or arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia, and shall be conducted in the English language … Notwithstanding the provisions of Article 33.1, the arbitration agreement contained in this Article 34 shall be governed by the laws of England."

> **"the word "venue" or "seat" is often used interchangeably in international arbitrations"**

BRIEF FACTS OF THE DISPUTE

A dispute arose between the Appellant and the Respondent in respect of the PSC around 2001. Due to the outbreak of the severe acute respiratory syndrome (SARS) epidemic in Kuala Lumpur, the venue of the arbitration was first moved from Kuala Lumpur to Amsterdam. Subsequently, the hearings were shifted to London, culminating in the consent order dated 15 November 2003 ("Consent Order") which shifted the seat of the arbitration to London. Thereafter, arbitration proceedings commenced, resulting in a partial award being issued on 31 March 2005 ("Partial Award").

The Appellant filed an Originating Motion in the High Court of Malaya to set aside the Partial Award on the premise that the seat of the arbitration was Kuala Lumpur. The Appellant obtained an order for leave to serve the said application out of jurisdiction. In response, the Respondent applied to set-aside the Originating Motion, the order for leave to serve out of jurisdiction and service of Originating Motion on the grounds that the High Court of Malaya had no jurisdiction to determine the dispute as the seat of arbitration had been shifted to London by the Consent Order.

THE LOWER COURTS' DECISIONS

The High Court and the Court of Appeal allowed the Respondent's application, essentially holding that the High Court of Malaya has no jurisdiction to entertain, adjudicate or decide on the Appellant's Originating Motion.

The High Court treated the "*venue of arbitration*" as the "*seat of arbitration*" and held that the latter had shifted from Kuala Lumpur to London under the Consent Order. The Court of Appeal, while deciding in favour of the Respondent, disagreed with the High Court's reasoning. It held that the "*venue*" is merely a matter of geographical convenience for the parties and that the seat of arbitration is determined by the law governing the arbitration agreement. As the PSC is governed by English law, the Court of Appeal concluded that London is the juridical seat. The Appellant appealed to the Federal Court.

THE PROCEEDINGS IN INDIA

While the appeal was being contested before the Court of Appeal in Malaysia, the Appellant filed a petition in the Delhi High Court in India, seeking a declaration that the seat of arbitration is Kuala Lumpur. The Delhi High Court dismissed the Respondent's objection that the Indian courts did not have jurisdiction to consider the application.

On the Respondent's appeal, the Supreme Court of India held that the Delhi High Court did not have the jurisdiction to entertain the Appellant's petition as the arbitration agreement was not governed by the laws of India, but by English law.

THE FEDERAL COURT'S DECISION

The Federal Court observed that the term used in the arbitration agreement in the present case is *"venue"* rather than *"seat"* and that in international arbitrations, the words often used are *"place of arbitration"*, *"seat of arbitration"* and *"forum"*. The Federal Court therefore had to address its mind to the following questions, namely: (1) whether there is a fixed terminology in reference to the seat of arbitration; (2) whether there was a *"seat"* of arbitration expressly selected by the parties; and (3) whether the term *"venue"* has the same meaning as *"seat"*.

The Federal Court in explaining the distinction between the seat and the geographical location of arbitration referred to another Federal Court case of *Government of India v Cairn Energy India Pty Ltd & Another* [2012] 3 CLJ 423. It held that the seat of arbitration will determine the curial law that will govern the

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arbitration proceeding. The seat refers to the legal seat rather than the geographical seat. It is a permanent or fixed seat which can only be changed by consent of the parties of the arbitration. The Court added that this must be distinguished from the physical or geographical place where the arbitration is to be held, which can be shifted from place to place without affecting the legal seat of arbitration.

In the present case, the arbitration agreement provides for the venue of arbitration being Kuala Lumpur while the law governing the arbitration agreement is English law. Although there is no provision for seat of arbitration in the arbitration agreement, the Federal Court found that there was a strong proposition for the venue of arbitration to be deemed the seat of arbitration for the following reasons:

(a) if the word *"venue"* in Article 34.12 merely refers to the geographical or physical seat of arbitration, it would not have been necessary to insert it into the agreement as the geographical seat may be changed at any time at the parties' convenience;

(b) the word "*venue*" or "*seat*" is often used interchangeably in international arbitrations. In the present case, it was common ground that venue of the arbitration was first moved to Amsterdam from Kuala Lumpur due to the outbreak of the SARS epidemic in Kuala Lumpur. Subsequently, the hearings were shifted to London and culminated in the issue of the Consent Order, which shifted the seat of the arbitration to London. Therefore, at the start of the arbitration proceedings, Kuala Lumpur was commonly accepted as the seat of arbitration; and

(c) the Appellant also filed its application to set aside the Partial Award in the Kuala Lumpur High Court and this shows that the Appellant had accepted Kuala Lumpur as the seat of arbitration. It is trite law that a challenge can only be made in the jurisdiction which is the seat of arbitration.

After the Federal Court found that the word *"venue"* in Article 34.12 should, on its proper interpretation, be construed to mean the seat of arbitration, the next question that follows is whether the seat of arbitration had been shifted to London. It found that the seat of arbitration had shifted to London by way of the Consent Order and that such a change in the seat of arbitration was within the parties' contemplation as reflected in Article 34.12, which reads: *"The venue of … arbitration proceedings pursuant to this Article, unless the Parties otherwise agree, shall be Kuala Lumpur, Malaysia …".* It was of the view that the Consent Order was made by the arbitral tribunal pursuant to this article.

The next issue was whether the change in the *"venue"* of arbitration requires the concurrence of all the parties to the PSC as stipulated under Article 35.2. The Federal Court held that Article 35.2 does not apply to the arbitration agreement contained in Article 34 as the latter is a distinct and separate agreement from the underlying contract and that "*the parties*" in Article 34.12 refers to the parties to the arbitration as distinct from the parties to the PSC.

The final issue related to the effect of the Indian Supreme Court's decision. The Federal Court found that there was no issue estoppel and *res judicata* operating to prevent the Respondent from re-litigating the issue before the Malaysian Court. This was because the Indian Supreme Court after having ruled that the lower court lacked jurisdiction to entertain the Appellant's petition, it was no longer necessary for the Supreme Court to delve into the issue of the seat of arbitration. The Federal Court held that whatever ruling or observation made by the Indian Supreme Court beyond the issue of jurisdiction must be taken as mere *obiter dicta* and had no binding effect on the parties.

COMMENTS

This case is a timely reminder on the importance of ensuring that an arbitration agreement must be drafted with infinite precision. It also highlights the problems that could arise from a failure to comply with this golden rule, as evident from the multitude of proceedings initiated across multiple jurisdictions, resulting in years of delay in the substantive proceedings as well as substantial legal costs being incurred in dealing with the ancillary issues.

The Federal Court's decision suggests a continuation of a growing trend where the designation of a *"venue"* for arbitration in an arbitration agreement would be considered as strong evidence that the *"seat"* should be in the same jurisdiction. In the instant case, the Federal Court adopted a common sense approach to interpreting the word *"venue"* in the arbitration agreement in that it recognised that it would not have been necessary to expressly insert the word *"venue"* when parties were at liberty to shift the geographical location at any time.

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SKRINE ANNUAL BOWLING CHAMPIONSHIP

Skrine's Ninth Annual Bowling Championship was held on 13 May 2016 at Black Bull, Midvalley, Kuala Lumpur.

After an intensely fought battle, the Incredibles (with 2142 pins) emerged as Champions for the 2nd consecutive year. The Blues (with 2037 pins) were the 1st runners-up and the Top Guns (with 1815 pins), the 2nd runners-up.

Members of the Incredibles, Ahmad Saiful Safuan and Rajeswary, took top spot in the Best Male Bowler and Best Female Bowler categories respectively.

Congratulations to all the winners of the 2016 Skrine Bowling Championship and many thanks to the participants and the many supporters whose attendance and support made for very merry and vocal atmosphere at the venue.

MALAYSIA'S MATCH MAKING INDUSTRY

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Whilst the RM Guidelines provide that a P2P Operator is required to have in place policies and processes to manage any default by an Issuer, including using their best endeavours to recover amounts owing to investors, no minimum standards are imposed. Based on the business models of P2P operators outside Malaysia, it is probable that P2P Operators will receive their profits the moment the underlying loans are disbursed and therefore they are unlikely to share the downside risk when Issuers default. P2P platform operators in other jurisdictions have responded to regulatory obligations to facilitate recovery by imposing additional charges to manage the recovery process or by setting up provision funds which all investors are required to contribute to.

A possible solution may be for security to be provided by Issuers although the RM Guidelines do not provide any guidance on the form and mechanism for such arrangements to be put in place. Furthermore, there are practicable difficulties and costs in managing the security as there may be a large number of investors pooling together to provide the funding to an Issuer.

Is repayment secured against bankruptcy of the P2P Operator?

Perhaps the biggest worry is that a badly managed P2P platform might collapse, taking investors' money with it. The bankruptcy of a P2P platform has in fact happened before in the case of Trustbuddy, a P2P lending platform based in Sweden that started in 2009 and was even listed on the NASDAQ OMX Nordic before it was forced to cease business.

To mitigate such risks, the RM Guidelines require monies raised from investors and payments received from Issuers to be placed in a trust account. If these requirements are complied with, such funds will be ring-fenced from the creditors of the P2P Operator. However, the position may be different if the P2P Operator fails to comply with these requirements and leaves the funds in its own accounts.

THE PATH FORWARD

The SC has announced that parties who are interested in establishing and operating P2P platforms may submit their applications to the SC from 2 May 2016 to 1 July 2016, the latter of which will be the closing date for the initial batch of applications. It has been reported in the local media that significant interest has been generated with over 100 parties interested in submitting applications to operate a P2P platform. Local media have also earlier reported that the successful applicants for registration as P2P Operators will commence operations in early 2017.

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OUT WITH THE OLD, IN WITH THE NEW

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Effects of No Par Value Regime

The most important effect of the no par value regime is that it will simplify the concept of share capital and a Malaysian company will cease to be encumbered by par values and authorised capital.

All monies paid for such shares will become the share capital of the company. This simplifies accounting as the share premium account will become extinct.

Subdivisions and consolidation of shares will become easier as companies will no longer have to consider the par value of shares when dividing and consolidating shares. One share will simply be divided into two shares, instead of dividing one share of RM1.00 each into two shares of RM0.50 each under the Act.

Shares can also be easily issued (subject, if required, to members' approval) since there will not be a need to increase the company's authorised capital, as the concept will cease to exist.

The CLRC also concluded that the abolition of the par value concept will not affect the voting rights of shareholders as the number of votes held by a shareholder will be based on the number, and not the par value, of shares held by him.

SHARE CERTIFICATES

Another radical change to be introduced under the Bill is that it will no longer be mandatory for a company to issue share certificates. A company is only obliged to issue share certificates if it is required to do so under its constitution or upon application by a member (Clause 97(1)).

In the absence of evidence to the contrary, the entry of a person's name in the register of members constitutes *prima facie* evidence that legal title to the shares is vested in that person (Clause 101(1)).

Notwithstanding the dispensation of a mandatory requirement to issue share certificates, the transfer of shares will still require the execution and lodgement of a duly stamped instrument of transfer unless the shares are deposited with a central depository established under the Securities Industry (Central Depositories) Act 1991 and are transferred in accordance with the rules of such depository (Clauses 105 and 148(1)).

To safeguard the interest of members, the Bill imposes obligations on the secretary to cause the register of members to be properly maintained and all issuance and transfers of shares to be properly entered into the register (Clause 102(1)).

REGISTER OF MEMBERS

The Bill will introduce a new requirement for a company to inform the Registrar, within 14 days, of any change of any shareholder in the register of members or upon any person becoming or ceasing to be a member (Clause 51(1)). Under the current regime, company searches do not reflect recent share transfers as there is no requirement for the company to inform the Registrar of share transfers in the company, save when the filing of the annual return of the company. It is hoped that this requirement will result in more up to date information on shareholders being available when company searches are carried out.

CONCLUSION

By removing outdated concepts, the Bill dispenses with the old and brings in the new. It is anticipated that after the coming into effect of the Bill, the Malaysian corporate landscape will be substantially overhauled and become more business-friendly. Stakeholders who are used to certain established concepts such as M&A and par value will have to adapt to the new regime introduced under the Bill.

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FAIR REWARD FOR AN HONEST YEAR'S WORK?

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even if they do not receive any remuneration for serving on the board of a listed issuer.

For the reasons set out above, it is submitted that it would be unfair for shareholders of a listed issuer to deprive independent directors from receiving directors' remuneration for providing their services as independent directors. If resolutions are approved by the shareholders of a listed issuer on terms of those described in section 5 above, any concern which the independent directors may have that they may not be remunerated for their services will be laid to rest.

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WARM UP TO EURO 2016

2016 saw the re-emergence of the Skrine Inter-House Futsal Championships after a two-year hiatus. The teams gathered at Samba De Futsal in Petaling Jaya early on 4 June 2016 - players young and old, rusty and sharp - but all with the goal of winning the Piala Chin Yoong Choong.

After six round robin matches to determine the finalists, the Top Guns ran out 6-0 winners over the Blues in the 3rd place playoff with the biggest margin of victory of the championships.

The closely fought final between the Incredibles and the Black Knights ended in a 1-1 draw. The dreaded penalty shootout followed. After a stalemate in the initial round of seven penalties, the Incredibles emerged victorious after four penalties in the sudden-death shootout by 7-6 and retained their spot as the best futsal team in Skrine after their previous victory in 2014.

The competition certainly whetted the players' appetite for the forthcoming European Championships.

UNION BUSTER BUSTED

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process during the secret ballot conducted by the Director General for Industrial Relations under section 9(4A) of the IRA. Although a company may communicate its reasons for disfavouring the union, it must ensure that no illegal tactics are employed to influence the manner in which its employees exercise their vote.

Once a union is recognised, the company must not evade collective bargaining negotiations. The company must undertake research on the benefits accorded to employees within the same scope of employment in comparable establishments and be able to justify to the union that the company's proposals with regard to benefits are fair and reasonable.

As with all complex issues, it is perhaps best for a company to engage a lawyer to provide assistance and guidance through the process of dealing with unions.

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IS THE TIME FRAME IN RULE 30(2) IMMUTABLE?

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usually involves heavily disputed facts and exchange of numerous affidavits.

This decision does not overrule the decision in *Crocuses & Daffodils* concerning a petition based on inability to pay debt under a valid judgment in which the Court of Appeal emphasised on strict compliance with the mandatory time limits prescribed by law.

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CURTAINS FOR ROLLER SHUTTER PATENT

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said to give any more power to our courts to enforce a patent when any one claim is invalid, whether the claim be dependent or independent. For now, the decision does not suggest any intention to declare anything more than dependent claims being automatically invalidated, but it remains to be seen what future patent challengers may make of this.

WHERE DO WE GO FROM HERE?

Unless this decision is revisited or the law amended, it appears that to mitigate the risk of automatic invalidation of dependent claims, prospective patentees may just have to fully recite preceding features of any relevant broader claim before stating the further elements or features to narrow the claims.

> “ prospective patentees may … have to fully recite preceding features of any relevant broader claim ”

A more vexed question which arises from the case is this: if you already have an existing patent which contains a number of dependent claims, can you amend the patent to set out fully the details of the independent claims on which the dependent claim is predicated? Our Patent Office, to our knowledge, has not officially given word on the extent amendments will be accepted or the timeframes required for such amendments to be processed if accepted.

It is believed that certain associations have put forward proposals for amendments to the Act to address the issues that arise from this case. It remains to be seen whether our legislators will be receptive to such proposals and if affirmative, how long it will take for such proposals to be implemented.

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Endnotes -

[1] [2011] 2 MLJ 781.
[2] [2014] 5 MLJ 98.
[3] *SKB Shutters Manufacturing Sdn Bhd v Seng Kong Industries Sdn Bhd & Anor* [2015] 6 MLJ 293.

PADDLING WITH THE DRAGONS 2016: PART 1

The first part of the Skrine Dragons' 2016 season started off with welcoming a team full of young, enthusiastic new paddlers. After two months of intense lake, land and pool trainings, we took to the Melaka waters at the end of May.

The Perlumbaan Perahu Naga 1 Malaysia Melaka on 29 May 2016 saw more than 60 competing teams, including Akademi Laut Malaysia, DBKL Dragon Boat Team and of course, the Skrine Dragons. The team did well in Melaka, considering that the boats were heavier and deeper than the usual practice boats in Putrajaya and this was the first race for more than half of our paddlers.

Training for the second part of our 2016 season will kick off in early August and the team will be heading to Kuching in November for the Sarawak International Dragon Boat Regatta 2016!

Paddles Up!

LEGAL INSIGHTS

A SKRINE NEWSLETTER

This newsletter is produced by the LEGAL INSIGHTS' Editorial Committee. We welcome comments and feedback on LEGAL INSIGHTS. You may contact us at skrine@skrine.com for further information about this newsletter and its contents.

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