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LEGAL INSIGHTS

A SKRINE NEWSLETTER

MESSAGE FROM THE EDITOR-IN-CHIEF

First, I would like to acknowledge the contribution by our lawyers in ensuring that our Firm continues to publish our newsletter on a quarterly basis (more or less) since our inaugural issue was published in March 2004. In these 15 years, we have only missed our publication in one quarter. In hindsight, it is quite a remarkable achievement.

Despite their busy schedules, our writers and editorial team have managed to find time to complete and edit our articles and commentaries. I would like to record our appreciation to all who have contributed to the production of our publication. With your continuing support, I hope that we will be able to continue our publication for many years to come.

This issue features four interesting cases. "*Of Universal Application*" appears to be the first reported Malaysian decision where the Court has recognised and applied the doctrine of universal succession in relation to the transmission of shares. In "*The Waiting Game*", the UK Supreme Court held a hospital liable for providing inaccurate information on waiting time for a patient. Our Court of Appeal in *CAS v MPPL* distinguished between paternity and legitimacy. "*In the Spirit of Attribution*" is one of the rare local cases on geographical indications.

In "*Sneak Peek*", our writers provide some insights into the features that could be included in our proposed Residential Tenancy Act. In "*Star Trolls: Attack of the Clones*", we explain the concept of "groundless threats", a new feature to be introduced under our Trademarks Bill 2019. Our writers explain the additional safeguards accorder to air passengers in "*Flying With Even Less Headaches*".

Also featured in this issue are articles on the Guidelines on Intellectual Property Rights and Competition Law issued by the Malaysia Competition Commission and Consultation Paper No. 3/2019 issued by Bursa Malaysia earlier this year.

I hope that you will find the contents of this issue of Legal Insights interesting.

With best wishes,

Kok Chee Kheong
Editor-in-Chief

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OF UNIVERSAL APPLICATION: RECOGNITION OF THE DOCTRINE OF UNIVERSAL SUCCESSION

Lee Shih and Joyce Lim discuss the doctrine of universal succession and the transmission of shares by operation of law

In the recent case of *United Renewable Energy Co Ltd v TS Solartech Sdn Bhd* [2019] 8 CLJ 721 ("*United Renewable Energy*"), the Malaysian High Court, for the first time, recognised the doctrine of universal succession and gave effect to the transmission of shares held in a Malaysian company by operation of law pursuant to a foreign merger.

DOCTRINE OF UNIVERSAL SUCCESSION

What is universal succession?

The doctrine of universal succession originates from Roman law. It provides that where the law of incorporation recognises a succession of corporate personality from one corporate entity to another, then the law of the forum will recognise both the changed status of the company, and the fact that the successor has inherited all rights and liabilities of the preceding company.

This doctrine has been widely recognised by the Commonwealth Courts. Various authorities are set out below which recognise the concept of a universal succession, where all assets and liabilities are vested in the successor entity. It did not matter whether the exercise was carried out pursuant to a statute that created a new successor entity or through a private merger agreement.

" a universal successor ... will be clothed with both the assets and liabilities of the predecessor "

United Kingdom

The leading case on this doctrine is the English House of Lords' decision of *National Bank of Greece and Athens SA v Metliss* [1958] AC 509 ("*Metliss*"). This case laid down the principle that as far as the law of the forum is concerned, once an entity is recognised as having the status of a universal successor, then it will be clothed with both the assets and liabilities of the predecessor entity. In *Metliss*, the universal succession was triggered by the amalgamation of companies under a statute which provided that a new entity would inherit the rights and obligations of two Greek banks. The Court held that the new entity was bound by a guarantee issued by one of the predecessor banks.

The English High Court decision of *Astra SA Insurance and Reinsurance Co v Sphere Drake Insurance Ltd (formerly Sphere Drake Insurance plc, Sphere Drake Insurance plc and Odyssey Re (London) Ltd)* [2000] All ER (D) 672 ("*Astra*") is also relevant. The question arose was whether Astra SA Insurance and Reinsurance Co ("Astra SA") had, under Romanian law, succeeded to the rights and liabilities of a former Romanian State Insurance Company ("ADAS"), and was thus liable under various international insurance and reinsurance contracts and bound by the arbitration clauses contained in those contracts. Pursuant to a development in Romanian Law, ADAS ceased to exist, and its assets and liabilities were divided among three new companies, one of which was Astra SA. It was held that the entire benefit and burden of ADAS' international insurance and reinsurance contracts had passed to Astra SA, and all the terms, including the arbitration clauses, were enforceable against Astra SA.

In the context of the effect on an arbitration agreement where one party ceases to exist by virtue of a universal succession, a similar decision was reached in the English High Court decision of *Eurosteel Ltd v Stinnes AG* [2000] 1 All ER (Comm) 964 ("*Eurosteel*"). A German company ("Bayerischer") entered into a contract of affreightment with an English company ("Eurosteel"), as charterers. Both parties referred a dispute to arbitration in England under English law. After the arbitration had commenced, Bayerischer was merged with another German company, Stinnes AG ("Stinnes"). One of the questions before the Court was whether the arbitration proceedings had come to an end on the merger since Bayerischer no longer existed. It was held that as a matter of the German law of universal succession, the rights under the arbitration passed to Stinnes upon its merger with Bayerischer. English law recognises that and accordingly the arbitral proceedings did not lapse or conclude by reason of the merger. The arbitration was entitled to continue.

Australia

In the Australian Federal Court decision of *Re Sidex Australia Pty Ltd (reg and mgr apptd); Sipad Holding ddpo and another v Popovic and others* [1995] 18 ACSR 436, a similar decision was reached. By virtue of a law being passed in the former Republic of Yugoslavia to allow the creation of privatised corporations, one of the enterprises operating in Yugoslavia that was privatised applied for a rectification of the register of its predecessor company to reflect that it was now the owner of certain shares of an Australian company formerly held by its predecessor company. The rectification application was allowed as the Australian Federal Court held that it will give effect to the transfer of assets and assumption of liabilities for which the Yugoslavian law provides.

Singapore

The doctrine of universal succession was, for the first time, considered and approved by the Singapore courts in a landmark decision of *JX Holdings Inc and another v Singapore Airlines Ltd* [2016] SGHC 212 ("*JX Holdings*").

In *JX Holdings*, the issue was where a foreign entity (A) succeeds to all the rights and liabilities of another foreign entity (B) pursuant


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to a corporate action which (under the laws of their jurisdiction of incorporation) deems A to be the successor of all of B's rights and obligations, who should be registered as the owner of shares which were originally owned by B? A related issue was whether there was a "transfer of shares" or a "transmission of shares". The distinction is crucial as only the former would require an instrument of transfer.

The Singapore High Court recognised the doctrine of universal succession and found that the status of a foreign corporation as it exists under its law of incorporation will be recognised by the Singapore courts out of comity. As such, the shares held by B had been transmitted to A by operation of law and therefore A should be registered as the owner of the shares originally owned by B.

On the issue of whether there was a transfer or a transmission of shares, the Singapore High Court highlighted that a transfer is a voluntary disposition of legal title to the shares brought by an act of the shareholder, whereas a transmission is an automatic devolution of title which takes place by operation of law upon the occurrence of a legally significant event, which includes a merger. As such, the shares in question had transmitted to the succeeding company by operation of law and the succeeding company was entitled to be registered as a shareholder in place of the predecessor company without having to prepare and deliver a proper instrument of transfer.

Another relevant case would be the Singapore International Commercial Court (SICC) decision of *BNP Paribas Wealth Management v Jacob Agam and another* [2017] 4 SLR 14. This decision was upheld by the Court of Appeal in *Jacob Agam and another v BNP Paribas SA* [2017] 2 SLR 1. BNP Paribas Wealth Management ("BNPWM") and its wholly-owned subsidiary, BNP Paribas SA ("BNPSA"), merged pursuant to a merger agreement under French law. This resulted in all assets and liabilities of BNPWM being assumed by BNPSA, including BNPWM's business in Singapore. One of the issues to be determined by the SICC was whether the assumption of BNPWM's business in Singapore by BNPSA should not be given effect because it was in breach of section 55B of the Singapore Banking Act (Cap 19, 2008 Rev Ed), which provides, among others, that Court approval must be obtained for any voluntary transfer of business. However, the said section also stated that the requirement for Court approval was without prejudice to the right of a bank to transfer the whole or any part of its business under any law.

The SICC cited *JX Holdings* with approval and held that Court approval was not required. Although the merger may be regarded as a voluntary act between the parties, BNPWM and BNPSA are companies incorporated in France and the merger agreement was effected through Article L.236-3 of the French Commercial Code, which provides a means by which there can be a succession to corporate personality in a merger. This was recognised by the SICC.

MALAYSIAN COURT RECOGNISES THE DOCTRINE

In Malaysia, transmission of shares by operation of law is usually seen in cases of bankruptcy or death of the registered holder of the shares.

In *United Renewable Energy*, the Malaysian Court had the opportunity for the first time to consider the doctrine of universal succession in the context of a foreign merger, and the issue of whether the successor company had assumed the shares of the predecessor company through a transfer or a transmission by operation of law.

Brief Facts

The plaintiff, United Renewable Energy Co Ltd ("URE"), is a public-listed company in Taiwan and the successor company after a merger between three solar-related Taiwan companies, namely Solartech Energy Corp. ("Solartech"), Gintech Energy Corporation ("Gintech") and Neo Solar Power Energy Corp. ("Neo Solar").

The defendant, TS Solartech Sdn. Bhd. ("TS Solartech"), was originally formed as a joint venture company between Solartech and Tek Seng Holdings Berhad ("Tek Seng"). Solartech held 97,700,693 shares in TS Solartech ("Subject Shares"). The current shareholding of Tek Seng and Solartech in TS Solartech is 50.7% and 42.1% respectively.

In January 2018, Gintech, Solartech and Neo Solar entered into a merger agreement where it was agreed that the parties shall be merged into one corporation to build a flagship class solar energy-oriented enterprise in Taiwan. It was also agreed that Neo Solar be the surviving company pursuant to the merger. On 1 October 2018, Solartech merged with Gintech and Neo Solar ("Merger"), with one single merged entity existing: Neo Solar. Neo Solar then changed its name to URE.

URE claimed ownership of the Subject Shares on the basis that the Subject Shares were transmitted to URE by operation of law pursuant to the Merger. Further, the various provisions under the laws of Taiwan provide that the Merger had caused URE to assume all rights, obligations, assets and properties of the predecessor companies. URE argued that its ownership of the Subject Shares should be recognised by virtue of the doctrine of universal succession.

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STAR TROLLS: ATTACK OF THE CLONES

Grace Teoh discusses the groundless threats provisions in the Trademarks Bill 2019

Back in 2014, Legal Insights examined the issue of patent trolls and the laws available to address such issues in *Star Trolls: The Patent Menace*. In December 2016, the Malaysian High Court held in *Diesel SpA v Bontton Sdn Bhd* [2016] MLJU 1350 that the Malaysian courts only had grounds to grant negative declarations, e.g. that the plaintiff's *bona fide* use of the plaintiff's own name does not infringe the defendant's registered trademark, if Parliament amended the Trade Marks Act 1976 to provide a remedy for groundless threats of infringement.

Parliament must have found the issue sufficiently threatening in Malaysia and has taken steps to provide a solution, starting with the Trademarks Bill 2019. Section 61 of the Trademarks Bill 2019 will provide the remedies for groundless threats of infringement proceedings when the Bill comes into operation.

THE BEST DEFENCE IS A GOOD OFFENSE

Sections 61(1) and 61(2) provide that where an aggrieved person is threatened with infringement proceedings, that person may initiate proceedings for a declaration that the threats are unjustifiable. He may also seek an injunction to restrain the continuance of the threats, or damages in respect of any loss he has sustained by the threats. Section 61(4) further provides that even if the trademark proprietor proves infringement, the aggrieved person is still entitled to relief if it is proven that the registration of the trademark should be revoked or is invalid.

These provisions are *in pari materia* with section 35 of the Singapore Trade Marks Act (Cap. 332), section 21 of the UK Trade Marks Act 1994 (which has now been amended by the UK Intellectual Property (Unjustified Threats) Act 2017), and sections 129 and 130A of the Australia Trade Marks Act 1995.

HOLD YOUR HORSES

This does not mean that any and all aggrieved persons may initiate proceedings the moment they receive cease and desist letters.

Section 61(1) of the Trademarks Bill 2019 is only triggered where the threat is for grounds <u>other than</u>: (a) the application of the trademark to labels, packaging, or goods; (b) the importation of goods bearing the trademark; or (c) the supply of services under the trademark. Further, section 61(1) specifically refers to threats of infringement of registered trademarks, appearing to ignore threats of action for the tort of passing off.

In *Han's (F & B) Pte Ltd v Gusttimo World Pte Ltd* [2015] 2 SLR 825, Han's was the registered proprietor of trademarks depicting the word "HAN'S" in relation to Class 43 and the operator of Hainanese-Western restaurants named "Han's Café". Gusttimo operated a Japanese restaurant named "HAN Cuisine of Naniwa". Gusttimo received a letter from Han's solicitors, requesting it to change the name of its restaurant and immediately cease use of the trademark "HAN" for Gusttimo's food and beverage business. This matter then escalated to litigation, where Han's instituted proceedings against Gusttimo for trademark infringement and passing off, and Gusttimo counterclaimed for groundless threats of infringement proceedings and applied to expunge Han's registered trademarks. The Singapore High Court decocted from the facts that the threat of proceedings, if at all, was in relation to infringement arising from the application of the trademark to goods and the supply of services under the trademark. Accordingly, Gusttimo's complaint of groundless threats was half-baked and dismissed by the Court.

ON YOUR MARK

Section 61(1) of the Trademarks Bill 2019 expressly refers to threats of proceedings for trademark infringement. Section 61(5) clarifies that the mere notification that a trademark is registered does not constitute a threat under section 61(1).

As to when a statement is a 'threat' and when it is a 'mere notification', Justice Lightman in *L'Oréal (UK) Ltd v Johnson & Johnson* [2000] FSR 686 succinctly stated that the test is whether the communication would be understood by the ordinary recipient in the position of the claimant as constituting a threat of proceedings for infringement. The objective recipient test has now been statutorily encoded via amendments to the UK Trade Marks Act 1994 by the UK Intellectual Property (Unjustified Threats) Act 2017.

In *L'Oréal (UK) Ltd*, Johnson & Johnson's lengthy letter stated, among others, that: (i) no decision to sue had been made yet but Johnson & Johnson had six years to make that decision; (ii) others had ceased infringing Johnson & Johnson's "NO MORE TEARS" trademark after pressure from Johnson & Johnson; (iii) Johnson & Johnson thought that L'Oréal had unfairly sought to benefit from Johnson & Johnson's goodwill; and (iv) L'Oréal would not receive assurances regarding the possibility of such proceedings. Justice Lightman tore the letter apart, declaring it "*the work of a master of Delphic utterances who uses all his skills to say everything and nothing and to convey an enigmatic message which has the same effect on the recipient as a threat or adverse claim whilst disclaiming to be either*". The threat may have been veiled and muffled by protestations of a continuing state of indecision but the threat remained sufficient (if not designed) to unsettle L'Oréal and the threat was of trade mark infringement proceedings.

L'Oréal (UK) Ltd was decided based on the previous section 21 of the UK Trade Marks Act 1994, which was almost identical to, and may be of guidance in interpreting, section 61 of the Trademarks Bill 2019.

GET SET

Section 61(2) provides that the aggrieved person may apply for "**any**" of the following reliefs: (a) a declaration that the threats are unjustifiable; (b) an injunction against the continuance of the threats; <u>**or**</u> (c) damages in respect of any loss he has sustained by the threats.

When compared with groundless threats provisions in other jurisdictions, section 61(2) is odd in its use of the conjunction

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'*or*', implying that the aggrieved person may only opt for one of the three remedies. No conjunction is used in the comparable provisions in the Singapore and UK Acts. In Australia, the Act specifically uses the conjunction '*and*'. It remains to be seen how the Malaysian courts would interpret this provision.

The Singapore Court of Appeal in *Lee Tat Cheng v Maka GPS Technologies Pte Ltd* [2018] 1 SLR 856 held that even though section 77(2) of the Singapore Patents Act 2005 provides that the plaintiff "*shall … be entitled to the relief claimed*", the court's power to grant relief is discretionary and not mandatory as the plaintiff still had to prove that it was aggrieved by the threats of patent infringement proceedings made. The plaintiff would not be "aggrieved" if it was unable to demonstrate that it had suffered any loss arising from the threats or that it was appropriate for the court to grant the reliefs. In *Dr Babor Gmbh & Co Kg v Sante De Beaute Pte Ltd* [2018] 5 SLR 928, the Singapore High Court applied this principle in the context of groundless threats of trademark infringement proceedings, on the basis that the Singapore Trademarks Act is structured and worded similarly to the Singapore Patents Act and the policy considerations underlying all groundless threats provisions are similar.

If the Malaysian courts were to be guided by the Singaporean cases, aggrieved persons in Malaysia may find that they are unable to obtain reliefs even if they succeed in proving that the threats were groundless or unjustified if they fail to prove loss or damages arising from the threats, or the need for a declaration or an injunction against the trademark proprietor.

EN GARDE

Trademark proprietors are not entirely unarmed. Section 64(3) of the Trademarks Bill 2019 provides that the aggrieved person is entitled to relief unless the trademark proprietor shows that the aggrieved person's acts constitute trademark infringement.

In *Telstra Corporation Ltd v Phone Directories Co Pty Ltd* [2014] FCA 568, a case concerning groundless threats of copyright infringement, the Federal Court of Australia held that whether a threat is justifiable is to be answered by reference to whether, objectively, the threat had a proper legal basis, without regard to the right owner's subjective intent.

At the time when Telstra made its threat, it had asserted a legal position that was supported by the Full Federal Court of Australia in *Desktop Marketing Systems Pty Ltd v Telstra Corporation Ltd* (2002) 119 FCR 491. Subsequently, by the time the dispute between Telstra and Phone Directories went to trial, the High Court of Australia had changed the applicable legal position. Nevertheless, the Federal Court of Australia found that as it stood at the material time, Telstra's threat of copyright infringement was based on strong authority and Telstra had good legal grounds for asserting the rights against Phone Directories that it did, even if Telstra subsequently failed at trial to claim copyright infringement. Accordingly, Phone Directories' claim that Telstra's conduct was an 'abuse of the copyright regime' or a 'threat in the air' constituting groundless threats was rejected.

So, trademark proprietors may have to make a call (or seek legal advice) as to whether objectively, at the time the threat was made, they had sufficient legal basis to assert their rights.

PRÊT

That's not the end of it; the aggrieved person may take another stab at it. Section 61(4) of the Trademarks Bill 2019 then goes on to provide that even if the trademark proprietor is able to prove that the aggrieved person's acts constitute trademark infringement, the aggrieved person is still entitled to relief if the aggrieved person could show that the registration is invalid or liable to be revoked under the Trademarks Bill 2019.

Under the Trademarks Bill 2019, the registration of a trademark may be revoked under section 45 by the Registrar where the Registrar failed to take into account opposition to the registration or extensions of time to oppose the registration, or under section 46 by the High Court on an application by an aggrieved person for non-use or for misleading use. The registration of a trademark may be declared invalid by the High Court pursuant to an application by an aggrieved person under section 47 on the ground that the trademark was registered in breach of section 23, which stipulates absolute grounds for refusal of registration.

ALLEZ?

Lord Justice Simon Brown in *Unilever plc v Procter & Gamble Co* [1999] IP&T 171 explained that the policy represented by groundless threats provisions is to stop proprietors who were "*willing to wound but afraid to strike from hanging a Damocletian* [sic] *sword above any trader's head*". In *Avel Pty Ltd v Intercontinental Grain Exports Pty Ltd* (1996) 65 FCR 154, the Full Federal Court of Australia held that an important rationale for the groundless threats regime in copyright, patents, and trademarks legislation is to guard against abuse of the protections afforded under that legislation.

Have we traded one monster for another? It appears that the law on groundless threats may have lowered the sword of Damocles that hangs above the heads of traders in Malaysia, but has it raised another over heads of trademark proprietors?

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PROPOSED AMENDMENTS TO LISTING REQUIREMENTS

Kok Chee Kheong summarises the proposed amendments under Consultation Paper No. 3/2019

On 30 August 2019, Bursa Malaysia Berhad ("the Exchange") issued Consultation Paper No. 3/2019 ("CP3/19") proposing amendments to the Main Market Listing Requirements ("MMLR") and ACE Market Listing Requirements ("ACE LR") (collectively "LR"). This article provides a summary of the proposed amendments.

New Issue of Securities: Announcements and Circulars

To enhance the presentation of announcements and circulars relating to new issues of securities, Appendices 6A and 6B of the LR will be rearranged and categorised according to key areas. The Exchange proposes to cluster the prescribed information in Appendices 6A and 6B into 13 key areas, namely: (a) cover page; (b) introduction; (c) details of the proposals; (d) rationale and justification for the proposal; (e) utilisation of proceeds; (f) effects of the proposal; (g) approvals required; (h) conditionality of the proposal; (i) interest of directors, major shareholders, chief executive and persons connected; (j) recommendation and basis of recommendation; (k) timeframe for completion/implementation; (l) further/additional information; and (m) appendices.

> "Appendices 6A and 6B of the LR will be rearranged and categorised according to key areas"

According to the Exchange, the clustering of information will improve the readability of announcements and circulars for new issues of securities and enable the shareholders and investors to have better insights on the proposals and to make better informed investment decisions. This approach follows the amendments made to the LR with regard to the contents of announcements and circulars relating to transactions that came into force on 3 June 2019.

Enhancing Disclosure For New Issue of Securities

The Exchange will enhance the disclosures in the circular for new issue of securities as follows:

(a) A listed issuer will be required to disclose details of previous fund-raising exercises undertaken in the 12 months preceding the announcement of the new issue of securities; these details include a description of the fund-raising exercise, the total proceeds raised, and the details and status of the utilisation of those proceeds - this practice is benchmarked with the requirements in Singapore and Hong Kong;

(b) Where new securities are issued to corporate placees, a listed issuer will be required to disclose the names of the directors and substantial shareholders, and their direct and indirect shareholdings in the corporate placees – this requirement codifies the existing practice adopted by the Exchange; and

(c) Disclosure relating to the utilisation of proceeds raised will be enhanced in two respects: (i) where the proceeds are to be used for investments that have yet to be identified, a listed issuer will also be required to disclose how the proceeds will be utilised pending identification of the investments; and (ii) where the proceeds raised are for working capital purposes, a listed issuer will be required to provide the details and breakdown of such usage.

The requirement in sub-paragraph (a) above will also be incorporated into announcements for new issue of securities.

According to the Exchange, the enhancements in sub-paragraphs (a) to (c) above codify their existing practice.

Dividend Reinvestment Scheme: Issue Price of Securities

The time frame for making an announcement on the issue price of securities to be issued under a Dividend Reinvestment Scheme will be reduced from 30 market days to 20 market days to reduce market volatility of the shares and to better reflect the market price of the securities.

> "To safeguard against the dilution ... the current ... limit of 50% (will) be extended to other convertible equity securities"

Extension of 50% Limit on New Shares

To safeguard against the dilution of shareholding, the Exchange has proposed that the current requirement which imposes a limit of 50% on the number of new shares that can be issued in respect of warrants be extended to other convertible equity securities, such as irredeemable and redeemable preference shares.

Controlling Shareholders: Material Loan Covenants

In relation to loans or borrowings which are deemed material by a listed issuer, the listed issuer is required to disclose conditions, covenants or restrictions which are tied to the interest of the controlling shareholders. Such information would include:

(a) Details of such conditions, covenants or restrictions including restrictions on change in control of the listed issuer; and

(b) The aggregate level of the facilities that may be affected by a breach of such conditions, covenants or restrictions.

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Judicial Management and Corporate Voluntary Arrangement

Arising from the coming into force of new corporate rescue mechanisms under the Companies Act 2016, namely judicial management and corporate voluntary arrangements on 1 March 2018, the Exchange proposes to enhance the LR by requiring a listed issuer to make an immediate announcement on the following events:

(a) Any application filed with a court to place any subsidiary or major associated company (i.e. an associated company which contributes 70% or more of the pre-tax profit or total assets employed of the listed issuer on a consolidated basis) of the listed issuer under judicial management;

(b) Any proposal for a corporate voluntary arrangement filed in a court by any subsidiary or major associated company of the listed issuer;

(c) Any material development arising from the aforesaid application or proposal; and

(d) Any appointment of, or change in, a judicial manager (including an interim judicial manager).

The appointment of judicial managers will be included as an additional criterion for triggering the requirements set out in Practice Note 17 of the MMLR and Guidance Note 3 of the ACE LR.

Independent Directors: Cooling-off Period

After considering the relevant cooling-off periods in Singapore, Australia and United Kingdom, which range from one to five years, the Exchange has sought feedback as to whether the two-year cooling-off period set out in the LR before an existing or former officer, adviser or person engaged in transactions with a listed issuer can be appointed as an independent director of a listed issuer should be extended, and if affirmative, what the extended period should be. In this regard, the Exchange did not specify any particular period of the extension.

Non-Independent Non-Executive Directors: Cooling-off Period

The existing definition of an "*independent director*" in the LR does not subject a non-executive director to the two-year cooling-off period even if such director is a non-independent director. To achieve the "*spirit and intent*" of independence in the LR, the Exchange proposes to subject non-independent non-executive directors to the two-year cooling-off period before they can be appointed as independent directors. According to the Exchange, this proposal will align the LR with the requirements in Hong Kong.

Convertible Securities: Alteration of Terms

The Exchange proposes to clarify Paragraph 6.54 of the MMLR and Rule 6.56 of the ACE LR, which permit a listed issuer to alter the terms of convertible securities, by **excluding** the application of those provisions to the following alterations:

(a) Any extension or shortening of the tenure of the convertible securities; and

(b) Changes to (i) the number of shares received from the exercise or conversion of the convertible security; or (ii) the pricing mechanism for the exercise or conversion price of the convertible security, except where the changes are adjustments arising from capitalisation issues, rights issues, bonus issues, consolidation or subdivision of shares or capital reduction exercises.

Calculation of Percentage Ratio for REIT

The Exchange proposes to clarify Paragraph 10.02(g)(ix) of the MMLR by providing that the percentage ratio applicable to a real estate investment trust ("REIT") under that provision is to be calculated by comparing the value of the transaction (instead of the total assets which are the subject matter of the transaction) with the total asset value of the REIT. According to the Exchange, this amendment will provide greater accuracy in the computation of the percentage ratio for transactions entered into by a REIT.

Consultation Period

The consultation period will end on 31 October 2019.

Comment

The proposed amendments under CP3/19 are to be welcomed as they will promote greater transparency and investor protection.

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SNEAK PEEK

Oon Hooi Lin and Melody Ngai explore some possible features of Malaysia's proposed new tenancy law

BACKGROUND

Earlier this year, it was reported that the Ministry of Housing and Local Government of Malaysia was in the midst of drafting a proposed Residential Tenancy Act ("Proposed Act"). According to the Senior Principal Assistant Director of the National Housing Department, the Proposed Act is expected to be presented to the Malaysian Parliament in 2020.

As it currently stands, Malaysia, unlike several of its commonwealth counterparts, such as the United Kingdom ("UK"), Australia, New Zealand and Canada, does not have a distinct piece of legislation that regulates tenancies and the relationship between landlords and tenants. Instead, tenancies in Malaysia are mainly governed by the law of contracts and common law, and in legislation such as the National Land Code 1965 ("NLC"), Civil Law Act 1956 ("CLA"), Distress Act 1951 ("DA") and Specific Relief Act 1950 ("SRA"), albeit these legislation deal with specific issues on tenancies only on a piecemeal basis.

ISSUES WITH EXISTING LEGAL FRAMEWORK

(Un)affordability of rental rates

The value of properties in certain locations such as the Klang Valley and Georgetown, Penang is notoriously high. This has resulted in landlords seeking higher rental to defray the cost of financing their purchase of such costly properties. Many tenants, especially those from the B40 and M40 groups (i.e. the lower and middle income groups that each represents about 40% of the country's population) cannot afford to rent properties at such high rentals. The unaffordability of rental rates has hindered the growth of the residential rental market and resulted in a glut of vacant properties in the country.

Lack of control of security deposits

The common deposits required to be paid by a tenant to a landlord under a tenancy agreement are the security deposit and utilities deposit. A security deposit of an amount equal to two months' rent and a utilities deposit of an amount equal to one month's rent are the norm. However, as there is no statutory control over residential tenancies, a landlord who has greater bargaining power may take advantage of his position to impose higher rates of deposits on the tenant.

The main purpose of holding security and utilities deposits is to enable the landlord to set off any arrears in payment by the tenant and to remedy any damage to the premises caused by the tenant. Most tenancy agreements would require the landlord to refund the security deposit and utilities deposit to the tenant at the determination of the tenancy after deducting all costs, expenses and charges liable to be paid by the tenant under the agreement. However, some tenants would circumvent this by utilising the deposits as the last two or three months' rent by not paying the rent for those few months and vacating the premises without notice to the landlord, thereby defeating the purpose of such deposits. The converse problem arises when a landlord forfeits or refuses to refund the deposits to the tenant at the end of the tenancy without basis.

Lack of regulation on terms of the tenancy agreement

In Malaysia, landlords and tenants in private residential tenancies derive their rights and obligations primarily from the terms set out in the respective tenancy agreements entered into between the parties. Parties under a private residential tenancy may face difficulties in proving and enforcing such rights and obligations in instances where the tenancy agreement is concluded orally or is poorly drafted. Similarly, as the agreement is created based on the principle of freedom of contract, this may create a problem when the landlord and the tenant are not on equal footing in terms of bargaining power and either party enters into the agreement out of desperation.

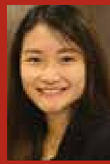
Inadequacy of legal protection

Under the current laws in Malaysia, there is no special infrastructure or mechanism to resolve disputes arising from the landlord and tenant relationship except through the usual court procedure which can be costly and time consuming.

"As it currently stands, Malaysia … does not have a distinct piece of legislation that regulates tenancies"

A landlord can rely on Section 28(4)(a) of the CLA to charge his tenant double rent for the period the tenant holds over the premises after the expiration of the tenancy. However, the landlord is not able to evict the tenant if the tenant continues to hold over or refuses to vacate the premises after the determination of the tenancy unless the landlord obtains an order from the court to recover possession of the premises pursuant to Section 7 of the SRA. From the tenant's perspective therefore, Section 7 of the SRA is a protection conferred on tenants under the law.

If a tenant defaults in rent payments, the landlord may rely on the DA to recover the rent arrears by way of writ of distress where the assets of the tenant within the rented premises may be seized and auctioned to recover the arrears in rent. Unfortunately, a distress action does not automatically terminate the tenancy and thus the tenant can continue to occupy the premises even after the distress action and the landlord will face a similar problem when the tenant defaults again. The landlord may however recover possession of the premises under the DA if the same has been abandoned by the tenant and there are insufficient assets left

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thereon from which arrears of rent may be recovered by distress.

THE PROPOSED RESIDENTIAL TENANCY ACT

The Proposed Act is reported to be modelled after similar acts in two Australian states, namely the Residential Tenancies Act 2010 ("NSW Act") of New South Wales ("NSW") and the Residential Tenancies Act 1997 ("Victorian Act") of Victoria, but will be tailored to suit the local context. In this article, we will examine some of the features of the NSW Act and Victorian Act as well as some aspects of the relevant laws in the UK to have an insight as to what the Proposed Act may encompass in light of the prevailing issues concerning residential tenancies in Malaysia.

Residential properties

The NSW Act covers tenancy agreements in respect of residential premises including social housing tenancy agreements and agreements or arrangements under which a person is given the right to occupy premises in return for carrying out work in connection with the premises or the person's employment. However, the NSW Act specifically excludes, *inter alia*, service apartments, premises used mostly for trade, profession or business, and agreements giving the right to occupy residential premises for no more than three months for a holiday.

Similarly, the Victorian Act applies to private rental tenancies, social housing tenancies as well as tenancies in respect of premises used primarily for residential purposes even if a trade, profession or business is also carried on by the tenant in those premises. The Victorian Act does not apply to tenancy agreements where the premises are ordinarily used for holiday purposes and tenancy agreements arising out of the terms of an employment contract (as opposed to the NSW Act).

It is not known at this juncture whether the Proposed Act will cover only private residential tenancies or will be extended to public residential tenancies as per the social housing tenancies under the NSW Act and the Victorian Act. The Proposed Act could also cover public housing or properties subject to government schemes such as *Rumah Mampu Milik Wilayah Persekutuan* (RUMAWIP), *Rumah Selangorku* and *Projek Perumahan Rakyat Dimilik* provided that there is no restriction in renting out the properties or such moratorium has lapsed under the relevant scheme.

It also remains to be seen whether tenancies arising from any employment contract or caretaker arrangement and tenancies in respect of properties such as service apartments, small office home offices (SOHO), Airbnb and homestays will be subject to the Proposed Act as they are partly for commercial purposes.

Rent regulation

Tenants in NSW and Victoria may apply to the NSW Civil and Administrative Tribunal ("NCAT") and the Director of Consumer Affairs Victoria respectively to review the rent payable or any rent increase if they think that the rent or the increase in rent is excessive. Both the NSW Act and the Victorian Act require landlords to give their tenants at least 60 days' written notice of the rent increase and prohibit landlords from increasing the rent before the determination of a fixed term agreement unless the agreement provides otherwise.

The Victorian Act also limits the frequency of rent increases to no more than once per year. It is also worth noting that in Victoria, a tenant who is awaiting repairs of the premises by the landlord may pay rent into the Rent Special Account for a period specified by the Victorian Civil and Administrative Tribunal ("VCAT") pending completion of the repairs.

In our view, the Proposed Act should regulate rent increase and the frequency of such increase and provide tenants with an avenue to review the rent. Proper guidelines on determination of rent should also be prescribed in the Proposed Act and factors such as the general market level of rents for comparable premises in the locality or a similar locality, the landlord's outgoings under the tenancy agreement, and fittings, appliances or other goods, services or facilities provided with the premises (which are typically considered by the NCAT in determining whether a rent or rent increase is excessive) are good reference points. Trust account arrangements like the Special Rent Account under the Victorian Act should be adopted as they may compel a landlord to undertake repairs expeditiously. They will also protect the tenants' interest by allowing tenants to indirectly withhold rent without being in breach of the tenancy agreement while awaiting repairs to the premises.

Security deposits and advance rents

In NSW, the amount of a rental bond which a landlord can collect from a tenant must not exceed four weeks' rent. The bond must be deposited with the Commissioner for Fair Trading. Any advance rent required by the landlord from the tenant must not exceed two weeks' rent unless the tenant agrees to pay more. The Victorian Act also imposes a duty on landlords to pay any rental bonds collected from their tenants to the Residential Tenancies Bond Authority within 10 days of receipt and limits the amount of a rental bond to one month's rent with an exception for high value properties or unless approved by the VCAT.

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IP RIGHTS AND COMPETITION LAW: CONTRADICTION OR COLLABORATION?

Leela Baskaran and Tan Shi Wen discuss the Guidelines on Intellectual Property Rights and Competition Law

The interaction between the laws relating to intellectual property ("IP") and competition has given rise to interesting questions for debate ever since the Malaysia Competition Act 2010 ("CA 2010") came into force in 2012.

On the surface, there appears to be a general tension between IP and competition laws. IP laws confer certain exclusivity on a proprietor whereas competition laws, in contrast, seek to preserve the open and free nature of a market. This friction intensifies where the owner of an IP right ("IPR") begins to cause difficulties for its competitors to enter markets or begin to abuse its dominant position. Having said that, IPRs and competition law are not necessarily inharmonious as the promotion of market efficiencies may lead to greater innovation and variety in a market.

The Malaysia Competition Commission ("MyCC") considers that the two are inevitably intertwined and had, on 6 April 2019, issued the Guidelines on Intellectual Property Rights and Competition Law ("Guidelines") with the main aim of providing guidance on MyCC's approach in respect of competition issues that may arise from matters relating to IPRs. The Guidelines are to be read together with other guidelines issued by MyCC.

> "There appears to be a general tension between IP and competition law"

KEY PROHIBITIONS UNDER THE CA 2010

The Guidelines characterise IP as 'creations of the mind', such as inventions, literary and artistic works, designs, as well as symbols, names, and images used in commerce; this may comprise patents, copyright, integrated circuits, industrial designs, trademarks, confidential information, plant varieties, and geographical indications.

As the definition of "goods" under the CA 2010 includes property of every kind, whether tangible or intangible, the MyCC's position is that IP falls within the purview of competition law and any dealings involving IPRs which are anti-competitive ("Chapter 1 Prohibition") or an abuse of a dominant position ("Chapter 2 Prohibition") by an IPR owner may fall foul of the CA 2010 and attract the concern of the MyCC.

DEFINING THE RELEVANT MARKET FOR IPRs

In addition to the MyCC's Guidelines on Market Definition (which is a separate set of guidelines), the MyCC in the Guidelines clarified that, for conduct involving IP, the MyCC would normally define the relevant market based on one of the following:

(a) **the product market** which refers to the final or intermediate products incorporating the IP;

(b) **the technology market** which refers to the processes or technology incorporating the IP; or

(c) **the innovation or research and development ("R&D") market** which refers to the intangible knowledge or know-how that constitutes the IP.

The MyCC further clarified that it would not define a relevant market in cases involving the licensing of IP; the MyCC would focus on what the legal rights granted to the licensee actually protect.

HOW DO THE GUIDELINES WORK?

In the Guidelines, the MyCC provided an extensive (but non-exhaustive) list of conduct involving IPRs and sought to illustrate how such types of conduct may potentially fall foul of the Chapter 1 Prohibition or the Chapter 2 Prohibition.

THE CHAPTER 1 PROHIBITION

Section 4(1) of the CA 2010 prohibits horizontal or vertical agreements which have the object or effect of significantly preventing, restricting, or distorting competition in any market for goods or services.

Vertical Agreements

The Guidelines provide that the relationship between an IPR owner and a licensee is normally regarded as a vertical arrangement. Potentially, competition issues may arise from vertical arrangements include:

(a) **vertical licensing agreements** - the Guidelines set out specific vertical restrictions common in vertical IPR agreements such as vertical price fixing, territorial and field-of-use restrictions, exclusive licensing, exclusive dealing, tying and grant-backs, and illustrate how they may give rise to anti-competition concerns;

(b) **vertical arrangements with horizontal dimensions** - the Guidelines recognise that vertical arrangements may also have an adverse effect on horizontal competition in either licensing or product markets. An example would be a resale price maintenance obligation imposed by an IPR owner to create a cartel at the downstream level by subjecting all its licensees to the same resale price maintenance condition.

Notwithstanding the above, an anti-competitive agreement will generally not be considered "significant" if the agreement comes within the safe harbour threshold, i.e. for an agreement between

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competitors, where the parties have a combined market share of less than 20% in the relevant market and for an agreement between non-competitors, where all the parties individually have less than 25% market share in the relevant market.

Horizontal IPR Agreements

Certain kinds of horizontal arrangements between enterprises relating to price fixing, fixing of trading conditions, sharing market or source of supply, or limiting or controlling production, market outlets or market access, technical or technological development and investment are *deemed* to be anti-competitive under section 4(2) of the CA 2010. The safe harbour threshold applicable for vertical arrangements discussed above do not apply to section 4(2) infringements and the MyCC does not have to define the relevant market share and/or determine the competitive effect for such arrangements. The only defence for infringing enterprises is to invoke section 5 of the CA 2010 and prove that there is significant identifiable technological, efficiency, or social benefit directly arising from the agreement.

THE CHAPTER 2 PROHIBITION

The Guidelines acknowledge that ownership of IPRs does not necessarily confer market power upon the owner. Market share is not by itself conclusive of dominance although in general, MyCC will consider a market share above 60% to be indicative that an enterprise is dominant. That said, MyCC recognises that the market power of an enterprise also depends on a range of competitive conditions in the relevant market including, among others, the enterprise's ability to act without concern about competitors, barriers to entry, and supply and demand conditions.

Nonetheless, an enterprise found to be dominant due to its IPR is not in itself acting illegally unless it abuses its dominant position. In practice, concerns about an abuse of a dominant position in a market may arise from the following non-exhaustive list of conduct:

(a) ***Excessive pricing or other unfair trading condition*** – these include practices that may amount to excessive pricing (including post expiration royalty where royalty is imposed after expiration of a patent) although the Guidelines recognise that a holder of IPRs needs to have the ability to charge higher prices to recover R&D costs and any intervention by the MyCC will take this into consideration so as not to affect incentive to innovate;

(b) ***Non-competition clauses*** – these prohibit the use of competing technology or the manufacture, distribution, or sale of any other product with the intention of restricting the manufacture or sale of competing technology or trademarked goods;

(c) ***Product hopping*** – one such example includes where a brand name pharmaceutical company withdraws its original product and forces customers to switch to a new reformulated product with no therapeutic advantages for the sole purpose of foreclosing the market for generic competitors;

(d) ***Refusing to grant licences*** – while an IPR owner has the right to refuse to grant a licence for the use of its IPR, such refusal may be abusive if, for example, a dominant enterprise's technology or product is indispensable to a derivative product in a secondary market;

(e) ***Discriminatory conditions*** – these include discrimination by applying different conditions to equivalent transactions that, among others, discourages new entrants or forces an enterprise to exit the market;

(f) ***Tying, grant back, or bundling*** – these include imposing contractual conditions which have no connection with the subject matter of the contract. The practice of mandatory patent package licensing (i.e. where a patent owner refuses to grant a licence under one patent unless the licensee accepts additional patent licences) may be permissible where interlocking or complementary patents are necessary for the full production of a product, but would be anti-competitive if there is an element of coercion and the additional patents are not necessary.

(g) ***Predatory pricing*** – examples include royalty stacking, predatory pricing, refusal to license patents which are essential for products to be manufactured in accordance with prescribed standards ("SEPs"), or refusal to allow access to SEPs on fair, reasonable, and non-discriminatory terms (this is a standard in the European Union and the United States of America whereby owners of SEPs are not allowed to prevent access to the SEPs if their competitors are willing to obtain licences for reasonable royalty);

(h) ***Buying up scarce input supply with no reasonable commercial justification*** – an example is where a dominant enterprise buys up all the supplies of essential raw materials needed for the manufacture of a patented drug to prevent competing enterprises from producing their own competing patented drugs.

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THE WAITING GAME

Loo Peh Fern and Siew Ka Yan explain a case of a hospital's liability for misinformation by its non-medically qualified staff

"*Please take a seat, we will attend to you shortly.*"

The standard expression above is commonly heard upon registering one's attendance at a healthcare service provider. Oftentimes, there is no indication given to the patient as to how long he or she would have to wait before being attended to by a medical staff. This may be so even in the overwhelmed Accident and Emergency ("A&E") departments of hospitals. Waiting times may range from minutes to hours.

The issue of waiting time was at the heart of the UK Supreme Court case of *Darnley v Croydon Health Services NHS Trust* [2018] UKSC 50 ("Darnley").

BACKGROUND FACTS

The claimant, Michael Mark Junior Darnley ("Michael") was assaulted and struck on the back of his head by an unknown assailant before presenting himself at the A&E department of the defendant hospital ("Hospital") with a suspected head injury. Upon providing his personal details to the receptionist at the Hospital and informing her that he required urgent attention as he was feeling very unwell, the receptionist told Michael that he would have to wait for about four to five hours before a medical staff would see him.

> **" hospitals owe a duty to take reasonable care not to cause physical injury to its patients "**

The receptionist did not inform Michael that he would be seen by a triage nurse within 30 minutes.

After waiting for about 19 minutes, Michael returned home as he was feeling worse and unwilling to wait any longer. He did not inform the hospital staff that he was leaving but both the receptionists on duty noticed that he had left. Michael's condition deteriorated an hour later when he was at home and his family called an ambulance. He was taken back to the Hospital where a scan identified a large extradural haematoma (i.e. internal bleeding between the skull and the outer membrane of the brain).

Surgery was conducted to remove the haematoma but unfortunately Michael was left with permanent brain damage in the form of a severe and disabling left hemiplegia (i.e. paralysis on one side of the body). He sued the Hospital for negligence, claiming that the receptionist had been in breach of duty by failing to provide accurate information about waiting times.

FINDINGS OF THE HIGH COURT

The agreed expert evidence was that had Michael's deterioration occurred at the Hospital, he would have been treated promptly and made a near full recovery. Nonetheless, the High Court held in favour of the Hospital based on the following findings and conclusions:

(i) Michael did not fall into the category of patients who should have been fast tracked under the priority triage system. His presentation was not sufficiently serious so as to alert the reception staff to call for the immediate attention of a nurse;

(ii) If Michael had been informed that he would be seen by a triage nurse within 30 minutes, he would have stayed and a medical staff would have attended to him. The subsequent deterioration of his condition would have occurred within the Hospital. Michael's decision to leave the Hospital was, in part, made based on the inaccurate and incomplete information provided by the receptionist, and was foreseeable;

(iii) However, receptionists in A&E departments are not under a duty to guard patients against harm caused by the failure of patients to wait to be attended to, even if such harm could be prevented by the provision of full and accurate information about waiting times. It would not be fair, just and reasonable to impose liability on the Hospital for harm arising as a result of the failure of the reception staff to inform the patient of the likely waiting time to be seen by a triage nurse; and

(iv) Michael's decision to leave the Hospital broke the chain of causation between the inaccurate and incomplete information provided by the receptionist and the ultimate harm suffered as the decision to leave was ultimately his.

Dissatisfied with the decision of the High Court, Michael appealed to the Court of Appeal.

FINDINGS OF THE COURT OF APPEAL

The appeal was dismissed by a majority on the ground that neither the receptionist nor the Hospital owed a duty to advise about waiting times.

Jackson LJ considered that the providing of inaccurate and incomplete information by the receptionist was not an actionable misstatement. When the receptionist informed Michael that he would have to wait for up to four or five hours, she was not assuming responsibility for the catastrophic consequence which he might suffer if he walked out of the Hospital. It was not fair, just or reasonable to impose on the receptionist or the Hospital, a duty not to provide inaccurate information about waiting times – to do so would add a new layer of responsibility to clerical staff and a new head of liability for the Hospital.

Further, even if the receptionist was in breach of duty by providing inaccurate information, the scope of that duty cannot extend to liability for the consequences of a patient who walked out without informing that he was leaving. The patient must accept


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responsibility for his own actions.

Sales LJ concurred and added that the fair, just and reasonable view was that information as to likely waiting times was provided as a matter of courtesy and out of a general spirit of trying to be helpful towards the public.

McCombe LJ in his dissenting judgment opined that the Hospital was in breach of its duty of care. The misinformation was provided negligently and created a false impression. It is the duty of a hospital not to provide misinformation to its patients, whether it is provided by the reception staff or medical staff. Hence, the division of a hospital's function in terms of administrative staff and medical staff was unhelpful and irrelevant. The Hospital's breach was causative of Michael's injury.

THE DECISION OF THE SUPREME COURT

On further appeal, the Supreme Court allowed the appeal and decided in favour of Michael. The approach of the majority at the Court of Appeal was scrutinised.

Duty of care

First, the Supreme Court considered that the common law has abandoned the search for a general principle capable of providing a "one size fits all" practical test applicable in every situation to determine whether a duty of care is owed and if so, what its scope is. According to Lord Lloyd-Jones who delivered the unanimous decision of the Court:

"In the absence of such a universal touchstone, it [the common law] has taken as a starting point established categories of specific situations where a duty of care is recognised and it has been willing to move beyond those situations on an incremental basis, accepting or rejecting a duty of care in novel situations by analogy with established categories."

Foreseeability of damage, proximity and fairness need not be re-evaluated on every occasion where an established category of duty is applied. In cases where the existence of a duty of care had previously been established, the consideration of justice and reasonableness would have already been taken into account. It is only when the court is asked to go beyond the established categories of duty of care that it is necessary to consider whether imposition of such duty is fair, just and reasonable.

According to his Lordship, the present case was not concerned with the imposition of a duty of care in a novel situation. It fell squarely within an established duty of care – it has been long established that hospitals owe a duty to take reasonable care not to cause physical injury to its patients. As soon as Michael presented himself at the Hospital seeking medical attention and provided the information requested by the receptionist, he had entered into a patient-health care provider relationship with the Hospital. The scope of duty to take reasonable care not to act in a manner such as to foreseeably cause injury to a patient clearly extends to taking reasonable care not to provide misleading information which may foreseeably cause injury.

The duty of care owed by the hospital should not depend on whether the misinformation was provided by a person who was or was not medically qualified, though the distinction may be relevant in deciding whether there has been a negligent breach of duty depending on the degree of skill reasonably expected of a person charged with such responsibility. Here, the Hospital had charged its non-medically qualified receptionists with the role of being the first point of contact with persons seeking medical assistance and thus with the responsibility of providing accurate information as to its availability.

Breach of duty

The Supreme Court took cognisance of the stressful environment in A&E departments and the fluctuating demands for attention and priorities. While it was not required for receptionists to provide accurate information to each arriving patient as to the precise time he or she would be seen by a medical staff, it is not unreasonable to expect receptionists to take reasonable care not to provide misleading information as to the likely availability of medical assistance.

The Court was satisfied that the receptionists on duty at the material time were aware of the standard procedure that anyone complaining of a head injury would be seen by a triage nurse and the usual practice was that such a patient would be informed that he or she would be seen by triage nurse within 30 minutes of arrival or as soon as possible. Hence, it is not unreasonable, in the opinion of the Court, to require that patients in Michael's position should be provided on arrival, whether orally or by a receptionist, by leaflet or notice, with accurate information that they would normally be seen by a triage nurse within 30 minutes.

Causation

Based on the findings of the trial judge, the Supreme Court was of the view that the conclusions of the High Court and majority of the Court of Appeal that Michael's unannounced departure from the A&E department broke the chain of causation could not be sustained for three reasons. First, the trial judge found that

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PATERNITY VS LEGITIMACY

Trevor Jason Mark Padasian and Ryan Jaafar discuss a ground-breaking decision by the Court of Appeal

Pater est quem nuptiae demonstrant – "the father is he whom the nuptials point out" – is the legal maxim which forms the common law presumption that a child's father is the man married to the child's mother at the time of birth or conception. This presumption is encapsulated within section 112 of the Evidence Act 1950 ("section 112") which provides:

"The fact that any person was born during the continuance of a valid marriage between his mother and any man, or within two hundred and eighty days after its dissolution, the mother remaining unmarried, shall be conclusive proof that he is the legitimate son of that man, unless it can be shown that the parties to the marriage had no access to each other at any time when he could have been begotten."

Section 112 is a statutory presumption originating in 19th century jurisprudence when DNA testing had not been invented. Such DNA testing has recently caught the attention of the media in Europe when the former King Albert II of Belgium, who had abdicated in 2013, agreed in May 2019 to comply (in default of which he would have had to pay a fine of €5,000 a day) with an order of a Belgian court in November 2018 ordering him to give a DNA sample in a paternity lawsuit brought by a woman who claims that she is the love child of his alleged extramarital affair with her mother, Baroness Sybille de Selys Longchamps. What is at stake, in the case of a positive result, may be inheritance by the claimant of some part of the Belgian royal family's private fortune and, possibly, eligibility for an aristocratic title (*Retired Belgian King Will Submit to Paternity Test*, The New York Times, 21 May 2019).

In the recent case of *CAS v MPPL & Anor* [2019] 2 CLJ 454, the Malaysian Court of Appeal had the opportunity to consider the question of DNA testing in relation to section 112.

CAS v MPPL & ANOR

Facts

The first defendant, a flight attendant ("D1"), and the second defendant, a pilot ("D2"), were in a valid marriage when the child ("C") was born. The plaintiff, another pilot ("P"), in his originating summons claimed that C was born as a result of his alleged affair with D1. P applied for a DNA test to be carried out to determine whether he was the biological father of C, and if the test were to show that P was indeed the biological father of C, then P applied to be declared as such.

The High Court's Decision

The High Court dismissed P's originating summons on two grounds. First, that section 112 provides a presumption that the fact of marriage is conclusive proof of a child's legitimacy and the only way to rebut the presumption is by showing non-access between the spouses, not by a DNA test. Second, that it was not in the best interests of C to allow the DNA test as a declaration of illegitimacy (in the event the DNA test shows P to be C's biological father) would disrupt C's family life.

Appeal to the Court of Appeal

On appeal, P submitted that the presumption of a child's legitimacy under section 112 had no relevance to the determination of a child's paternity. P also relied on Article 7 of the United Nations Convention on the Rights of the Child ("UNCRC") to argue that the best interest of the child was for the child to know his or her biological parents. P further asserted that courts can order DNA tests to determine paternity.

D1 and D2 contended that the declaration of paternity sought by P would result in C becoming an illegitimate child. They further argued that the policy behind section 112 was to avoid a child being made illegitimate.

The Court of Appeal's Decision

The Court of Appeal held that the High Court had erred when it linked paternity with legitimacy.

> **" the concepts of "paternity" and "legitimacy" should necessarily be separated "**

According to Nallini Pathmanthan, JCA (as Her Ladyship then was), who delivered the judgment of the Court of Appeal, "*… section 112 does not bar enquiry into the paternity of a child. Paternity and legitimacy are two distinct, though interrelated concepts.*" The learned judge added that "*the concepts of "paternity" and "legitimacy" should necessarily be separated. The former concerns a question of fact; the latter a question of law. Section 112 of the EA constitutes adjectival law, and it is trite that adjectival law must be interpreted liberally so as not to defeat the rights of parties.*"

Her Ladyship was of the view that section 112, which dates back to 1872, is an outdated and anachronistic legal provision and ought to be construed and given effect in line with modern day scientific advancements.

The learned Judge further stated that "*Our law, and indeed the law of many civilised nations, recognises that a child may in fact be an illegitimate child, but, by operation of law, the said child may still be considered legally legitimate.*"

The Court of Appeal concluded that section 112 does not bar enquiries into paternity and that such enquiries *per se* do not illegitimise a child.

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After considering the relevant provisions of the UNCRC (namely Article 3(1) which provides, *inter alia*, that in all actions concerning children, the best interest of the child shall be a primary consideration and Article 7(1), whilst noting that the latter had been subjected to a reservation by the Malaysian Government when it acceded to the UNCRC, which provides, *inter alia*, that a child shall as far as possible, have the right to know and be cared for by his or her parents) and the Indian decision of *Shri Rohit Shekhar v Shri Narayan Dutt Tivoari & Anor* IA No. 4720, the Court of Appeal held that in determining whether a paternity test ought to be ordered, the court must have regard to the '*best interests*' of the child, which in this instance is the right to know who his or her biological parents are.

The Court of Appeal added that the High Court had also erred in its undue pre-occupation with the supposed fears of "illegitimising the child". In the opinion of the appeal court, the High Court should have allowed the factual disputes to be determined, whereafter it could then go on to balance the competing interests of paternity and legitimacy and arrive at a fair and just determination of the matter.

In light of the errors by the High Court, the Court of Appeal remitted the matter back to the High Court with P's originating summons converted into a writ action so that the case could be fully ventilated.

In the authors' view, the Court of Appeal's astute interpretation of section 112 captures the intention of Parliament at the time the Evidence Act 1950 was drafted, that is, section 112 was to ensure certainty of a child's legal status unless it is conclusively proved that there was no access between husband and wife at the time of conception. However, it is clear from the judgment that a conclusive DNA test is still insufficient to displace the legal presumption of fatherhood under the Evidence Act 1950.

The approach adopted by the Court of Appeal is to be lauded as it is in line with the latest developments in international law which appear to support the argument that it is in the child's interests for the child to know the truth of its origins.

PROBLEMS WITH SECTION 112

Section 112 was conceived in an era which lacked conclusive means of determining biological parenthood. Even today, a child declared illegitimate is by law deprived of rights, particularly in scenarios where parents pass away intestate. In an attempt to curtail such declarations, the presumption under Indian law was incorporated into the Malaysian Evidence Act 1950.

In its most general sense, legitimacy is separate and distinct from paternity. However, the position of Malaysian law on legitimacy does not allow for reconciliation with the social understanding of legitimacy. For instance, in *CAS v MPPL*, once it is established that D1 had access to D2 during the period of C's conception, C's legitimacy would be forever established. As much as we would hope otherwise, the social stigma of illegitimacy is very much prevalent in our society. What happens when fact and law do not coincide?

DEVELOPMENTS IN THE UNITED KINGDOM

In determining paternity in the UK, the Courts have been granted powers under section 20 of the Family Law Reform Act 1969 to not only rely on scientific tests, such as DNA tests, as evidence of paternity but to direct them as well. As for legitimacy, the presumption of *pater est quem nuptiae demonstrant* exists in common law as opposed to statute. However, section 26 of the Family Law Reform Act 1969, allows the presumption to be rebutted by "evidence which shows that it is more probable than not that that person is illegitimate or legitimate". This means that both the legitimacy and paternity can be determined by means of scientific tests.

CONCLUSION

Although the Court of Appeal is correct in its judgment that paternity and legitimacy have in the past been distinct concepts at law, we doubt that such a position should remain any longer. The availability of DNA testing has led to appropriate reform in a number of jurisdictions on legal provisions concerning the determination of paternity and it is perhaps time Malaysia follows suit.

However, the obstacles that arise with DNA testing should not be ignored. Exclusive reliance on biology to determine parenthood at law can be further complicated by assisted contraception techniques, second families, step-parents and adoptions. Unfortunately, Malaysian law will have considerable difficulty in developing its family law jurisprudence to keep up with these rising contemporaneous issues if the existing statutory presumption can only be rebutted by proof that there has been no access between husband and wife.

As a start, section 112 could be amended to provide a discretion for the Court to rely on DNA testing or other scientific evidence to establish or disprove legitimacy at law. However, in exercising its right to make such a finding with regard to a person below the age of 18, there should be statutory guidelines on how a Court should exercise its discretion, having as its paramount concern the best interests of the child.

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FLYING WITH EVEN LESS HEADACHES

Shannon Rajan and Raja Nadhil explain the changes under the Malaysian Aviation Consumer Protection (Amendment) Code 2019

INTRODUCTION

According to the 2016 edition of the International Air Transport Association's 20-Year Air Passenger Forecast, Asia Pacific will be the biggest driver of demand for air travel from 2015 to 2035 with more than half of the new passenger traffic coming from the region. Four out of five of the fastest-growing markets in terms of additional passengers per year over the forecast period will be from Asia.

Malaysia's air passenger traffic is expected to grow to between 105.5 million and 106.7 million passengers, a range of 2.9% to 4.1% growth. In 2017, the Malaysian aviation sector employed 450,000 people and contributed US$10.1 billion to the country's GDP. A robust set of laws to safeguard consumers' interest is essential to ensure Malaysia's aviation industry remains competitive in the global market.

THE MALAYSIAN AVIATION COMMISSION

The Malaysian Aviation Commission Act 2015 ("Act") came into force on 1 March 2015 and established the Malaysian Aviation Commission ("MAVCOM"). MAVCOM serves to promote a commercially viable, consumer-oriented and resilient aviation industry which supports Malaysia's economic growth. In line with that object, MAVCOM introduced the Malaysian Aviation Consumer Protection Code 2016 ("Code"), which seeks to strike the right balance between protecting passengers and industry competitiveness. The Code was made by way of subsidiary legislation pursuant to section 69(1) of the Act and came into force on 1 July 2016.

AMENDMENTS TO THE CODE

The Code was amended by the Malaysian Aviation Consumer Protection (Amendment) Code 2019 ("Amendment Code"), which came into force on 1 June 2019. The amendments were made after MAVCOM had taken into consideration the feedback from consumers and consultations with industry players.

The key amendments include the following:

(a) full disclosure of final price of air fare and prohibition of post-purchase price increase;
(b) disclosure of key terms and conditions before the purchase of a ticket;
(c) regulation of refunds;
(d) communication of change in flight status and compensation for route cessation and planned flight rescheduling;
(d) entitlement to wheelchair service for persons with disability; and
(e) consumer awareness.

Price of Air Fare

The Amendment Code replaces paragraph 3 of the Code. The new provision covers two situations in relation to air fare – firstly, for the purpose of advertisement and secondly, before a ticket is purchased.

In respect of advertisements, an airline is now required to publish an all-inclusive fare consisting of:

(a) the base fare (including all charges payable to the airline);
(b) government taxes and fees;
(c) fees and charges prescribed by any written law; and
(d) fuel surcharge.

For the final air fare, in addition to the items set out in sub-paragraphs (a) to (d) above, an airline is also required to disclose any charges for optional services purchased by a consumer on an opt-in basis before a ticket is purchased, such as baggage, seats and meals.

Paragraph 4 of the Code prohibits, subject to the exceptions stipulated therein, an airline from increasing the price of an air fare after the air fare has been purchased by a consumer. The Amendment Code amends this provision to clarify that the prohibition in paragraph 4 applies only to the final air fare after the air fare is purchased by the consumer, and not in respect of fares displayed in advertisements.

> **" By introducing a new paragraph 7A ... refunds are now regulated "**

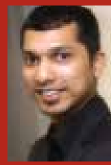
These amendments promote greater transparency in the prices of air fares as they seek to eliminate hidden charges such as card payment and administrative fees on air tickets.

Disclosure of Key Terms before Purchase

The previous paragraph 7(1) of the Code imposed an obligation on airlines to "*disclose all terms and conditions of the contract of carriage to the consumer*" prior to a ticket being purchased. This requirement has been replaced by an obligation to disclose the following key terms and conditions before a ticket is purchased by a consumer:

(a) cancellation fees;
(b) any refund and rebooking policies;
(c) policies for a passenger who fails to show up at the check-in counter or at the boarding gate within the designated period or to board the aircraft at the specified boarding time;
(d) baggage allowance policies; and
(e) validity of the passenger's travel documents.

The amendment was made to avoid the risk or possibility of the



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terms and conditions being overlooked by consumers. This was the case prior to the amendment as airlines merely provided website links to the contract of carriage.

Further, the insertion of the new paragraph 7(1A) imposes a positive obligation on an airline to ensure that the key terms and conditions set out in the amended paragraph 7(1) are communicated to the consumer before the ticket is purchased even where a ticket is purchased from a travel agent. This ensures that airlines can also be held accountable when an agent fails to comply with the requirement of disclosure.

Regulation of refunds

Previously, most airlines had been charging consumers between RM15.00 to RM300.00 for the processing fee for Passenger Service Charges refunds (an amount which could exceed the amount of the service charge itself), while some airlines did not impose any fee at all.

By introducing a new paragraph 7A into the Code, refunds are now regulated. Among others, it requires a contracting airline, when claimed by a consumer, to refund:

(a) the base fare, including all charges payable to the airline;
(b) charges for optional services purchased by the consumer;
(c) government imposed taxes and fees; and
(d) fees and charges prescribed under any written law.

In respect of the refunds of the amounts set out in sub-paragraphs (c) and (d) above, a contracting airline is entitled to charge a processing fee but only up to 5% of the taxes, fees or charges. However, no such processing fee can be charged if the contracting airline has already charged a processing fee for the refund of the base fare or charges referred to in sub-paragraphs (a) and (b) above.

Further, a contracting airline must remit the refund within 30 days from the date of the claim for the refund. However, if a ticket is purchased from a travel agent or through a travel portal, the refund is to be remitted within 30 days from the date of the claim being made by the consumer in accordance with terms and conditions between the contracting airline and the travel agent or the relevant travel portal, as the case may be.

Any tax which is not refunded to the consumer is to be dealt with in accordance with the Unclaimed Moneys Act 1965.

Change in Flight Status, Route Cessation and Planned Rescheduling

Previously, an airline's obligation to provide information to passengers and the public of any "*change in the status of a flight*" only applied where there was flight cancellation, a delay of 30 minutes or more in the scheduled operation of a flight, or a diversion. It did not cover situations where the airline changes the flight to a time that is earlier than the scheduled time or the cancellation of a flight due to route cessation. Thus, the substitution of the previous paragraph 8(3) with a new one is aimed to cover the aforesaid two situations.

Further, the effects of the substitution of paragraph 8(1) and the insertion of a new paragraph 8(4) are as follows:

(a) the operating airline must notify the passengers and the public of a route cessation one month before the date of cessation;
(b) in the case of a planned flight rescheduling of three hours and more before or after the scheduled departure time, such notification must be made within 12 to 48 hours from the scheduled departure time; and
(c) where there is a delay of thirty minutes or more but less than three hours, such notification must be made "*as soon as practicable*" in a manner determined by MAVCOM.

The new paragraph 8(5) requires an operating airline to provide to a passenger a letter pertaining to a cancellation or delay of 30 minutes or more of his flight, if the passenger requests for it.

In addition, a new paragraph 12A and amendments to the First Schedule of the Code provide for compensation and care for route cessation and planned flight rescheduling of three hours and more before or after the scheduled departure time. However, an operating airline is exempted from providing compensation and care if it can prove that the route cessation or planned flight rescheduling is caused by extraordinary circumstances which could not be avoided even if all reasonable measures had been taken. In this regard, it would be interesting to see whether airlines would be able to argue that they ought to be exempted from providing compensation and care to their passengers for the recent network failure at Kuala Lumpur International Airport which had affected key functions at that airport and caused delays and cancellation of flights.

Wheelchair Service

As a result of the insertion of the new sub-paragaph (16A) into paragraph 9 of the Code, a person with disability is entitled to use wheelchair services without charge upon production of a card issued to persons with disability under the Persons with Disabilities Act 2008. This is in line with the International Air

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IN THE SPIRIT OF ATTRIBUTION

Joshua Teoh explains an interesting case on geographical indications in Malaysia

WHAT IS A 'GEOGRAPHICAL INDICATION'?

A geographical indication is used to identify the specific geographical origin of a product and associate the product with the quality, reputation, or other characteristic usually attributed to products from the same geographical origin. Geographical indications may be used for any product; for example, agriculture – Ceylon tea, food – Kobe beef, spirits – Champagne, and accessories – Swiss watches.

As a product's origins suggest to consumers that the product will have a prescribed quality or characteristic which consumers may prefer, the use of a geographical indication may increase the value of the product itself. Thus, producers in a geographical area would seek to restrict and prohibit third parties from misusing any designation indicating that such goods originate from that area when that was never the case.

THE "TEQUILA" GEOGRAPHICAL INDICATION

The "Tequila" indication is owned by Mexico, through the Mexican Institute of Industrial Property ("IMPI"). IMPI had appointed Consejo Regulador del Tequila AC ("plaintiff"), the Mexican tequila regulator, to register "Tequila" as a geographical indication. The plaintiff is the only organisation accredited to certify compliance with the official Mexican standard for the production and marketing of "Tequila" alcoholic beverages.

> **"A geographical indication is used to identify the specific geographical origin of a product"**

In Malaysia, the plaintiff is the registered proprietor of the geographical indication "Tequila" bearing Geographical Indication No. GI2015-00002 for alcoholic beverages in Class 1.

In *Consejo Regulador del Tequila AC v Pelican Winery (M) Sdn Bhd* (KLHC Civil Suit No. WA-24IP-17-08/2017), the High Court found, *inter alia*, that the reference to "Tequila" used on the labels of products not distilled within the designated municipalities in Mexico was misleading as to the geographical origin of the product.

FACTS OF THE CASE

The defendant, a Malaysian alcoholic beverages manufacturer and distributor, had manufactured and marketed, among others, an alcoholic beverage product bearing the name Tequila Gold and the trademark "Agawa" ("AGAWA Tequila Gold"). The defendant claimed that as the tequila ingredients were imported from authorised producers in Mexico, the product could be lawfully referred to as "Tequila".

The defendant also argued that since the product complied with the health regulations in Malaysia and is certified safe for consumption, there was no deception practised upon members of the trade and public.

The plaintiff contended, among others, that the use of the reference to "Tequila" on the defendant's product label would misleadingly suggest that the AGAWA Tequila Gold product originated from an authorised manufacturing facility in Mexico and complied with the mandatory official Mexican standard for "Tequila".

In a surprising turn of events, on the day that the High Court was to deliver its decision, the parties agreed to a consent judgment which included the defendant being restrained from using the geographical indication "Tequila" on its products. Notwithstanding and without prejudice to the consent judgment, the High Court proceeded to render its decision and reasoning, to provide clarification on section 5(1) of the Geographical Indications Act 2000 ("GIA"), which states that any interested person may institute proceedings to prevent, among others, the misuse of geographical indications.

> **"The High Court was satisfied that "Tequila" is a geographical indication"**

PROVING THE 'GEOGRAPHICAL INDICATION'

The High Court was satisfied that "Tequila" is a geographical indication as defined under section 2 of the GIA with the plaintiff's production of the certificate of registration for "Tequila". The certificate was accepted as *prima facie* evidence of a registered geographical indication pursuant to section 20(2) of the GIA. The High Court agreed that the use of 'Tequila' indicated that the specific alcoholic beverage originated from one of the 181 municipalities in five designated Mexican states, namely Jalisco, Guanajuato, Michoacán, Nayarit, and Tamaulipas.

WHO IS AN 'INTERESTED PERSON'?

Section 2 of the GIA defines an 'interested person' as persons specified in section 11 of the GIA. Section 11 sets out the categories of persons who are entitled to apply for registration of a geographical indication.

The High Court, reading sections 2, 5(1), and 11 of the GIA together, found that although the plaintiff was a non-profit organisation, the plaintiff as the registered proprietor of the registered geographical indication for 'Tequila' is an 'interested

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person' who may institute proceedings under section 5(1) of the GIA to, among others, prevent the misleading use of the 'Tequila' geographical indication.

POSSIBLE DEFENCES

The High Court observed that the GIA only recognised two exceptions: for prior use or use of a personal name. Hence the Court held that the fact that the tequila ingredients used in the defendant's products were imported from two authorised tequila producers in Mexico (the ones who complied with the Mexican standard for 'Tequila' and were authorised by the plaintiff) could not be used as a defence in this case.

The High Court also rejected the defendant's reliance on the Food Regulations 1985 and the food safety certificates issued by Ministry of Health as a defence. It was observed that any contravention of the Food Regulations 1985 is a separate offence, and that such a defence was also rejected in the case of *The Scotch Whisky Association & Anor v Ewein Winery (M) Sdn Bhd* [1999] 6 MLJ 280, a case on extended passing off.

> **“ the fact that the tequila ingredients … were imported from two authorised tequila producers … could not be used as a defence ”**

DECISION OF THE HIGH COURT

Accordingly, the High Court held that the plaintiff had established its case pursuant to section 5(1)(a) of the GIA, that the use of the word “Tequila” in the name of AGAWA Tequila Gold and in the designation by way of ingredients in the label of the product fell within section 5(1)(a) as they misled the public as to the geographical origin of the goods.

The High Court further found that pursuant to section 5(1)(b) of the GIA, the defendant's presentation and ingredient designation of “Tequila” in the AGAWA Tequila Gold product amounted to an act of unfair competition which is prohibited under Article 10*bis* of the Paris Convention, in that they are liable to mislead the public as to the “nature” and “characteristics” of the goods.

CONCLUSION

Cases on the misleading use of geographical indications in Malaysia are rare even though the GIA is about to celebrate its 20th anniversary. Thus far, the only reported Malaysian case on this subject is *Maestro Swiss Chocolate Sdn Bhd & Ors v Chocosuisse Union Des Fabricants Suisses De Chocolat (a co-operative society formed under title XXIX of the Swiss Code of Obligations) & Ors and another appeal* [2016] 2 MLJ 359 which concluded in the Federal Court. This High Court decision may, possibly, be the second local case on misleading geographical indications.

In recognising the plaintiff, a competent authority on tequila, as an “interested person”, the High Court's reasoning was consistent with sections 2 and 11 of the GIA and the *obiter dictum* in *Maestro Swiss Chocolate Sdn Bhd*.

As mentioned earlier, a registered geographical indication has the purpose of protecting the unique attributes of a product which originates from a particular geographical region. The High Court's decision is interesting as it held that the use of a geographical indication to describe an ingredient on a label could amount to a misleading use of a geographical indication, even though the ingredient originated from the location designated in the geographical indication.

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ANNOUNCEMENT

SENIOR ASSOCIATES

The Firm congratulates Tan Hui Wen and Janice Ooi on their promotion to Senior Associates.

Hui Wen is a member of the Commercial Litigation and Arbitration Practice of our Firm. She graduated from the University of Auckland in 2013.

Janice is a member of the Commercial Litigation and Arbitration Practice of our Firm. She graduated from Cardiff University in 2013

OF UNIVERSAL APPLICATION: RECOGNITION OF THE DOCTRINE OF UNIVERSAL SUCCESSION

continued from page 3

TS Solartech refused to register URE as the owner of the Subject Shares. As such, URE resorted to legal action, where it sought a declaration that the Merger had carried into effect a transmission of the Subject Shares to URE by operation of law. URE also sought for consequential orders for the registration of the transmission of shares and rectification of TS Solartech's register of members ("ROM") to include URE's name as the new registered owner of the Subject Shares.

TS Solartech contested the application and argued that:

(i) the wording of section 109(1) of the Companies Act 2016 in referring to a transmission by operation of law should only be restricted to transmission in cases of death and bankruptcy, and could not include a universal succession; and

(ii) the Merger, being a voluntary commercial decision between the parties, had resulted in a transfer of shares, thereby requiring an instrument of transfer to be executed.

> **"The determining factor … is whether there was an active act of a transfer … or an automatic devolution of title"**

URE argued that:

(i) the wording of section 109(1) of the Companies Act 2016 does not limit transmission by operation of law to cases of death and bankruptcy. Rather, it is wide enough to include a universal succession;

(ii) there was a transmission by operation of law of the Subject Shares from Solartech to URE, and not a transfer. The determining factor in deciding whether there was a transfer or a transmission, is whether there was an active act of a transfer of shares by a member or an automatic devolution of title. Even though the act of entering into the merger could be regarded as a voluntary commercial decision, the merger had caused an automatic devolution of title in respect of the Subject Shares; and

(iii) there is no need for an instrument of transfer to be executed. In any event, it would be practically impossible to execute any instrument of transfer as the transferor, i.e. Solartech, has ceased to exist.

The High Court's Decision

The High Court found in favour of URE and held that the devolution of ownership of the Subject Shares is one that took place by operation of law, which is a process classified as a transmission, rather than a transfer within the Companies Act 2016.

The High Court agreed with URE that section 109(1) of the Companies Act 2016 on transmission of shares by operation of law is not restricted to cases of death or bankruptcy. Rather, it is sufficiently wide in scope to include a universal succession.

The High Court allowed URE's prayer for a declaration that the Merger had carried into effect a transmission of the Subject Shares to URE by operation of law. The High Court further ordered that TS Solartech's ROM be rectified to include URE's name as the new registered owner of the Subject Shares, without the need for an instrument of transfer.

CONCLUSION

The *United Renewable Energy* case is significant as there are no reported cases in Malaysia where the concept of universal succession has been recognised by the Malaysian Courts in relation to shares held by an entity that ceases to exist and its rights and obligations are assumed by a successor entity by operation of law.

This is also the first occasion where a Malaysian Court decided that section 109(1) of the Companies Act 2016 is wide enough to allow for the recognition of universal succession.

Non-Malaysian companies seeking to undertake mergers in their countries will have comfort that such mergers are likely to be recognised in Malaysia by virtue of the doctrine of universal succession. The assumption of all assets, liabilities, obligations and rights by the successor entity will be recognised as a consequence of such mergers.

Where these assets include shares, the shares would be treated as having been transmitted to the successor company by operation of law. The successor company would be entitled to be registered as the owner of the said shares without the need for any instrument of transfer.

There is also significant importance from the dispute resolution perspective. As can be seen from *Astra* and *Eurosteel*, the successor entity would be allowed to continue with arbitration or continue to enjoy the right under an arbitration clause, pursuant to the assumption of rights and liabilities under a foreign merger.

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Likewise, the UK's Tenant Fees Act 2019 ("TFA") caps the amount of a tenancy deposit at five weeks' rent (where annual rent is less than £50,000) or six weeks' rent (where annual rent is more than £50,000). Under the TFA, it is mandatory for landlords to deposit the tenancy deposits under a government-backed tenancy deposit scheme for assured shorthold tenancies.

The Proposed Act should regulate the amount of security and utilities deposits and advance rents that a landlord can impose on a tenant. An independent governmental agency should be established to hold the security and utilities deposits and other types of deposit (if any) in escrow for the landlord and tenant of a residential tenancy and provide for the release of the same to the relevant party in accordance with the tenancy agreement in line with the NSW Act, the Victorian Act and the TFA.

Prescription of fundamental terms

The NSW Act and the Victorian Act each provides a standard tenancy agreement which incorporates most of the rights and obligations of landlords and tenants stipulated in the respective acts. Similarly, the UK government has made available a model tenancy agreement to the public. Regardless of whether this requirement to adopt a standard tenancy agreement is followed under the Proposed Act, it is in the interest of all concerned that the general terms and fundamental rights and obligations of landlords and tenants are clearly stipulated in the Proposed Act. Towards this end, the implied terms set out in Sections 230 to 233 of the NLC for leases and sub-leases can be adopted. There should also be a requirement for every tenancy agreement and any variation thereto to be made in writing and signed by both parties.

Dispute Resolution Mechanism

A special tribunal having similar functions and powers as the VCAT and the NCAT should be set up to resolve disputes between landlords and tenants in a timely and cost-efficient manner. Such tribunal should be given powers to make all orders that could typically be made by the courts in relation to tenancy matters, such as orders to restrain any action in breach of a residential tenancy agreement, or compel performance of the terms of a residential tenancy agreement, or for payment or refund of money or compensation. Several tenancy deposit protection schemes in England, namely the Tenancy Deposit Scheme, MyDeposits and the Deposit Protection Service, also make available to their landlord and tenant users free dispute resolution services for tenancy deposit.

Termination of tenancy

Under the NSW Act, the landlord cannot terminate a tenancy without grounds before the end of the fixed term and if the tenancy is not terminated at the end of the tenancy, it will continue as a periodic tenancy. If the landlord wishes to terminate the tenancy at the end of the fixed term, the landlord must give at least 30 days' notice (90 days' notice in the case of a periodic tenancy) with an exception of a tenancy where the tenant has been in continual possession of the premises for a period of 20 years or more and the tenure of the original fixed term agreement has ended; in this situation, the landlord may apply to the NCAT for a termination order together with an order for possession of the premises without serving a termination notice on the tenant.

In Victoria, it is mandatory for the landlord to give the tenant a valid notice to vacate and the notice period depends on grounds of termination and whether the tenancy is a fixed-term tenancy or a periodic tenancy.

Similar to Malaysia, tenants in NSW, Victoria and the UK are protected from being evicted from the premises (even after the expiry of the deadline to vacate premises specified in the notice) unless and until the landlord has obtained a possession order either from the NCAT, the VCAT or the court (for tenancies in the UK).

It is recommended that all the remedies for landlords and tenants including but not limited to those set out in the NLC, SRA, CLA and DA should be consolidated under the Proposed Act and the termination period for different circumstances should also be set out therein.

Levy on vacant premises

To encourage owners to rent out their vacant properties, the UK government can impose a charge of up to an amount that is twice the council tax payable if a property has been vacant for two years or more unless the property is an annexe or the owner is in the armed forces. The Malaysian Government could adopt a similar approach in order to boost the rental market for residential properties.

CONCLUSION

It is the writers' opinion that the current landscape of the rental market in Malaysia is neither pro-landlord nor pro-tenant and may vary according to the circumstances. As mentioned earlier, the existing laws that govern tenancies are piecemeal and found in different legislation such as the NLC, CLA, DA and SRA. Thus, the introduction of a holistic piece of legislation that governs all aspects of residential tenancies and safeguards the interest of both landlords and tenants is long overdue and should be welcomed by all stakeholders.

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FLYING WITH LESS HEADACHES

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Transport Association's efforts to make air travel more accessible to the disabled and those with reduced mobility.

Consumer Awareness

A new paragraph 19(2) extends the obligation of raising consumer awareness to any person who performs aviation services on behalf of aviation service providers. This provision requires an aviation service provider to use its best endeavours to ensure that all of its employees or any person who performs aviation services on its behalf possess adequate knowledge and awareness of the Code, so as to be able to assist and facilitate consumers in exercising their rights.

Further, an airline is now required to publish on its website the rights conferred to the consumer under the Code regardless of whether a travel insurance has been purchased by the consumer.

CONCLUSION

In line with MAVCOM's efforts to protect consumers from being unfairly charged by airlines, a financial penalty of RM200,000.00 each was recently imposed on two airlines for charging credit card, debit card and online banking processing fees separately from their base fares in contravention of the Code. Dr. Nungsari Ahmad Radhi, Executive Chairman of MAVCOM said that "*These actions are also intended to move the aviation industry in Malaysia towards an improved level of service, integrity and transparency, in line with MAVCOM's long term objectives for the industry*". The importance of MAVCOM's role in the aviation industry cannot be overstated - not only have consumers benefitted from the protection under the Code, they have also developed greater awareness of their rights as air travellers. These translate into improvements in the level of service in the Malaysian aviation industry.

The latest amendments under the Amendment Code were aimed to promote greater transparency and fairness in the dealings between airlines and passengers, which would allow consumers to enjoy monetary savings and make more informed decisions.

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Editor's Note: For an overview of the Malaysian Aviation Consumer Protection Code 2016, please refer to "*Now Everyone Can Fly … With Less Headaches*" by Shannon Rajan in Issue 3/2016 of Legal Insights.

THE WAITING GAME

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Michael would not have left the Hospital if he had been told that he would be attended to in 30 minutes. Secondly, Michael's decision to leave was made, in part at least, based on the misinformation provided by the receptionist which was inaccurate or incomplete. Thirdly, it was reasonably foreseeable that a person who believes that it may be four or five hours before he is seen by a doctor may decide to leave, whereas he would have stayed if he believed he would be seen much sooner by a triage nurse.

CONCLUSION

As noted by the Supreme Court, *Darnley* is not a case about whether a duty of care exists, but whether the Hospital had breached its duty by providing inaccurate information through its receptionist. The apex court clarified that the duty in the present case not to provide misinformation fits within the well-established category of duty owed by health care providers to its patients, i.e. to take reasonable care not to cause physical injury to its patients.

In this, we can see that the common law and the court's approach is not to determine the existence of duties of care based on precise factual circumstances framed as novel situations, but to look widely at the general duty owed in an established category and, if possible, place the precise factual circumstances under its umbrella. A hospital's general duty is to take reasonable care not to cause injury to its patients, and the duty to not provide inaccurate and incomplete information is just one of many specific duties parked under its umbrella. As seen in *Darnley*, the provision of negligent misinformation by a non-medical staff as to waiting times may cause serious and irreversible injury to a patient that is not dissimilar to a medical staff giving negligent advice as to treatment or diagnosis to a patient.

Darnley illustrates that in appropriate circumstances, such as those in the instant case, the duty to exercise reasonable care imposed not only on medically trained staff, but also on non-medically trained staff, of a hospital.

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IP RIGHTS AND COMPETITION LAW

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(i) ***Others*** – examples include margin or price squeezing or offering loyalty rebates and discounts to buyers by requiring a minimum volume purchase to foreclose the market from rivals.

CONCLUSION

Although the Guidelines have yet to address areas which the CA 2010 arguably may have a greater impact, such as the franchise industry or technology transfer and R&D agreements, the Guidelines serve as a basic guide for arrangements involving IPRs as they provide greater clarity on how the MyCC views the interaction between IPRs and competition law. IPR owners may also use the Guidelines to reduce the risks of falling foul of the prohibitions, and to protect themselves against anti-competitive activities of their potential or actual competitors.

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PATERNITY VS LEGITIMACY

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The Court should also be given express powers under an amended section 112 to order such DNA tests. Such tests in respect of children under the age of 18 should only be carried when it is in the best interests of the child, that is, where there is something to be gained or benefited by the child at the risk of being declared illegitimate.

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Highly Regarded: (1) Theresa Chong; (2) To' Puan Janet Looi; (3) Quay Chew Soon; and (4) Phua Pao Yii.

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LEGAL INSIGHTS

A SKRINE NEWSLETTER

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SKRINE WAS FOUNDED ON 1ST MAY 1963 AND IS TODAY ONE OF THE LARGEST LAW FIRMS IN MALAYSIA. SKRINE IS A FULL-SERVICE FIRM DELIVERING LEGAL SOLUTIONS, BOTH LITIGATION AND NON-LITIGATION, TO NATIONAL AND MULTINATIONAL CLIENTS FROM A BROAD SPECTRUM OF INDUSTRIES.

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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