ISSUE 3/2017 • SEPTEMBER 2017 KDN No. PP 13699/01/2013 (031337)

LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

In the third quarter of 2017, the Federal Court delivered an interesting judgment in *Dato' Low Bin Tick v Datuk Chong Tho Chin*. The apex court held that complaints made to regulatory authorities, such as the Registrar of Societies and the Anti-Corruption Agency (now the Malaysian Anti-Corruption Commission), are protected by absolute privilege and no defamation claim can be brought against the complainants in respect of statements contained in such complaints.

The decision in *Low Bin Tick* extended the application of the principles laid down in 2013 in *Lee Yoke Lam v Chin Keat Seng*. The rationale for the Court's decision is discussed in *"Licence to Defame – The Sequel?"*.

The *Law Reform (Marriage and Divorce)(Amendment) Bill 2017* was passed during the July-August 2017 meeting of the Malaysian Parliament. This Bill, which was a modification of an earlier version that was withdrawn, omitted a crucial provision which required both parents to consent to the conversion of the religion of a minor child. This has, at least for now, dashed all hopes that legislative intervention would bring an end to unilateral conversion of minor children in Malaysia.

The Employment Insurance System Bill 2017, which will introduce an unemployment insurance scheme for employees in Malaysia, is expected to be tabled at the forthcoming meeting of the Malaysian Parliament. The main features of the Bill are highlighted in *"A Social Safety Net"*.

We hope that you will enjoy reading the above-mentioned articles as well as other 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

ASIALAW ASIA-PACIFIC DISPUTE RESOLUTION AWARDS 2017

We are pleased to announce that our Firm has been awarded the National Law Firm of the Year for Malaysia at the Asialaw Asia-Pacific Dispute Resolution Awards 2017 held in Hong Kong on 28 September 2017.

We extend our appreciation to the lawyers in our Dispute Resolution Division whose efforts have enabled our Firm to win this award.

SENIOR ASSOCIATE

The Partners are pleased to announce that Nicholas Lai has been promoted to Senior Associate.

Nicholas is a member of our Dispute Resolution Division. He obtained his Bachelor of Laws from University of Reading in 2011 and was admitted as an Advocate and Solicitor of the High Court of Malaya in September 2013. His practice includes trade remedies and general litigation.

We have no doubt that Nicholas will continue to make invaluable contributions to the Firm.

CLIENTS' FEEDBACK

In an effort to enhance the quality of our legal service for our valued clients, we have created an email address namely: executivecommittee@skrine.com for our clients to provide feedback on matters undertaken by our lawyers. Clients are encouraged to use it to help our lawyers assist you better.

A SOCIAL

Foo Siew Li provides an overview of

It has been reported that the 1997/98 Asian financial crisis had caused 121,222 Malaysian employees to lose their jobs. Recent statistics show that in 2015, a total of 44,343 local employees were laid off while in 2016, 37,699 employees were affected.

Greater challenges lie ahead for the labour markets of tomorrow. The advent of technology is having a transformative effect on the global labour force, including Malaysia, with automation rapidly replacing human employees and artificial intelligence and the Fourth Industrial Revolution looming on the horizon. A report by Khazanah Research Institute projected that more than half of all current jobs in Malaysia are at high risk of being affected by automation in the next one or two decades.

In an effort to alleviate the effects of unemployment and to help employees to bridge the gap from one period of employment to another, the Government has introduced the Employment Insurance System Bill 2017 ("Bill"). The Bill was first tabled in Parliament on 1 August 2017 and the revised Bill is set to be tabled at the October 2017 session of Parliament.

> **"The (Bill seeks to) introduce an unemployment insurance scheme in Malaysia"**

In this article, the "Act" refers to the Bill when it has been passed and comes into operation.

What is the purpose of the Act?

The Act will introduce an unemployment insurance scheme in Malaysia which is to be known as the Employment Insurance System ("EIS"). The scheme will be funded by mandatory contributions from employees and employers and will provide certain benefits and a re-employment placement programme for insured persons in the event of loss of employment.

Who is an insured person under the Act?

Under the Act, an insured person is an employee, irrespective of the amount of wages earned, who is registered or deemed to be registered with the Social Security Organisation ("SOCSO") and in respect of whom contributions are paid or payable.

What constitutes "loss of employment" under the Act?

Loss of employment occurs if the contract of service of an insured person is terminated or becomes void due to any reason **other than** the following:

(a) the voluntary resignation by the insured person;

(b) the expiry of the contract of service of the insured person;

SAFETY NET

the Employment Insurance System Bill 2017

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(c) termination of the contract of service by mutual consent of the employer and the insured person without terms and conditions;

(d) completion of the work in accordance with the terms of the contract of service;

(e) the retirement of the insured person; or

(f) the termination of the contract of service of the insured person due to misconduct.

Who will manage and administer the EIS?

The EIS will be managed and administered by SOCSO.

Do employers need to register with SOCSO?

Yes, employers are required to register their industries and ensure that all employees are registered and insured with SOCSO under the Act. However, an employer that has registered its industry with SOCSO under the Employees' Social Security Act 1969 ("SOCSO Act") is deemed to have registered its industry under this Act. Likewise, an employee who has been registered with SOCSO under the SOCSO Act is deemed to be registered under this Act.

> **"Both employers and employees will be required to make monthly contributions"**

What are the contributions to be made under the Act?

Both employers and employees will be required to make monthly contributions of an equal amount as set out in the Second Schedule of the Act to SOCSO. The current proposed contribution rate by an employer and an employee respectively ranges from RM0.10 for wages up to RM30 a month to RM19.75 for wages exceeding RM4,000 a month (i.e. a contribution of 0.5% of the employee's wages).

It has been reported that a proposal to revise the Bill to reduce the rate of contribution from 0.5% to 0.2% by each of the employer and employee will be tabled at the October 2017 session of Parliament.

The Act allows the Minister to determine the rates of contribution by the employer and employee once every three years. In addition, there is a discretion to vary the contribution by the employer at any other time.

Contributions to SOCSO under the EIS is in addition to the contributions under the SOCSO Act.

Can an employer make the employee bear the employer's contribution?

No, the employer cannot directly or indirectly reduce the wages of any employee, or discontinue or reduce the benefits payable to the employee.

What are the benefits available under the EIS?

The benefits include the provision of Job Search Allowance, Early Re-Employment Allowance, Reduced Income Allowance, and/or Training Allowance and Training Fee.

What is a Job Search Allowance?

The Job Search Allowance is a monthly payment for a period of 3 to 6 consecutive months to assist the insured person during the period he is seeking for employment. The payment of the Job Search Allowance will be at the rate of 80% of assumed monthly wages for the 1st month, 50% for the 2nd month, 40% for the 3rd and 4th months, and 30% for the 5th and 6th months as financial assistance during the job seeking period.

> **"The benefits include … Job Search Allowance, Early Re-Employment Allowance (and) Reduced Income Allowance"**

The expression "*assumed monthly wages*" refers to an amount equal to the aggregate sum of the monthly wages for each month for which the contributions have been paid or is payable during the six consecutive months immediately preceding the month in which the loss of employment occurred, divided by the number of months for which contributions were paid or payable. The amount of the "*assumed monthly wages*" is set out in Part I, Part II or Part III of the Third Schedule.

What is an Early Re-Employment Allowance?

The Early Re-Employment Allowance is an incentive paid in lump sum to an insured person for accepting an offer of employment from any employer and commencing employment within seven days from the date of approval of a claim for benefits ("waiting

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NEW CAPITAL REDUCTION PROCEDURE AND WHITEWASH EXEMPTION FOR FINANCIAL ASSISTANCE

Julia Chow and Ebbie Wong explain two new concepts in the Companies Act 2016

The Companies Act 2016 ("CA 2016") which came into operation on 31 January 2017 (with the exception of certain provisions which are not relevant to this article) introduces various new concepts into Malaysian company law. These new concepts include an alternative procedure for the reduction of share capital and a whitewash exemption for the provision of financial assistance for the purchase of shares.

THE SOLVENCY TEST

Both of the newly-introduced concepts mentioned above require a solvency statement to be made in the prescribed form, whereby each director making the statement has to declare that he has formed the opinion that the company satisfies the solvency test laid out in section 112(1) of the CA 2016, namely that:

(a) immediately after the transaction there will be no ground on which the company could be found unable to pay its debts;

(b) the company will be able to pay its debts as the debts become due during the period of 12 months immediately following the date of the transaction **or** it is intended to commence winding up of the company within 12 months after the date of the transaction and the company will be able to pay its debts in full within 12 months after the commencement of the winding up; and

(c) the assets of the company exceed the liabilities of the company at the date of the transaction.

The solvency test has been discussed in greater detail in Legal Insights Issue No. 2/17 (June 2017).

ALTERNATIVE PROCEDURE FOR CAPITAL REDUCTION

The previous regime under the Companies Act 1965 ("CA 1965") provided that a company may only reduce its share capital by a special resolution subject to confirmation of the reduction by the Court. The CA 2016 retains this concept but also introduces an alternative procedure whereby a company may reduce its share capital by passing a special resolution which is supported by a solvency statement ("Section 117 Capital Reduction").

Procedural requirements

The procedure for carrying out a Section 117 Capital Reduction may be summarised as follows:

(1) All directors of the company make a solvency statement in relation to the reduction of share capital;

(2) The company passes a special resolution to reduce its share capital in accordance with its constitution within 14 days (in the case of a private company) or 21 days (in the case of a public company) from the date of the solvency statement;

(3) The company sends a notice to the Director General of the Inland Revenue Board and the Registrar of Companies ("Registrar") within 7 days of the date of the resolution. The notice must state that the resolution has been passed and contain the text and the date of the resolution. A copy of the solvency statement is to be lodged with the Registrar together with the notice;

(4) The company makes the solvency statement or a copy thereof available for inspection without charge by its creditors at its registered office for six weeks from the date of the resolution; and

(5) The company advertises a notice of the reduction of share capital within seven days from the date of the resolution in two widely circulated newspapers in Malaysia – one in Bahasa Malaysia and the other in the English language.

The CA 2016 exempts a company whose reduction of share capital is solely by way of cancellation of any paid-up share capital which is lost or unrepresented by available assets from the requirement for a solvency statement.

Objection by creditor

Any creditor of the company may, within six weeks from the date of the resolution, apply to the Court for the resolution passed under the Section 117 Capital Reduction to be cancelled. The creditor is required to serve the application on the company as soon as possible. The company must, in turn, give notice of the application to the Registrar as soon as possible.

If the resolution has not been cancelled at the time when the application is to be heard, the Court may make an order cancelling the resolution ("Section 120 Order") if any debt or claim on which the application was based is outstanding, and the Court is satisfied that:

(a) the debt or claim has not been secured and the applicant does not have other adequate safeguards for the debt or claim; and

(b) it is not the case that security or other safeguards are unnecessary in view of the assets that the company would have after the reduction.

The Court is required to dismiss the creditor's application if it is not satisfied that there are sufficient grounds to make a Section 120 Order.

Effective Date of Section 117 Capital Reduction

If no application for cancellation of the resolution is made by any creditor, the company is required to lodge the documents specified in Section 119(1) of the CA 2016 with the Registrar within 6 to 8 weeks from the date of the resolution (i.e. within 2 weeks from the end of the period within which creditors may apply to Court for a cancellation of the resolution).

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If one or more applications for cancellation of the resolution have been made, the proceedings for all such applications are to be brought to an end due to their being dismissed, withdrawn or for any reason as the Registrar may allow. The company is then required to lodge the documents specified in Section 119(2) with the Registrar within 14 days from the date on which the last of such applications was dismissed, withdrawn or bought to an end.

The reduction of the share capital will take effect when the Registrar has recorded the information lodged with him in the appropriate register. The Registrar will then issue a notice to confirm the reduction of share capital, which is conclusive evidence that all the requirements of the CA 2016 with respect to the reduction of share capital have been complied with.

THE WHITEWASH EXEMPTION FOR FINANCIAL ASSISTANCE

General prohibition

Under the CA 1965, a company was prohibited from providing financial assistance for the purpose of, or in connection with, a purchase or subscription of shares in the company or in its holding company. This general prohibition is retained in Section 123(1) of the CA 2016.

In addition to the general prohibition, a further restriction is introduced in Section 123(2) of the CA 2016 which prohibits the provision of financial assistance for the purpose of reducing or discharging any liability that has been incurred by a person in the acquisition of shares in the company or in its holding company.

The Whitewash Exemption

Notwithstanding the general prohibition on financial assistance, Section 126 of the CA 2016 introduces a "*whitewash*" exemption which allows a company whose shares are not quoted on Bursa Malaysia to provide financial assistance for the acquisition of its own shares or shares in its holding company, or for the reduction or discharge of any liability incurred for the purpose of such acquisition of shares.

The granting of financial assistance under the whitewash exemption however is subject to the following requirements:

(1) The company must pass a resolution authorising the giving of financial assistance;

(2) Before the assistance is given, the company must pass a directors' resolution, setting out the full grounds of the conclusions of the directors, that (a) permits the company to give the assistance; (b) states that the giving of the assistance is in the best interest of the company; and (c) the terms and conditions under which the assistance is to be given are just and reasonable to the company;

(3) On the same day that the resolution for financial assistance is passed, the directors who voted in favour of that resolution must make a solvency statement that complies with provisions in relation to the giving of the assistance;

(4) The aggregate amount of the assistance and any other financial assistance given under Section 126 that has not been repaid must not exceed 10% of the aggregate amount received by the company in respect of the issue of shares and the reserves of the company, based on the most recent audited financial statements of the company;

(5) The company must receive fair value in connection with the giving of the assistance; and

(6) The assistance must be given not later than 12 months after the day on which the solvency statement was made.

Notification to members

Within 14 days from giving financial assistance under Section 126 of the CA 2016, the company must send to each member a copy of the solvency statement made in connection with provision of the assistance together with a notice that contains the following information:

(a) the class and number of shares in respect of which the assistance was given;

(b) the consideration paid or payable for those shares;

(c) the name of the person receiving the assistance and, if a different person, the name of the beneficial owner of those shares; and

(d) the nature, the terms and, if quantifiable, the amount of the assistance.

It is to be noted that the CA 2016 does not restrict the types of persons who are allowed to be given financial assistance under the whitewash exemption.

Penalties for contravention

The penalty that may be imposed on an officer of the company who contravenes the general prohibition against financial assistance in Section 123 is a term of imprisonment not exceeding five years, or a fine not exceeding RM3,000,000, or both. Although

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LICENCE TO DEFAME – THE SEQUEL?

Oommen Koshy and Kwan Will Sen discuss a sequel of sorts to Lee Yoke Yam v Chin Keat Seng

A BROADER LICENCE?

From 28 November 2012 onwards, by virtue of the landmark Federal Court case of *Lee Yoke Yam v Chin Keat Seng* [2013] 1 MLJ 145 ("*Lee Yoke Yam*"), statements made in a police report (known as the first information report) pursuant to Section 107 of the Criminal Procedure Code is accorded absolute privilege against defamation claims. This means that a defamation claim cannot lie against the maker of the said statements (regardless of what those statements are).

The recent Federal Court case of *Dato' Dr. Low Bin Tick v Datuk Chong Tho Chin* in Civil Appeal No. 02-73-10/2015(W), which was heard together with three other related appeals with the same parties (i.e. Civil Appeals No. 02-73-10/2015(W), 02-75-10/2015(W) and 02-76-10/2015(W)) (collectively, the "*Low Bin Tick Case*"), concerned amongst others, a revisiting of the legal principles laid down in *Lee Yoke Yam*, as well as issues relating to qualified privilege.

This article will first set out the factual background relevant to the Federal Court's decision. It will then explain the Federal Court's rationale in answering the questions of law, and more importantly, the impact of the decision on statements made in letters of complaint to the Registrar of Societies ("ROS"), the Anti-Corruption Agency ("ACA") (now the Malaysian Anti-Corruption Commission), the Commercial Crime Division ("CCD") and Bar Council Malaysia ("BC") with regard to defamation claims.

BACKGROUND

The Facts

The alleged defamer, Dato' Dr. Low Bin Tick ("Appellant"), was at the material time, the President of Chinwoo Athletic Association Selangor and Kuala Lumpur ("Chinwoo"). He had succeeded the individual who was allegedly defamed by him, Datuk Chong Tho Chin ("Respondent"), who was the immediate past President of Chinwoo. The Respondent is also an advocate and solicitor in a legal firm in West Malaysia.

Chinwoo was the registered owner of a parcel of land in Kuala Lumpur ("the Land"). In the 1980s, Chinwoo entered into a joint venture with a company known as Jiwa Realty Sdn Bhd ("Developer") to develop the Land ("Project"). For this purpose, the parties entered into various sale and purchase agreements ("SPAs"), whereby Chinwoo would sell the Land to the Developer, and in return, the Developer agreed to sell 23% of the units developed to Chinwoo. At the material time, it was agreed that the Developer would develop a total of 669 units of property. This would then entitle Chinwoo to 154 units (which represent the said 23%). The Project never took off and the said SPAs were revoked.

In 1991, new SPAs were entered into for the same Project, with Chinwoo's entitlement of 154 units of property remaining intact. Chinwoo and the Developer also entered into an additional agreement ("Additional Agreement") which contained a clause that allowed the Developer to develop the Land "*in any manner it may deem fit*" ("Free Hand Clause"). The Additional Agreement was agreed to by the Trustees of Chinwoo. At the material time, the Respondent was a trustee of Chinwoo, the President of Chinwoo and a member of the Chinwoo Property Committee. Further, the new SPAs and the Additional Agreement were drawn up by the Respondent's law firm.

The Project was completed in 1998. Chinwoo's 154 units were delivered to Chinwoo pursuant to the SPAs. During this time, some of the members of Chinwoo realised that the 154 units were less than the 23% sharing ratio initially agreed to in the earlier SPAs. By virtue of the Free Hand Clause, the Developer had obtained an approval from the authorities to build an additional 201 units (thus totalling 870 units). Going by the 23% ratio, this would have meant that Chinwoo ought to have been entitled to 200 units, i.e. 46 more than the 154 units it received.

Given the circumstances, it was resolved at an annual general meeting of Chinwoo on 29 June 2003 that an investigation be carried out to determine whether there were any irregularities in relation to the Project. An investigation committee was formed for this purpose. This eventually led to amongst others, a finding that the Respondent was in breach of his duty to Chinwoo and was negligent in failing to protect Chinwoo's entitlement to 23% of the constructed units in respect of the Project.

The Appellant thereafter issued letters of complaint to the ROS, ACA, CCD and BC on this issue. These letters contained, amongst others, allegations of fraud, misuse of power and breach of trust against the Respondent. This then led to the Respondent's defamation suits against the Appellant. In his defence against the defamation suits, the Appellant raised the defences of absolute privilege and/or qualified privilege.

Findings of the High Court and the Court of Appeal

The trial judge found that the Appellant had defamed the Respondent. The High Court held that the Appellant could not avail himself to the defences of absolute privilege and/or qualified privilege as he did not have the mandate of Chinwoo to issue the letters of complaint against the Respondent. The lack of mandate was said to have shown that the Appellant had acted *mala fide* in writing the impugned letters of complaint. The Court of Appeal upheld the High Court's findings.

ABSOLUTE PRIVILEGE (ROS, ACA AND CCD)

The Federal Court held that the lodging of reports or writing letters of complaint to the ROS, ACA and CCD are occasions of absolute privilege. These three bodies share a common feature in that they are empowered by statute to investigate and take appropriate action against those who have breached the respective legislation under their purview.

The Court held that the ratio in *Lee Yoke Yam* ought to similarly apply to complaints made to the ROS, ACA and CCD, in that public policy considerations ought to prevail – if defamation

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actions can be brought against such complainants, it may discourage individuals (out of fear of risk of slander) from making the relevant reports or complaints, thus placing the investigation, detection and punishment of crimes at serious risk. These public policy issues were considered in the Court of Appeal case of *Abdul Manaf v Mohd Kamil Datuk Hj Mohd Kassim* [2011] 4 MLJ 346, the English House of Lords case of *Taylor and Another v Director of the Serious Fraud Office and Others* [1999] 2 AC 177 and the English case of *Dunnet v Nelson* [1926] S.C. 769.

The Federal Court considered the Singapore Court of Appeal case of *Goh Lay Khim and Others v Isabel Redrup Agency Pte Ltd and another appeal* [2017] SGCA 11 ("*Goh Lay Khim*"). In *Goh Lay Khim,* the Court held that gratuitous complaints to authorities should be protected by qualified privilege only, taking into account the local political and social conditions of Singapore. Notwithstanding *Goh Lay Khim,* the Federal Court reiterated its stance in *Lee Yoke Yam*, in that police reports are protected by absolute privilege, and extended this privilege to reports or complaints made to ROS, ACA and CCD (the last of which is essentially part of the police).

The issue as to whether malicious intent may possibly disentitle one from relying on the defence of absolute privilege was also raised. The Federal Court adopted *Lincoln v Daniels* [1962] 1 QB 237, which gives higher credence to *"truth [being elicited] even at the risk than an injury inflicted maliciously may go unredressed".*

The apex court further held that for absolute privilege to apply, authority or mandate to make the relevant statements are not necessary considerations. Thus, the Appellant could avail himself to the defence of absolute privilege, even if he did not have the mandate to lodge the relevant complaints to the ROS, ACA and CCD.

QUALIFIED PRIVILEGE (BC)

Having decided that the complaints to the ROS, ACA and CCD are occasioned by absolute privilege, the Federal Court took the view that complaints made to the BC are *prima facie* occasioned by qualified privilege.

The Federal Court held that *"[i]f the communication were made in pursuance to a duty or on a matter which there was a common interest in the party making and the party receiving it, the occasion is said to be one of qualified privilege"* and *"[w]hether an occasion is a privileged occasion depends on the circumstances of each case, the nature of the information and the relation of the speaker and recipient".* In short, there is no hard and fast rule with regard to qualified privilege, and it is for the judge to determine as a matter of law whether the occasion is privileged.

In the present case, the Appellant was the President of Chinwoo when the complaints were made to the BC. He was responsible for the proper conduct and management of the affairs of Chinwoo. On the other hand, the recipient, i.e. BC, is tasked with the responsibility to manage the affairs and professional conduct of members of the Malaysian Bar (of which the Respondent is a member). The Federal Court adopted the English cases of *Lincoln v Daniels* [1962] 1 QB 237 and *Beech and another v Freeson* [1971] 2 All ER 854.

On the question of malice, the Federal Court held that the law prevents the inference of malice in the publication of statements which are false in fact and injurious to the character of another if such statements are fairly made by a person in the discharge of some public or private duty, whether legal or moral, or in the conduct of his own affairs.

In the High Court and Court of Appeal, the Courts found that the absence of mandate to lodge the relevant complaints *per se* was sufficient to prove malice. The Federal Court disagreed, and held that the mere act of filing the complaints is insufficient to prove malice.

CONCLUSION

The Federal Court's decision, in particular on absolute privilege, is illuminating. One of the reasons for the Federal Court to accord absolute privilege to police reports is the fact that there are provisions under both the Penal Code and Criminal Procedure Code which penalise false first information reports being made. However, similar provisions are not found in the Societies Act 1966 and the Malaysian Anti-Corruption Commission Act 2009. Yet, the Federal Court saw it fit to accord absolute privilege to complaints made to the ROS, ACA and CCD on the strength of public policy considerations.

Further, it remains to be seen whether absolute privilege will be extended to the lodgement of complaints to other regulatory authorities, such as the Securities Commission Malaysia, Companies Commission of Malaysia, Insolvency Department, Inland Revenue Board, Customs and Excise Department and Malaysian Competition Commission, all of which are tasked under specific laws to carry out investigations to determine whether the laws within their purview are breached. Going by the decisions in *Lee Yoke Yam* and now the *Low Bin Tick Case,* it would perhaps not be far-fetched to assume that where appropriate, the Malaysian Courts may extend absolute privilege to complaints made to other regulatory authorities.

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Editor's Note: A commentary on the Federal Court's decision in *Lee Yoke Yam v Chin Keat Seng* was published in Legal Insights 1/2013 under the title "*Licence to Defame?*"

STEP UP WITH "CARE"

Alia Abdullah highlights some new features in the Malaysian Code on Corporate Governance 2017

INTRODUCTION

The latest version of the Malaysian Code on Corporate Governance was released by the Securities Commission Malaysia ("SC") on 26 April 2017 ("MCCG 2017") and came into effect immediately. It represents the third revision made to the Code and supersedes its earlier edition, the Malaysian Code on Corporate Governance 2012 ("MCCG 2012").

This article will highlight certain features introduced under the MCCG 2017.

AN OVERVIEW OF THE MCCG 2017

The MCCG 2017 is based on three key principles, namely: (1) board leadership and effectiveness; (2) effective audit and risk management; and (3) integrity in corporate reporting and meaningful relationship with stakeholders ("Principles"). These Principles are supported by 12 Intended Outcomes ("Intended Outcomes").

> "The MCCG 2017 is based on three key principles … supported by twelve Intended Outcomes"

The MCCG 2017 also sets out a list of 36 actions, practices and processes which a company is expected to adopt ("Practices") in order to achieve the Intended Outcomes. The MCCG 2017 also provides guidance ("Guidance") that may be adopted when applying a Practice in order to achieve an Intended Outcome.

As an illustration, under the "*board leadership and effectiveness*" principle, one of the Intended Outcomes is the promotion of good business conduct and maintaining a corporate culture that engenders integrity, transparency and fairness. Among the Practices which a company is expected to adopt to achieve this Intended Outcome is the establishment of a code of conduct and ethics to implement policies and procedures to manage conflicts of interest and prevent abuse of power, corruption and money laundering. By way of Guidance, the board is to encourage employees to report genuine concerns in relation to breach of a legal obligation (including criminal activity or breach of law) and to ensure that the company's whistleblowing policies provide avenues where such concerns can be raised without the risk of reprisal.

COMPLIANCE WITH MCCG 2017

Although the MCCG 2017 is targeted primarily at listed companies, non-listed entities including state-owned enterprises, small and medium enterprises (SMEs) and licensed intermediaries "*are encouraged to embrace this code on corporate governance*" to enhance their accountability, transparency and sustainability.

Interestingly, the MCCG 2017 recognises that listed companies are not a homogeneous group. Thus, certain Practices, such as the requirement to have boards that comprise at least 30% women and to appoint independent experts periodically to facilitate objective and candid board evaluations, apply only to Large Companies.

A "*Large Company*" is one which is included on the FTSE Bursa Malaysia Top 100 Index or has a market capitalisation of RM2 billion and above, at the start of its financial year. Once a company satisfies either or both of the aforesaid criteria, it will be required to comply with the Practices that are applicable to Large Companies even if it subsequently ceases to satisfy those criteria during the financial year.

Other listed companies are encouraged to adopt the Practices applicable to Large Companies to achieve greater excellence in corporate governance.

> "The MCCG 2017 also includes four enhanced Practices ("Step Ups")"

CARE APPROACH

A key feature of the MCCG 2017 is the introduction of the Comprehend, Apply and Report (CARE) approach, and the shift from "*comply or explain*" to "*apply or explain an alternative*".

The CARE approach requires a company to clearly identify the thought processes involved in practising good corporate governance and to provide a fair and meaningful explanation on how it has applied the Practices. Where there is a departure from a Practice, the company must provide an explanation for the departure, disclose the alternative practice it has adopted and how this practice achieves the Intended Outcome.

In addition, a Large Company which departs from a Practice must disclose the steps that it proposes to take and the time frame required to comply with such Practice.

STEPPING UP

The MCCG 2017 also includes four enhanced Practices ("Step Ups"), namely limiting the tenure of independent directors to nine years, disclosing the detailed remuneration of each member of its senior management on a named basis, establishing an audit committee that comprise solely of independent directors and a risk management committee that comprise a majority of independent directors.

Companies that aspire to achieve excellence in corporate governance in particular, Large Companies, are encouraged to

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adopt the Step Ups to strengthen their governance practices and processes.

BOARD COMPOSITION

Board composition influences the ability of the board to fulfill its oversight responsibilities. A board comprising a majority of independent directors from a diverse pool allows greater depth and more effective oversight of management compared to a non-diverse board.

Under the superseded MCCG 2012, the board must comprise a majority of independent directors only where the chairman of the board is not an independent director.

On the other hand, the MCCG 2017 stipulates that at least half of the board should comprise independent directors. For Large Companies, the board should comprise a majority of independent directors.

Although the MCCG 2017 does not define an independent director, it provides that in considering independence, it is necessary to focus not only on whether a director's background and current activities qualify him as independent but also whether the director can act independently of the management.

For listed companies, both the Main Market Listing Requirements and the ACE Market Listing Requirements (collectively "Listing Requirements") define an "*independent director*" as *"a director who is independent of management and free from any business or other relationship which could interfere with the exercise of independent judgment or the ability to act in the best interests of an applicant or a listed issuer"*.

APPOINTMENT OF INDEPENDENT DIRECTOR

Stakeholders are increasingly concerned about the potential negative impact that directors' long tenure may have on their independence. The long tenures of independent directors and familiarity may erode the board's objectivity. Due to long or close relationship between the board and the management, an independent director may be too sympathetic to the management's interests or too accepting of the management's work.

Under the superseded MCCG 2012, the tenure for an independent director should not exceed a cumulative term limit of nine years. However, after the period of nine years has lapsed, an independent director may continue to serve on the board subject to the director's re-designation as a non-independent director. If the board intends to retain an independent director in that capacity beyond nine years, it should justify and seek annual shareholders' approval.

The position under the MCCG 2017 is similar except that shareholders' approval to retain an independent director to continue to serve on the board as an independent director only applies from the ninth until the twelfth year. In this regard, the board should undertake a rigorous review to determine whether the '*independence*' of the director has been impaired. Findings from the review should be disclosed to the shareholders for them to make an informed decision.

The MCCG 2017 requires a company which seeks to retain a person as an independent director after the twelfth year to obtain its shareholders' approval through a two-tier voting process.

TWO-TIER VOTING PROCESS

The votes of shareholders under the two-tier voting process for the appointment of an independent director beyond the cumulative period of twelve years are to be cast in the following manner:

- Tier 1: Only the Large Shareholder of the company votes; and
- Tier 2: Shareholders other than Large Shareholders vote.

A "*Large Shareholder*" is a shareholder who:

- is entitled to exercise, or control the exercise of, not less than 33% of the voting shares in the company;
- is the largest shareholder of voting shares in the company;
- has the power to appoint or cause to be appointed a majority of the directors of the company; or
- has the power to make or cause to be made, decisions in respect of the business or administration of the company, and to give effect to such decisions or cause them to be given effect to.

The decision for the resolution is determined based on the vote of Tier 1 and a simple majority of Tier 2. If there is more than one Large Shareholder in Tier 1, a simple majority of votes determine the outcome of the Tier 1 vote. The resolution is deemed carried if both Tier 1 and Tier 2 votes support the resolution. Conversely, the resolution is deemed to be defeated where the votes between the two tiers differ or where Tier 1 voter(s) abstained from voting.

Notwithstanding the foregoing, the MCCG 2017 discourages Large Companies from retaining an independent director for more than twelve years.

The SC has stated in a FAQ that the two-tier voting process for the appointment of independent directors who have served twelve years will apply to resolutions to be tabled at general

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MULTI-TIERED DISPUTE RESOLUTION CLAUSES

Janice Tay provides an overview on the enforceability of multi-tiered dispute resolution clauses

Multi-tiered dispute resolution clauses (or escalation clauses) are clauses in a contract which provide for distinct stages of alternative dispute resolution, such as negotiation and mediation, before a party can commence proceedings in respect of a dispute.

Such clauses offer the possibility of a cheaper and faster alternative to arbitration or litigation and enable the parties to attempt to resolve disputes in a non-adversarial setting thus preserving the commercial relationship.

One of the key issues is the extent to which these clauses are mandatory and enforceable. What are the consequences if a party ignores the obligations set out therein and who decides on this issue: the arbitral tribunal or courts?

This article summarises the approach of different jurisdictions to such clauses.

THE MALAYSIAN POSITION

The Malaysian courts have taken the view that escalation clauses, where sufficiently clear and allowed by law, are preconditions to be complied with before the commencement of any legal proceedings. Although an arbitral tribunal may rule on its own jurisdiction, a challenge on its ruling may be made to the courts.

> **"Multi-tiered dispute resolution clauses … provide for distinct stages of alternative dispute resolution"**

In the Federal Court decision of *Juara Serata Sdn Bhd v Alpharich Sdn Bhd* [2015] 9 CLJ 37, the architect issued an interim payment certificate for works done but the defendant refused to pay the same as the plaintiff's works were deemed incomplete. The plaintiff commenced proceedings in the High Court, claiming for, *inter alia*, the interim payment certificate sum and the defendant counterclaimed against the plaintiff. The High Court held that the parties were bound by the escalation clause, which required them to first refer their dispute to the architect/consultant for a decision and thereafter to arbitration if no decision is given by the architect/consultant within 14 days. If the aggrieved party fails to refer the dispute on the decision of the architect/consultant to arbitration within the stipulated time, the decision is deemed to be final and binding on the parties.

The High Court allowed the plaintiff's claim and dismissed the defendant's counterclaim because there were no written instructions from the defendant or the architect concerning the defects in the works. The Court of Appeal affirmed the High Court's decision.

In the Federal Court, the defendant argued that the interim payment certificate was not intended to be final and that it could be challenged in arbitration or the courts. The defendant further argued that the escalation clause had deprived its right to have the disputes heard in the courts and thereby contravening section 29 of the Contracts Act 1950, which does not allow for any contractual provision which purports to forfeit one's right to pursue legal or arbitral proceedings.

The Federal Court, in affirming the decisions of the courts below, held that:

1. The escalation clause had set out in clear terms the steps to be taken in the case of a dispute. This was a plain case where parties are called upon to honour their part of the bargain when they entered into the agreement. The real issue was whether the parties to an agreement were in breach of the terms which they had agreed upon and not the issue relating to the validity and enforceability of an interim payment certificate. The defendant should not be allowed to resile from terms in the agreement which had imposed obligations as that would be tantamount to allowing it to take advantage of its own wrong.

2. Section 29 of the Contracts Act 1950 is not contravened as the escalation clause provided for a two-tiered dispute resolution mechanism. The clause did not impose any absolute restriction on or expressly oust the jurisdiction of the court.

In *Usahasama SPNB-LTAT Sdn Bhd v Abi Construction Sdn Bhd* [2016] 7 CLJ 275, the plaintiff took the position that the notice of arbitration issued by the defendant was premature as the dispute should first be referred to the Superintending Officer prior to arbitration in accordance to the escalation clause and hence, the arbitrator had no jurisdiction to decide the dispute between parties. The arbitrator dismissed the plaintiff's application holding that he had the jurisdiction to decide the dispute between the parties. Dissatisfied, the plaintiff appealed to the High Court under Section 18(8) of the Arbitration Act 2005 to challenge the jurisdiction of the arbitral tribunal.

The High Court allowed the plaintiff's appeal and found that both parties had agreed contractually to a precondition to be fulfilled before there could be a valid reference to arbitration. The requirement that the contractor must first refer the dispute or difference to the Superintending Officer for a decision before the dispute is referred to arbitration was clearly in the form of a condition precedent. Until and unless the contractually agreed conditions were fulfilled, the arbitrator concerned could not assume jurisdiction.

THE SINGAPOREAN POSITION

The Singaporean Courts have held that the courts will respect the parties' choice of dispute resolution mechanism. Parties must abide by the preconditions which they have agreed to, failing which an arbitral tribunal will have no jurisdiction over the dispute.

In *International Research Corp PLC v Lufthansa Systems Asia Pacific Pte Ltd and Another* [2014] 1 SLR 130 (CA), whilst the

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enforceability of the multi-tiered clause was not the subject of the appeal, the Court of Appeal took the opportunity nonetheless to note that it would have upheld the multi-tiered clause if it had been challenged. The Singapore Court of Appeal held that the multi-tiered clause was sufficiently certain to be enforced.

THE ENGLISH POSITION

In *Walford v Miles* [1992] 2 AC 128, the House of Lords held that an agreement to agree or to negotiate in good faith is not enforceable. Accordingly, the English courts have generally been reluctant to recognise multi-tiered dispute resolution clauses as giving rise to enforceable agreements to engage in informal dispute resolution before recourse to formal proceedings.

In *Sulamerica CIA Nacional De Seguros SA v Enesa Engenharia* [2012] EWCA Civ 638, the Court of Appeal held that an obligation on the parties to *"seek to have the Dispute resolved amicably by mediation"* was unenforceable because it did not define the parties' rights and obligations with sufficient certainty to enable it to be enforced. The clause did not set out a mechanism to appoint a mediator or any defined mediation process. As such, the failure to mediate was no bar to commencing arbitration.

In *Wah (Aka Alan Tang) & Anor v Grant Thornton International Ltd & Ors* [2012] EWHC 3198, the claimants brought a claim in the High Court challenging the arbitration award and alleging that the requisite steps to enable a process of pre-arbitration conciliation were clearly prescribed and were conditions precedent before an arbitral reference could be made. As they were not fulfilled, the reference was thus invalid, so that the arbitration tribunal did not have jurisdiction to hear the dispute.

Mr Justice Hildyard stated that the overarching test of enforceability is *"whether the obligations and/or negative injunctions it imposes are sufficiently clear and certain to be given legal effect"*. The Judge found that the clause was too equivocal in terms of process required and too nebulous in terms of the content of the parties' obligations to be given legal effect.

However, the recent case of *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm) signals a shift in the English courts' approach. The Court held that the dispute resolution clause requiring the parties to resolve a dispute by *"friendly discussions"* within a limited period and in good faith before the dispute could be referred to arbitration was enforceable. This decision departs from the general principle that an agreement to negotiate is unenforceable.

THE AUSTRALIAN POSITION

In *WTE Co-Generation v RCR Energy Pty Ltd* [2013] VSC 314, a dispute arose between the parties and litigation was commenced by the plaintiff. The defendant applied to stay the litigation because the dispute resolution clause had not been complied with and the plaintiff opposed the same on the basis that the dispute resolution clause was uncertain and unenforceable.

The Court held that the dispute resolution clause constituted "an agreement to agree" because the clause left the method of resolving dispute to a further agreement.

The Court stressed that *"as a minimum, what is necessary for a valid and enforceable dispute resolution clause, is to set out the process or model to be employed, and in a manner which does not leave this to further agreement. It is not for the court to substitute its own mechanism where the parties have failed to agree upon it in their contract. To do otherwise would involve the court in contractual drafting, which is a distinctly different exercise from contractual construction of imprecise terms."*

THE HONG KONG POSITION

In *Hyundai Engineering & Construction Co Ltd v Vigour Ltd* [2005] 3 HKLRD 723, the Court of Appeal considered the enforceability of an agreement for negotiation and meditation. The Court of Appeal concluded that the agreement to negotiate was unenforceable as the negotiation provision was no more than an agreement to agree and the mediation provision was imprecise.

CONCLUSION

The approach by the courts in the different jurisdictions highlights the importance of meeting all the preconditions set out in a multi-tiered dispute resolution mechanism before initiating legal or arbitration proceedings.

The failure to comply with such clauses may result in a challenge to the arbitral tribunal's jurisdiction. In the worst-case scenario, one might even be faced with a successful arbitral award later being challenged for lack of jurisdiction in a setting aside application or an opposition to enforcement.

The cases also illustrate that if one is minded to incorporate a multi-tiered dispute resolution mechanism in a contract, it is crucial to draft such clauses with clarity and sufficient detail to avoid the preconditions to arbitration or legal proceedings being held to be unenforceable as an agreement to agree or too imprecise for enforcement. It is advised to have a clearly defined process that includes the relevant representatives and obligations which are not too onerous with a time limit for compliance.

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THE SELF-EMPLOYMENT SOCIAL SECURITY ACT 2017

Daniel Heng highlights the salient features of a new social security legislation

As a general rule, a person who is employed in Malaysia, as well as his employer, are required to contribute to a social security fund established under the Employees' Social Security Act 1969 ("SOCSO Act") in order to safeguard the employee and his dependants against certain contingencies, such as partial or permanent disability or injury sustained by the employee in the course of his employment.

No corresponding social security system had existed in Malaysia for self-employed persons until the Self-Employment Social Security Act 2017 ("Act") came into operation on 13 June 2017.

OVERVIEW

The objective of the Act is to provide social security for citizens or permanent residents of Malaysia who carry out a self-employment activity. A "self-employment activity" refers to any activity in relation to an industry specified in the First Schedule of the Act ("self-employment activity").

The Act establishes a scheme called the "Self-Employment Social Security Scheme" ("Scheme") and a fund known as the "Self-Employment Security Fund ("Fund"). The Scheme and Fund are to be administered by the Social Security Organisation ("Organisation") established under the SOCSO Act.

Presently, the only self-employment activity specified in the First Schedule of the Act is the service of carriage of passengers by means of a public service vehicle or motor vehicle owned by a person, or managed, maintained or operated by a person under any arrangement with the owner or lessor of the vehicle. The vehicles that may be used to provide this service include taxis, airport taxis, limousine taxis, school buses, employees' buses and in due course, e-hailing vehicles.

IMPLEMENTATION

The Act requires every self-employed person who is engaged in a self-employment activity ("self-employed person") to register under the Scheme and make contributions on a monthly basis to the Organisation. The rates of contribution are set out in the Second Schedule and are based on the insured monthly earnings in the Second Schedule selected by the self-employed person ("selected insured monthly earnings"). The monthly contribution is about 1.25% of the selected insured monthly earnings and range from RM13.10 to RM49.40 for income coverage from RM1,050 to RM3,950 per month.

Failure by a self-employed person to register under the Scheme or contribute to the Fund is an offence which is punishable with a fine not exceeding RM10,000 or imprisonment for a term not exceeding two years or both.

Notwithstanding the First Schedule, section 10 of the Act provides that the Scheme is to be implemented by the Organisation to self-employed persons carrying out a self-employment activity by regulations made under the Act. In furtherance of the foregoing, the Act was applied to taxi drivers when the Self-Employment Social Security (Rates of Contribution for Taxi Drivers) Regulations 2017 ("Regulations") were gazetted and came into force on 13 June 2017.

Unlike the Second Schedule of the Act which provides 30 tiers of monthly earnings within the range of RM1,050 to RM3,950, the Regulations only provide four such tiers within the same range of monthly earnings. The Regulations also provide that contributions are to be made in a lump sum payment for coverage of 12 months.

BENEFITS UNDER THE ACT

A self-employed person who has registered with the Organisation and has paid the contributions under the Act ("insured") is entitled to claim benefits arising from a self-employment injury, that is, a personal injury to the insured caused by an accident or an occupational disease arising out of and in the course of his self-employment activity, including while travelling for the purpose of such activity.

An occupational disease refers to a disease specified in the Fifth Schedule of the SOCSO Act which is contracted by an insured who is directly involved in any occupation or industry specified in that schedule (e.g. lung fibrosis due to exposure to arsenic during the production of arsenic-based pesticides) while being self-employed or within 72 months (or such extended period as the Organisation may accept upon production of relevant supporting evidence) after ceasing to be self-employed.

The benefits provided to an insured under the Act are as follows:

Temporary disablement benefit

An insured who suffers temporary disablement will be entitled to a periodical payment of an amount equal to 80% of his selected insured daily earning for the duration of his disablement. The temporary disablement benefit will only be payable if the temporary disablement lasts for at least four days, including the day of the accident.

The expression "temporary disablement" refers to a condition resulting from a self-employment injury which requires medical treatment and renders the insured, as a result of such injury, temporarily incapable of carrying out any self-employment activity which he was capable of performing before or at the time of the self-employment injury.

Permanent disablement benefit

An insured who suffers permanent partial disablement will be entitled to a periodical payment of an amount equal to 90% of his selected insured daily earning multiplied by the percentage of his loss of earning capacity.

An insured who suffers permanent total disablement will be entitled to a periodical payment of an amount equal to 90% of his selected insured daily earning.

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The expression "permanent partial disablement" refers to any disablement of a permanent nature, which reduces the earning capacity of an insured to carry out any self-employment activity which he was capable of performing before or at the time of the self-employment injury; whereas the expression "permanent total disablement" refers to any disablement of a permanent nature, which disables an insured from carrying out any self-employment activity which he was capable of performing before or at the time of the self-employment injury.

The "selected insured daily earning" of an insured is an amount equal to one-thirtieth of his selected insured monthly earnings. For example, if the selected insured monthly earnings is RM2,050, the selected insured daily earning will be RM68.33.

Dependants' benefit

If an insured dies as a result of a self-employment injury, his dependants shall be entitled to the following benefit:

(a) for a widow or widower, an amount equal to three-fifths of the daily rate of permanent total disablement benefit of the deceased insured, or if there is more than one widow, such amount shall be divided equally between the widows; and

(b) for each child, two-fifths of the daily rate of permanent total disablement benefit of the deceased insured.

However, if the total of the dependants' benefit to be distributed among the widow or widower and child or children exceeds at any time the daily rate of permanent total disablement benefit, the share of each dependant will be proportionately reduced so that the total amount payable to the dependants will not exceed the daily rate of permanent total disablement benefit.

A "child" refers to a child of the deceased insured who is (a) under 21 years of age (including a posthumous child, a dependent stepchild, an illegitimate child and an adopted child); and (b) of any age who is mentally retarded or physically incapacitated and is incapable of supporting himself.

The benefit is payable to a child:

(a) until the child is married, legally adopted or dies (whichever occurs first);

(b) in the case of a child who is mentally retarded or physically incapacitated and is incapable of supporting himself, for so long as the child is incapable of self-support; or

(c) in the case of a child who is receiving education in any institution of higher education, until he completes his first degree or ceases to receive such education or marries, whichever occurs first.

If a deceased insured does not leave a widow or widower, or if the widow or widower dies, the daily rate of benefit for each child shall be three-fifths of the daily rate of permanent total disablement benefit, and if there is more than one child, the amount payable shall be equally divided between them.

Where a deceased insured does not leave a widow or widower or child, or if the widow or widower or child dies, the parents or siblings (excluding a sibling who is 21 years of age or older, or is married or adopted, or has died) or grandparents shall be paid a dependants' benefit of an amount equal to four-tenths of the daily rate of permanent total disablement benefit, and if there are two or more parents or grandparents, the amount payable shall be equally divided between them.

Funeral benefit

If the insured dies as a result of a self-employment injury or while receiving a disablement benefit, a funeral benefit will be paid to his dependants, or if there is none, to any person who incurs the funeral expenses.

Constant attendance allowance

An insured who is entitled to a permanent total disablement benefit will also be entitled to a daily constant attendance allowance, if and so long as he is so severely incapacitated as to constantly require the personal attendance of another person.

Medical benefit

An insured whose condition requires medical treatment and attendance as a result of a self-employment injury shall be entitled to receive a medical benefit.

Rehabilitation or dialysis

An insured who has been certified to suffer from a self-employment injury may be provided with facilities for physical or vocational rehabilitation or dialysis, and where his condition requires, be fitted, at no cost, with prosthetic, orthotic or other appropriate appliances.

Education benefit

The Organisation may provide education benefit in the form of an educational loan or scholarship on terms to be determined by the Organisation, to a child of an insured who has died as a result of a self-employment injury or is in receipt of permanent disablement benefits.

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MAKING A WILL – WHY IS IT NECESSARY?

Oon Hooi Lin explains the advantages of making a Will

When a person passes away, all his assets will be frozen until the High Court has granted the probate (where there is a valid Will) or letters of administration (where there is no Will). Hence, one of the key objectives of estate planning is to "unfreeze" the frozen assets of the estate of a deceased person as soon as possible after the deceased's death so that financial hardship to the deceased's dependants can be minimised or avoided.

WHAT IF A PERSON DIES WITHOUT A WILL

Where a person dies without leaving a Will, he is said to have died intestate. To "unfreeze" the deceased's assets, letters of administration must be granted by the High Court to an administrator. Under Section 30 of the Probate and Administration Act 1959, any person "interested in the estate of the deceased person" is entitled to apply to be the administrator. One of the potential problems when a deceased dies without leaving a Will is that disputes may arise among persons having an interest in the estate as to who should be the administrator of the deceased's estate.

It is also harder to identify and locate the assets of the deceased without a Will. The distribution process is longer, the costs are higher and there is the additional need for the administrator to procure two persons to act as sureties to provide an administration bond equivalent to the gross value of the deceased's estate. When a deceased has children who are minors, i.e. below the age of 18, the courts will appoint a guardian of its choice to take care of the welfare of the minors.

> **"By making a Will, a testator can largely avoid the potential problems which may arise in an intestacy"**

Further, assets will be distributed strictly in the manner prescribed in Section 6(1) of the Distribution Act 1958 which may not be in line with the person's wishes. For example, if a person dies intestate leaving a spouse, issue or issues and parent or parents, the surviving spouse shall be entitled to one-quarter of the estate, the issue or issues shall be entitled to one-half of the estate and the parent or parents the remaining one-quarter.

ADVANTAGES OF HAVING A WILL

A Will is defined in Section 2 of the Wills Act 1959 as "a declaration intended to have legal effect of the intentions of a testator with respect to his property or other matters which he desires to be carried into effect after his death and includes a testament, a codicil and an appointment by will or by writing in the nature of a will in exercise of a power and also a disposition by will or testament of the guardianship, custody and tuition of any child."

By making a Will, a testator can largely avoid the potential problems which may arise in an intestacy. A testator exercises control over who should be the executor and/or trustee who can apply to the High Court for a grant of probate to manage and administer his assets and affairs according to his wishes after his death.

A testator is also able to dictate who will be entitled to his assets as well as the extent of their entitlement. He can appoint guardians to look after the interest of his minor children. He has the powers to create a testamentary trust for heirs with special needs, his children's education, his elderly parents' living expenses or the charities of his choice. He can also give directions as to his funeral arrangements (although this is rarely done due to its impracticality). Overall, in testacy situations, the distribution process is faster and the costs of administering the estate is reduced.

There is also no requirement to procure sureties to provide an administration bond equivalent to the gross value of the deceased's estate.

> **"A testator is … able to dictate who will be entitled to his assets as well as the extent of their entitlement"**

REQUIREMENTS OF A WILL

Under the Wills Act 1959, in order for a Will to be valid, it must satisfy the following requirements:

(a) The testator must have attained the age of majority, i.e. 18 years.
(b) The testator must be of sound mind.
(c) The Will must be in writing.
(d) The Will must be signed by the testator.
(e) The Will must be attested by two witnesses in the presence of each other.

Beneficiaries under a Will cannot be witnesses to the Will, otherwise they will lose their entitlement under the Will.

A Will takes effect only upon death of the testator and may be revoked at any time before his death. A Will is revoked in each of the following circumstances: (i) when a later Will is made by the testator; (ii) upon the marriage of the testator; (iii) on the written declaration by the testator with regards to his intention to revoke the Will; (iv) upon the intentional destruction of the Will by the testator or some other person in his presence and under his direction; or (v) upon the conversion of the testator to Islam.

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There is no requirement for a Will to be stamped or registered with any authority.

FACTORS TO CONSIDER WHEN MAKING A WILL

The testator should consider a number of factors prior to the making of his Will.

Who should the Testator select as Executor(s)

Common sense dictates that the testator should appoint someone he can trust to administer his estate. The executor can be an individual aged 21 years or older; a family friend or a professional adviser or it can be a trust corporation. In the case of individuals, it is generally advisable to appoint no less than two executors to administer the estate in case one of them should pre-decease the testator or declines to act. The size of the estate and the complexity of the Will and testamentary trust should be considered when the testator selects the executor(s). Other factors to consider are the executor's age, knowledge and experience, impartiality, accountability and continuity.

> **"A testamentary trust is a trust that is created by a person under his Will"**

What assets does the Testator own

The Will should cover all assets of the testator. As such, a list of assets containing particulars of all the assets for easy identification by the executor should be prepared and periodically reviewed and updated. Assets commonly included in Wills are real properties, cash, bank deposits, shares, motor vehicles, trust properties, personal chattels such as jewellery, books and paintings, intangible assets such as contractual rights, intellectual property rights, and other benefits and interests which are capable of transmission or assignment. Some properties do not pass under the Will, for instance, proceeds from insurance policies and Employees Provident Fund where nominations of beneficiaries have been made. A residuary clause should be included in the Will to deal with the distribution of assets which are acquired after the making of the Will or are not specifically covered in the Will.

Who does the Testator wish to benefit

Generally, the testator has the right to decide who he would like to benefit, as well as the extent to which the beneficiaries will benefit, under his Will. However, he is obliged under the Inheritance (Family Provision) Act 1971 to make reasonable provision for the maintenance of his spouse, unmarried daughter, infant son, or a child under disability. If any of the said persons are omitted from the Will, they can apply to the court for maintenance orders.

How does the Testator wish to benefit the Beneficiaries

Specific or general gifts can be bestowed, whether with or free of all liabilities, charges and costs. A gift can be given outright or can be held under a trust.

Creation of a Testamentary Trust

A testator should consider whether there is a need to create a testamentary trust. A testamentary trust is a trust that is created by a person under his Will. It is a trust which only comes into effect upon the death of that person. The most common uses of a testamentary trust are as follows:

(a) To hold residential property so that dependants can live in the property until they are financially independent or until their death. This is to prevent the property from being sold prematurely. The property can be sold and its proceeds given to the beneficiaries when the trust ends.

(b) Instead of giving a lump sum to beneficiaries, a testamentary trust can be used to give them a monthly allowance over a period of time. This can be used where beneficiaries are too immature or otherwise unfit to responsibly handle a lump sum payment.

(c) A testamentary trust can be used to motivate a beneficiary with payments being made conditional upon the beneficiary achieving specified goals, e.g. obtaining a university degree.

(d) Leaving assets to children will have the effect of impliedly creating a testamentary trust where the trustee will hold the assets on trust until each child attains the age of majority.

Appointment of Guardian and Trustees

Where there is a minor beneficiary named in the Will, the testator should appoint a guardian and trustees. A guardian is needed to take care of the welfare of the minor children if both parents have passed away whereas the trustees will hold the properties on trust for the minor till he has attained the age of majority or in accordance with the terms of the testamentary trust created in the Will.

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MORONS IN A HURRY, BUYING LEMONS IN A JIFFY

Grace Teoh concentrates on a landmark case on passing off

"*You should consider that imitation is the most acceptable part of worship, and that the gods had much rather mankind should resemble, than flatter, them.*"[1]

Such form of worship may come with its fair share of complications - for example: Customer C has been a loyal consumer of Product A, which is made and sold by Proprietor A, for the last 10 years. Every so often, Customer C walks down the healthcare aisle and puts Product A, packaged in a bright red and gold get-up, in his shopping basket. One day, Customer C finds Product B, packaged in a bright green and gold get-up, right next to Product A. Customer C purchases Product B, believing it to be a newly launched variation of Product A, from the same manufacturer. Customer C consumes Product B, and ends up dancing the Aztec two-step for days. Customer C then demands compensation from Proprietor A.

Proprietor A may be able to claim for trade mark infringement against Proprietor B, assuming that Proprietor A has a relevant trade mark registration. However, trade mark infringement actions are limited by the scope of protection granted by the specific trade mark registration. What if Proprietor A does not have a relevant registration?

> **"The common law tort of 'passing off' continues to supplement registered trade mark protection"**

The common law tort of 'passing off' continues to supplement registered trade mark protection in such situations. The UK House of Lords extensively cultivated the tort in *Erven Warnink BV and Ors v J Townend & Sons (Hull) Ltd and Ors* [1979] AC 731, then later distilled it into a three-part test in *Reckitt & Colman Products Ltd v Borden Inc and others* [1990] 1 All ER 873, also known as the 'Jif Lemon' case.

THE JIF-FY FACTS

Since 1956, Reckitt's predecessors have marketed lemon juice in 55ml lemon-shaped and lemon-coloured containers with yellow caps, under the 'Jif' brand in the UK. After Reckitt took over in 1957, all competing lemon-dupe containers dropped from the market. In 1975, Borden attempted to squeeze into the UK market by selling lemon juice in 250ml bottles under the 'ReaLemon' brand, and by 1980, had successfully plucked about 25% share of the total sales of lemon juice in the UK. Reckitt reacted by selling its lemon juice in first 150ml bottles, then 250ml bottles.

Sometime in 1985, Borden attempted to seize a slice of Reckitt's market share by marketing 'ReaLemon' in 75ml lemon-shaped and lemon-coloured containers with red caps. When Reckitt pressed Borden to cease, Borden agreed to do so but subsequently sprouted a plan to launch 75ml and 100ml lemon-shaped and lemon-coloured containers with red or green caps, with small labels identifying them as Borden's goods.

Reckitt then ran to the courts for a *quia timet* injunction against Borden. Justice Walton sitting in the High Court found that housewives purchasing lemon juice would not examine the labels but would assume that lemon-shaped and lemon-coloured containers must contain Jif juice. Thus, Justice Walton held that the use of the Borden get-ups would constitute passing off, and he accordingly granted permanent injunctions to restrain Borden from selling lemon juice in any container so nearly resembling the Jif lemon-dupe container as to be likely to deceive, without making it clear to the purchaser that it is not a Jif juice. Justice Walton also found as a fact that Borden was fraudulently intending to pass off their goods as Reckitt's goods.

Borden appealed to the Court of Appeal, which reversed the findings of fraud but affirmed the decision that the Borden get-ups would constitute an actionable passing off. Borden then appealed to the House of Lords.

> **"no man may pass off his goods as those of another"**

EXTRACT FROM THE HOUSE OF LORDS

The judgment began with Lord Bridge agreeing, albeit with undisguised reluctance, to dismiss the appeal, as the use of lemon-shaped and lemon-coloured containers to package lemon juice was an obvious choice.

Lord Oliver boiled down the law of passing off to one short general proposition: no man may pass off his goods as those of another. His Lordship then set out the three elements for the plaintiff to succeed in an action for passing off:

(a) Goodwill: First, the plaintiff must establish goodwill or reputation attached to the goods or services which the plaintiff supplies under a particular get-up, be it brand name or some design feature, i.e. that the purchasing public recognises the identifying get-up as distinctive specifically of the plaintiff's goods or services.

(b) Misrepresentation: Second, the plaintiff must demonstrate a misrepresentation by the defendant to the public (whether intentional or otherwise) leading or likely to lead the public to believe that the goods or services offered by the defendant are the goods or services of the plaintiff. Whether the public is aware of the plaintiff's identity as the manufacturer or supplier of the goods or services is irrelevant.

(c) Damage: Third, the plaintiff must demonstrate that he suffers,

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or is likely to suffer, damage by reason of the erroneous belief engendered by the defendant's misrepresentation that the source of the defendant's goods or services is the same as the source of those offered by the plaintiff.

Both Lord Oliver and Lord Jauncey impressed in their judgments that customers are to be taken as they are found. The essence of the action for passing off is a deceit practiced on the public and it is no defence that the public would not have been so deceived if they had been more prudent, literate, or discerning.

Lord Oliver reproduced Justice Walton's various findings, and in particular the following:

- that shoppers paid little attention to any labels borne by the plastic lemons; the shopper need not read the label to know that they were obtaining lemon juice. Further, there was evidence that the shoppers could and would easily remove the labels after buying the lemons; and

- that none of Borden's get-ups caught the shoppers' attention such as to alert them that they were ReaLemon, and not Jif, lemons. It could be assumed that the shoppers would just assume that the ReaLemon products were variants of the Jif product.

> **"It is not sufficient … if the only person … misled would be 'a moron in a hurry'"**

On the facts, it was undisputed that Reckitt had acquired a reputation in the market for the Jif juice get-up in lemon-dupes. There was abundant evidence that customers would be deceived if any of the Borden ReaLemon products were put on the market in their present form, even if the evidence was the result of surveys carried out under somewhat, inevitably, artificial conditions.

Consequently, the House of Lords upheld the injunction against Borden. The House of Lords strained to emphasise that the injunction was not a *de jure* monopoly as it was only to the extent that Borden marketed its ReaLemon products without taking adequate steps to make it clear to the ultimate purchaser that it is not Reckitt's goods.

A JUICY WRAP UP

Justice Foster in *Morning Star Cooperative Society v Express Newspapers Limited* [1979] FSR 113 acerbically dismissed a claim for trade mark infringement and passing off stating, "*If one puts the two papers side by side I for myself would find that the two papers are so different in every way that only a moron in a hurry would be misled*". Lord Denning then reshaped it as a test in *Newsweek Inc v British Broadcasting Corporation* (1979) RPC 441.

Closer to home, the Malaysian Court of Appeal has allowed this test to steep into the 'classical trinity' of passing off elements in *Yong Sze Fun & Anor (t/a Perindustrian Makanan & Minuman Layang-Layang) v Syarikat Zamani Hj Tamin Sdn Bhd & Anor* [2012] 1 MLJ 585. The Court held that: "*In passing off cases, the courts are concerned with the ordinary members of the public and the likelihood of them being confused by the products sold in the open market. As to the appropriate test to apply, Lord Denning in Newsweek Inc v British Broadcasting Corporation (1979) RPC 441, at p 447 aptly said:*

"*The test is whether the ordinary, sensible members of the public would be confused. It is not sufficient that the only confusion would be to a very small, unobservant section of society: or, as Foster J put it recently, if the only person who would be misled would be 'a moron in a hurry'.*"

So, in answer to the question posed earlier in this article, if Proprietor A is able to prove that:

(a) it has goodwill and reputation in the get-up,

(b) there were instances of the average consumer (who was neither moronic nor in a hurry) being confused or deceived by the get-up of Product B, and

(c) it had suffered damage as a result thereof,

Proprietor A will be able to restrain Proprietor B from taking advantage of the fruits of its labour even if it did not have a registered trade mark over the get-up.[2]

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End Notes:

[1] From the biography titled 'The Emperor Marcus Antoninus: His Conversation with Himself'.

[2] All puns in this article were intended.

THE CASE OF THE MISSING COMMA

Kok Chee Kheong highlights a tale of caution for legal draftsmen

The subject matter of this article is the case of *O'Connor and Others v Oakhurst Dairy and Dairy Farmers of America* (United States Court of Appeals for the First Circuit Case No.16-1901). The main issue is aptly summed up in the opening sentence of Judge Barron's judgment where he said, "*For want of a comma, we have this case.*"

The comma in question was not the garden-variety comma, but rather, the Oxford comma.

THE OXFORD COMMA

As evident from its description, the Oxford comma originated from the renowned university town of Oxford in England. This being the case, it would be appropriate for us to seek an explanation as to the meaning of this punctuation mark from the venerable Oxford English Dictionary ("OED").

The online edition of the OED describes the Oxford comma as "*a comma used after the penultimate item in a list of three or more items, before 'and' or 'or'*". The OED adds that the Oxford comma is a characteristic of the house style of the Oxford University Press, which incidentally is also the publisher of the OED.

> **"The comma in question was not the garden-variety comma, but rather, the Oxford comma"**

We would add that the Oxford comma is also known as the Harvard comma or the serial comma, the latter not by reason of its rabid use, or abuse, but rather, describes its use in a series of items, hence a "serial comma."

THE MAIN ARGUMENTS

The first appellee is a producer of dairy products and is owned by the second appellee. The appellants are employed by the first appellee as delivery drivers for its dairy products.

The issue in dispute between the parties concerned the interpretation of Exemption F to section 664(3) of a piece of legislation known as Title 26 of the Maine Revised Statutes which regulates overtime law in that State ("Overtime Law"). Section 664(3) precludes an employer from requiring an employee to work more than 40 hours in any one week unless 1½ times the regular hourly rate is paid for all hours actually worked in excess of 40 hours in that week.

Section 664(3) is subject to various exceptions, one of which is Exemption F which, *inter alia*, states that the protection of the Overtime Law does not apply to the canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of agricultural products, meat and fish products, and perishable goods.

The appellants had brought a claim in the District Court in Maine against the first appellee for unpaid overtime wages. They argued that they were protected by section 664(3) as they fell outside the categories of workers described in Exemption F. The first appellee disputed the claim, contending that the appellants fell within Exemption F and were not entitled to the protection under section 664(3) as the appellants, being delivery drivers, were involved in the distribution of perishable goods.

More precisely, the dispute turned on the meaning of the words "***packing for shipment or distribution***" in Exemption F. The appellants contended that, in combination, those words refer to a single activity of "packing", whether for "shipment" or for "distribution." The appellants acknowledged that they handled perishable goods but were not engaged in "packing" them. Hence, the appellants submitted that they fell outside Exemption F and were entitled to overtime payments at the rate prescribed in section 664(3).

The first appellee on the other hand said that the disputed words refer to two distinct exempt activities, one being "packing for shipment" and the other, being "distribution." As the appellants were involved in the delivery of dairy products, which are perishable products, the first appellee submitted that the appellants fell within Exemption F and were not entitled to the protection of the Overtime Law.

THE DECISION OF THE DISTRICT COURT

The United States District Court for the District of Maine agreed with the argument by the first appellee that "distribution" was a stand-alone exempt activity and granted partial summary judgment in favour of the first appellee. The appellants appealed this ruling to the United States Court of Appeals for the First Circuit.

PROCEEDINGS BEFORE THE US COURT OF APPEALS

As observed by Judge Barron, both parties recognised that Exemption F raised questions as to its scope, largely due to the fact that no comma precedes the words "or distribution". However, each party also contended that the exemption's text had a latent clarity when various interpretive aids are applied. Some of the arguments raised by the parties are set out below.

The first appellee's arguments

The first appellee referred to *Harrington v State*, 96 A.3d 696, 697-98 (Me. 2014) where the court stated that it was necessary to look beyond the statutory language only if the statute is reasonably susceptible to different interpretations. The first appellee contended that it was clear that Exemption F identifies "distribution" as a stand-alone, exempt activity rather than an activity that merely modifies the stand-alone exempt activity of "packing."

KOK CHEE KHEONG

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The first appellee also relied on "the rule against surplusage" in *Stromberg-Carlson Corp. v State Tax Assessor*, 765 A.2d 566, 569 (Me. 2001), which instructs that independent meaning must be given to each word in a statute and that none must be treated as unnecessary. The first appellee contended that the words "shipment" and "distribution" are synonyms, and "distribution" cannot describe a type of "packing" as the word "distribution" would then redundantly perform the role that "shipment" – as its synonym – already performs. The first appellee submitted that the first word, "shipment" described the exempt activity of "packing", i.e. "packing for shipment" while the second, "distribution", describes an exempt activity in its own right.

The first appellee also relied on the *Maine Legislative Drafting Manual* @ 113 (Legislative Council, Maine State Legislature 2009) ("Drafting Manual") which expressly instructs that: "when drafting Maine law or rules, don't use a comma between the penultimate and the last item of a series." While acknowledging that the Drafting Manual was published after the Overtime Law was passed, the first appellee referred to various laws to show that Maine statutes invariably omit the serial comma from its lists.

The appellants' arguments

The appellants contended that the inclusion of both "shipment" and "distribution" to describe "packing" did not give rise to redundancy. They contended that "shipment" refers to the outsourcing of the delivery of goods to a third-party carrier whereas "distribution" refers to a seller's in-house transportation of products directly to recipients. The appellants cited the *New Oxford English American Dictionary* and *Webster's Third New International Dictionary* in support of its contention. They also cited section 1476 of another Maine statute, 10 M.R.S.A., which used both terms as if each represented a separate activity in its own right, i.e. "manufacture, distribution or shipment."

To rebut the first appellee's contention that the Drafting Manual instructs against the use of the serial or Oxford comma, the appellants highlighted that the Drafting Manual @ 114 provided for various exceptions including several examples of how lists with modified or otherwise complex terms should be written to avoid the ambiguity that a missing serial comma would otherwise create.

The decision of the Court of Appeals

The Court of Appeals was not convinced by the arguments put forward by both parties. "*And so - - there being no comma to break the tie – the text turns out to be no clearer on close inspection than it first appeared*" observed Judge Barron. However, the Judge added, "*We are not, however, without a means of moving forward.*"

The Judge then referred to *Dir. of Bureau of Labor Standards v Cormier*, 527 A.2d 1297, 1300 (Me. 1987), and said, "*The default rule of construction under Maine law for ambiguous provisions in the state's wage and hour laws is that they "should be liberally construed to further the beneficent purposes for which they are enacted.""*

Judge Barron noted that the opening of the subchapter of the Overtime Law states a clear legislative purpose: "*It is declared public policy of the State of Maine that workers employed in any occupation should receive wages sufficient to provide adequate maintenance … and to be fairly commensurate with the value of the services rendered*" (section 661 of 26 M.S.R.A,).

Thus, the Court held that in accordance with *Cormier*, the ambiguity in Exemption F must be interpreted in light of the remedial purpose of the Overtime Law. When doing so, the Court ruled that the ambiguity clearly favours the appellants' narrower reading of the exemption and furthers the broad remedial purpose of the Overtime Law, which is to provide overtime pay protection to employees.

Given that the appellants engaged in neither packing for shipment nor packing for distribution, the Court ruled that the appellants fell outside the scope of Exemption F and were entitled to the protection of the Overtime Law. Accordingly, the Court of Appeals reversed the partial summary judgment granted in favour of the first appellee by the District Court.

CONCLUSION

This case is not the first where the outcome turned on a missing comma. In all probability, neither will it be the last. Nevertheless, it is a timely reminder to legislative draftsmen and lawyers of the importance of exercising care when drafting. Having said that, the Oxford comma is not a silver bullet which cures all ills of (or by) draftsmen and lawyers. It is to be used with forethought in order to avoid ambiguity.

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Note: Wikipedia contains an interesting write-up on the "serial comma."

A SOCIAL SAFETY NET

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period") or the period of receiving a Job Search Allowance. The rates for the Early Re-Employment Allowance are:

(a) where an insured person accepts an offer of employment and reports for work within the waiting period, 25% of the total Job Search Allowance;

(b) where an insured person accepts an offer of employment within the waiting period but reports for work within the period of receiving the Job Search Allowance, 25% of the total balance of the Job Search Allowance which remains unpaid; or

(c) where an insured person accepts an offer of employment and reports for work within the period of receiving the Job Search Allowance, 25% of the total balance of the Job Search Allowance which remains unpaid.

What is a Reduced Income Allowance?

The Reduced Income Allowance is a lump sum payment to assist an insured person who holds two or more employments and has lost one or more of his employments. The Reduced Income Allowance will be paid at the rates of 80% of the assumed monthly wages for the 1st month, 50% of the assumed monthly wages for the 2nd month, 40% of the assumed monthly wages for the 3rd and 4th months, and 30% of the assumed monthly wages for the 5th and 6th months. An insured person who receives the Reduced Income Allowance is not entitled to a Job Search Allowance, a Training Allowance, or Early Re-Employment Allowance.

What are the Training Allowance and Training Fee?

The Training Allowance is a monthly payment to an insured person for a period of not more than 6 months for attending any training in Malaysia provided by a training provider under the re-employment placement programme. The Training Allowance will be paid at a rate of 25% of the assumed monthly wages subject to a minimum of RM10 and a maximum of RM20 per day. Such allowance shall be paid monthly according to the number of training days attended by the insured person.

Any Training Fee charged to the insured person by the training provider will be paid by SOCSO up to a maximum of RM4,000.

Will an insured person receive any other assistance?

Yes, SOCSO also manages a re-employment placement programme which provides employment services such as job search, counselling, matching, placement, mobility assistance or referral to undergo a re-skilling programme for the insured person who has lost his employment.

How does an insured person make a claim?

The insured person must submit an application for claim for benefits to SOCSO within 60 days from the date he considers that he has lost his employment.

What will SOCSO do after receiving a claim?

SOCSO will determine whether the insured person has lost his employment. If SOCSO finds that this is the case, SOCSO shall consider whether the insured person has made the required number of monthly contributions over the required number of consecutive months immediately preceding the loss of employment in respect of a claim for benefits and either approve or reject the claim. If the claim is approved, SOCSO will determine the relevant benefits to be provided to the insured person.

How often can an insured person make a claim?

The Act allows an insured person to make up to 12 claims for benefits. The qualifying conditions for each claim are set out in the Fourth Schedule. The number of monthly contributions which has been taken into account in respect of a claim for benefits by an insured person will not be taken into account for any subsequent claim for benefits by such insured person.

> **"The introduction of the EIS will undoubtedly be a significant milestone in the protection of employees in Malaysia"**

CLOSING COMMENTS

The introduction of the EIS will undoubtedly be a significant milestone in the protection of employees in Malaysia. While the benefits accorded under the EIS are interim in nature, they will no doubt assist an insured person financially and, possibly, to gain re-employment by learning new skills or upgrading existing skills under SOCSO's re-employment training programme.

Although the EIS will increase the cost of doing business in Malaysia, it may very well be the social safety net that we can no longer afford to do without.

The collection of contributions to the EIS is expected to commence in January 2018 with the first benefit payout commencing in January 2019.

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NEW CAPITAL REDUCTION PROCEDURE ETC.

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the maximum term of imprisonment remains unchanged from the CA 1965, the maximum fine has been increased substantially from RM100,000 to RM3,000,000 under the new CA 2016. As in the case of the CA 1965, a person who is convicted of the offence may also be ordered to pay compensation to the company or the person who has suffered loss or damage as a result of the contravention.

Further, the company and every officer who contravenes the whitewash exemption provisions in Section 126 may be liable to a fine not exceeding RM3,000,000 or imprisonment for a term not exceeding 5 years or to both. In the case of a continuing offence, a further fine not exceeding RM1,000 per day may be imposed for each day that the offence continues after conviction.

Continued validity notwithstanding contravention

A newly introduced Section 124 provides that the validity of the financial assistance and any contract or transaction connected with the financial assistance is not affected only by reason of the contravention of the provisions in the CA 2016 on financial assistance.

CONCLUSION

The procedure for effecting a Section 117 Capital Reduction is a welcomed alternative to a court sanctioned capital reduction as it expedites the time frame and reduces the cost of implementation of a capital reduction exercise, in particular if no objections are made by the company's creditors.

The whitewash exemption for the provision of financial assistance in connection with a purchase of shares in the company or its holding company is a slight liberalisation of the absolute prohibition under the CA 1965. The legislators have put in place various safeguards against the abuse of this procedure. Firstly, the total amount of the assistance that can be provided is limited to 10% of the company's share capital and reserves. Secondly, the provision of assistance must be approved by a special resolution of members and a board resolution supported by a solvency statement. Thirdly, the giving of assistance must be in the best interest of the company and be on terms which are fair and reasonable to it. Fourthly, the severe penalties which may be imposed for contravention of the provisions against financial assistance may mitigate the risk of abuse. To prevent the company from being short-changed, the 2016 Act also makes it mandatory that the company receives fair value in connection with the giving of the financial assistance.

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STEP UP WITH "CARE"

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meetings after 1 January 2018.

LISTING REQUIREMENTS

On 14 August 2017, Bursa Malaysia ("Exchange") issued Consultation Paper No. 3/2017 to seek feedback on the proposed amendments to be made to the Listing Requirements to align them with the MCCG 2017 ("Proposed Amendments").

The Proposed Amendments require a listed company to disclose in its annual report, an overview of the application of the Principles (CG Overview Statement) and the application of each of the Practices (CG Report) during the relevant financial year. A listed company is required to explain any departure from the Practices and to disclose details of the alternative practice which it has adopted and how such practice has achieved the Intended Outcome.

It is proposed by the Exchange that the Proposed Amendments are to take effect from financial year ending on or after 31 December 2017.

As the consultation period for the Proposed Amendments closed on 11 September 2017, it is possible that the Proposed Amendments may be modified based on the feedback received by the Exchange.

CONCLUSION

The MCCG 2017 seeks to improve the quality of corporate governance disclosures, and at the same time, promote good corporate governance practices by companies, in particular, listed companies.

Excellent corporate governance practices among companies in Malaysia will maintain confidence in the capital market and attract more foreign direct investments (FDIs). According to leading academicians on the subject, excellent corporate practices also often lead to better financial performances and shareholder returns for companies.

In line with the SC's aim towards greater internalisation of good governance culture, the MCCG 2017 emphasises the importance of application in substance of good corporate governance practices, beyond merely a matter of compliance in form with a set of rules. This is a positive move away from a box-ticking approach to a more progressive corporate governance culture for the Malaysian corporate landscape.

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THE SELF-EMPLOYMENT SOCIAL SECURITY ACT 2017

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Travelling and other allowances

A claimant for benefit may be paid travelling and other allowances if he is required to appear before a medical assessor or the Appellate Medical Board, or is required by the Organisation, a medical assessor or the Appellate Medical Board to attend physical or vocational rehabilitation, or dialysis.

Commutation

Where loss of earning capacity has been assessed by a medical assessor or the Appellate Medical Board at not more than 20%, the insured may opt to commute the daily benefit to a lump sum payment. Where the loss of earning capacity has been assessed as aforesaid at more than 20%, the insured may opt to commute one-fifth of the daily benefit payable for a lump sum payment and to receive the balance as periodical payments.

Further subsidiary legislation

The Act stipulates that regulations will be made to provide for the various matters, including: (a) the amount of the funeral benefit; (b) the existence of the degree of incapacity that qualifies an insured for a constant attendance allowance; (c) the nature and scale of the medical benefits and places where treatment is to be provided; (d) the nature, scale and terms of the facilities for physical or vocational rehabilitation or dialysis; (e) the terms and conditions for payment of travelling and other allowances; and (f) the terms on which daily payments may be commuted to lump sum payments.

Benefits not assignable or attachable

The benefits under the Act are not transferable, assignable nor liable to attachment.

CONCLUSION

Notwithstanding the Regulations, it would appear that the Act has yet to be implemented as regulations have yet to be made to provide for matters that require prescription, such as the existence of the degree of incapacity that qualifies an insured for a constant attendance allowance and the nature and scale of the medical benefits.

It is not inconceivable that the Malaysian Government will in due course extend the application of the Act to provide social security for self-employed persons in other businesses, trades or industries.

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MAKING A WILL – WHY IS IT NECESSARY?

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CAN A WILL BE CHALLENGED?

A Will is only valid if all legal requirements have been complied with.

Further, a Will can be challenged on allegations that the contents have been altered, the signature of the testator has been forged, the execution of the Will was not properly witnessed, the testator was of unsound mind or under undue influence at the time when the Will was made or if there are ambiguities or important omissions in the Will.

A testator is well advised to seek professional assistance when writing his Will to avoid the pitfalls of an invalid Will or a Will which can be easily subject to challenge.

FOREIGN ASSETS

In recent years, as a result of globalisation, more people have come to own properties in more than one country. If a Will is made and proved in a Commonwealth country, the executor can apply to the High Court to re-seal the grant of probate in Malaysia. Under certain circumstances, e.g. when the Will is made in a civil law jurisdiction and re-sealing of the grant of probate is not permissible in Malaysia, separate Wills dealing specifically with the assets in each country should be drawn up. As the law governing the disposal of real properties under a Will varies from country to country, specific legal advice from the relevant foreign jurisdictions should also be sought. Matters get a little more complex when a deceased's intestate estate comprises foreign assets. Which jurisdiction's inheritance law applies will depend on the domicile of choice of the testator. As a general rule, the law of domicile of the deceased applies in the case of movable properties. In the case of immovable properties, it is the *lex situs*, i.e. the law applicable in the country where the immovable property is situated, which will apply.

Testators who own foreign assets should also bear in mind that many countries impose some form of duty or tax arising upon the death of the testator which may be called death duty, estate duty or inheritance tax. Careful estate planning can most certainly reduce the duty or tax payable.

NON-APPLICABILITY TO MUSLIMS

The Wills Act 1959 and the Distribution Act 1958 apply only to non-Muslims. Muslims in Malaysia are bound by Islamic laws which are out of the scope of this article.

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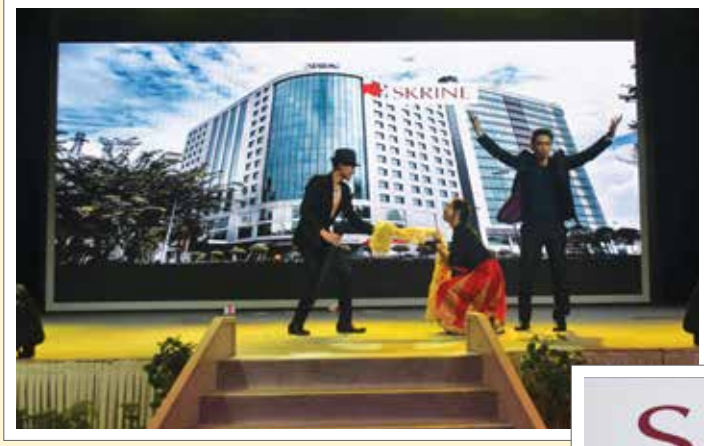

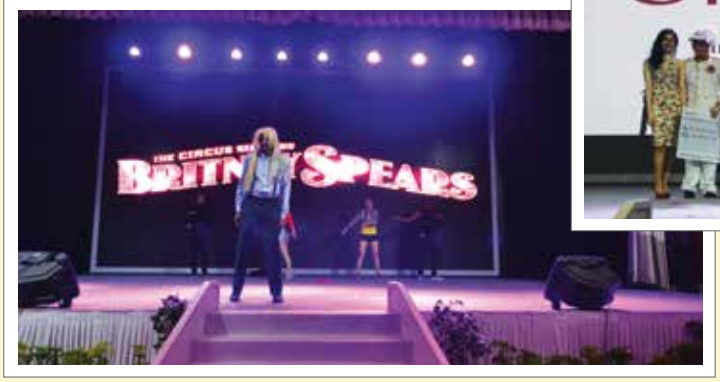

SKRINE DINNER & DANCE 2017

Our Firm held our Dinner & Dance 2017 at the Equatorial Hotel in the Historic City of Malacca over the weekend of 30 September and 1 October 2017.

The turnout was excellent, with 380 persons, comprising our lawyers, staff and members of their families, attending. Some took the extra effort to dress according to the theme of the evening, *Back to 1950s' Malaya*.

The highlight of the evening was the inter-floor competition. Lawyers (including Partners) and staff members from each floor provided entertaining performances, with the 9th Floor emerging as winners and the 12th Floor as runners-up.

The evening also witnessed our long serving staff members being honoured and trophies being handed to the winning teams of the various sports events held earlier this year.

On the whole, it was an enjoyable weekend. Many thanks to the Organising Committee for a job well done!

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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Printed By
Nets Printwork Sdn Bhd
58 Jalan PBS 14/4,
Taman Perindustrian,
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THE FIRM HAS DEVELOPED OVERSEAS TIES THROUGH ITS MEMBERSHIP OF INTERNATIONAL ORGANISATIONS SUCH AS LEX MUNDI, PACIFIC RIM ADVISORY COUNCIL, THE INTER-PACIFIC BAR ASSOCIATION, THE ASEAN LAW ASSOCIATION, THE INTERNATIONAL TRADEMARKS ASSOCIATION AND THE INTERNATIONAL ASSOCIATION FOR THE PROTECTION OF INDUSTRIAL PROPERTY.

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