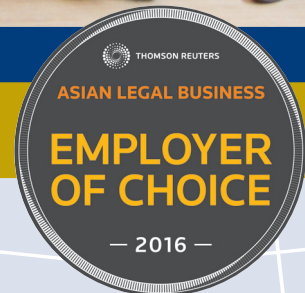


# THE BRIEF *Case*

Thank you for making us Employer of Choice 2016





## A BRIEF NOTE...

by Dato' Zulkifly Rafique

### *The rise of the machines?*

In an ever-changing, fast paced and dynamic world, technology has been evolving at an accelerated rate, together with society's dependence on it.

Even the justice and legal systems worldwide have embraced the use of technology. Books, cases and even files are now available electronically. Time spent on research, which once took laborious and sometimes even painful hours, is now halved, with resources available a mere click away.

In the latest legal development, a law firm has actually hired *Ross*, an Apple Siri-like artificially intelligent attorney, which assists legal practitioners in their research by providing citations and topical reading suggestions to legal questions posed.

With such advancement of technology in the legal field, are human lawyers at a danger of 'extinction'? Technology is undoubtedly constantly evolving and stops for no one. Thus, lawyers are advised to get an edge on artificial intelligence and remain relevant.

As the saying goes, "If you can't beat them, join them".

On a separate note, I would like to take this opportunity to convey my thanks and gratitude to all our clients and friends for making us Employer of Choice 2016 (by the *Asian Legal Business*). This is our seventh win since 2009 and we hope to keep this title for good.

## CONTENTS

### page 2 IN-BRIEF...

The highlights in this Folder include:

- *International Partnership by DAC Beachcroft*
- *New Companies Act*
- *New Fintech regulatory framework*
- *New Minimum Wages law*
- *India: Insolvency and Bankruptcy Code 2016 passed*
- *Indonesia: Foreign Ownership Regulations eased*
- *Singapore: Choice of Court Agreements Act passed*
- *UK: National Minimum Wage Regulations amended*

### page 4 BRIEFING...

Amongst the articles in our feature:

- *Stairway to Litigation?*
- *New Minimum Wages law*
- *Artificial Intelligence... The rise of the machines?*
- *We are closed... for business*

### page 9 DEBRIEF...

Our Debrief contains the following:

- *Majlis Agama Islam Wilayah Persekutuan v Victoria Jayaseele Martin* [2016] 4 CLJ 12, Federal Court
- *HT SRL v Wee Shuo Woon* [2015] SGHC 15, Singapore High Court

### page 10 BRIEFLY...

Legislation Update:

- *Employees' Social Security (Amendment) Act 2016*
- *Employees Provident Fund (Amendment) Act 2016*
- *Minimum Wages Order 2016*
- *Loans Guarantee (Bodies Corporate)(Remission of Tax and Stamp Duty) Order 2016*
- *Guidelines/Rules/Circulars/Directives and Practice Notes issued between April and June 2016 by Bank Negara Malaysia, Bursa Malaysia and Securities Commission Malaysia*

- **AMENDMENTS TO LAND ACQUISITION**

**ACT 1960** The Land Acquisition (Amendment) Bill 2016 ("the Bill") which was passed by the *Dewan Rakyat*, aims to improve the existing land acquisition procedure with a view to facilitate the infrastructure development in the nation. These amendments, amongst others, involve land acquisition for underground works such as the building of tunnels, drainage systems, and underground infrastructure. ☞☞

- **CIVIL LAW ACT TO BE AMENDED** The proposal to amend section 7 of the Civil Law Act 1956, which seeks to increase the age limit for those involved in road accidents, from the age of 55 to 60, is being reviewed. The proposed amendments include revising the amount of compensation for grief and the calculation of loss of income by taking into consideration the increase of the mandatory retirement age from 55 to 60 under the Pensions Act 1980, and the minimum retirement age of 60 years fixed by the Minimum Retirement Age Act 2012. ☞☞

- **INTERNATIONAL PARTNERSHIP BY DAC BEACHCROFT** DAC Beachcroft, a legal firm headquartered in London, has applied to the Malaysian Bar Council for a licence to form an international partnership (IP) with a Malaysian firm. The IP will focus on matters relating to insurance and reinsurance. Although both firms may work and bill their clients together, the Malaysian firm will remain independent, with local legal advice provided by the local lawyers of the IP. In 2014, Malaysia announced the liberalisation of its legal services market to allow international firms to enter its jurisdiction. ☞☞

- **LANDMARK DECISION ON SEXUAL HARASSMENT** The Federal Court, in *Mohd Ridzwan Abdul Razak v Asmah Hj Mohd Nor*, has decided in favour of a female employee who sued his employer based on the tort of sexual harassment. The ruling sets a precedent for employees who are sexually harassed at their workplace to file a civil suit to claim damages against the perpetrators and for similar suits to be heard in the civil courts beyond the ambit of the Employment Act 1955. In this case, Asmah's claim for MYR120,000 in damages was upheld. ☞☞

- **NEW AGE LIMIT FOR ALCOHOL**

**PURCHASE** Effective 1 December 2017, the age limit under the amended Food Regulations 1985 ("the Regulations") for purchase of alcohol is raised to 21 years, from the previous 18 years. Other measures introduced under the Regulations include the requirements for the sale of alcoholic beverages to be displayed on a separate cabinet and for all alcoholic drinks to carry the label "Drinking Alcohol is Injurious to Health". Failure to comply with the Regulations will attract a maximum fine of MYR10,000 or an imprisonment term of up to two years. ☞☞

- **NEW COMPANIES ACT** The Companies Act 2015 ("the Act"), which will replace the current Companies Act 1965, was tabled and passed by the Malaysian Parliament recently. The objectives of the Act include lowering the cost of compliance by introducing simplified laws and deregulatory measures. The Act however is yet to take effect. ☞☞

- **NEW FINTECH REGULATORY FRAMEWORK**

The regulatory framework ("the Framework") for financial technology (Fintech) is expected to unveil in July 2016 by the Central Bank of Malaysia or *Bank Negara Malaysia* (BNM). Measures are also imposed on the Fintech firms to address concerns about privacy and money laundering. These measures require the Fintech firms to observe reasonable standards of service, transparency to customers, appropriate funding, and reporting requirements. ☞☞

- **NEW MINIMUM WAGES LAW** The Minimum Wages Order 2016 ("the Order") which takes effect from 1 July 2016, will be enforced against all employers in the private sector, regardless of the number of employees. Under the Order, employees in Peninsular Malaysia are entitled to MYR1000 per month, whilst employees in Sabah, Sarawak, and the Federal Territory of Labuan are entitled to a monthly wage of MYR920. ☞☞

- **SOGA TO BE INTRODUCED** A new law, the Stated-Owned Enterprise and Government-Linked Companies Act ("SOGA"), will be introduced to initiate reforms of government-linked companies (GLCs). The aim of the SOGA is to improve the governance of GLCs and to ensure compliance with its international commitments. ☞☞

## AROUND THE WORLD... IN-BRIEF

- **AUSTRALIA: “GOOGLE TAX” INTRODUCED** Google tax has been introduced in the Australian Budget to curb the issue of tax avoidance. Companies that move profits offshore to avoid tax, upon discovery, will be taxed at a penalty rate of 40 percent, compared to the previous 30 percent. 🌀
- **AUSTRIA: NEW ASYLUM LAW PASSED** A new asylum law (“the new law”) passed by the Austrian lawmakers enables the Austrian Government to declare a “state of emergency” over the migrant crisis and thereby reject and restrict asylum-seekers. Under the new law, a successful asylum claim is limited to only three years. 🌀
- **EUROPE: COCA-COLA’S TRADEMARK APPLICATION REJECTED** The European General Court has rejected the 3D Community Trademark application by *Coca-Cola* for the shape of its bottle on the basis that the bottle, which is wide in the middle and bottom but narrow at the top, lacks distinctive character which distinguishes it from other bottles in the market. It was held that the bottle was merely a variation of the shape of a bottle which is incapable of distinguishing goods of *Coca-Cola* from other goods. 🌀
- **INDIA: INSOLVENCY AND BANKRUPTCY CODE 2016 PASSED** The Indian Parliament has passed the Insolvency and Bankruptcy Code 2016 (“the Code”) which replaces the existing bankruptcy laws with a set of new rules under a single legislation. The winding down of companies and recovery of bad loans by banks are made easier under the Code. The Code also sets a 180-day deadline for the resolution of bankruptcy cases. 🌀
- **INDONESIA: FOREIGN OWNERSHIP REGULATIONS EASED** The Indonesian Government has revised and relaxed the foreign ownership regulations (“the Regulations”) in retail and port services to attract more investment opportunities for its economy. The Regulations,

which came into effect in May 2016, have imposed a 49 percent foreign ownership cap on small e-commerce business. 🌀

- **SINGAPORE: CHOICE OF COURT AGREEMENTS ACT PASSED** The Singaporean Parliament has approved the Choice of Court Agreements Act (“the Act”) which enables court judgments on civil and commercial matters to be enforced internationally. This means that when a Singapore Court is chosen to preside over a dispute pursuant to the exclusive choice of court agreement, the hearing must be held in Singapore and that the judgments handed by the Singaporean Court will be recognised and enforced by the courts of other parties to the Hague Convention. 🌀
- **SINGAPORE: TRANSBOUNDARY HAZE POLLUTION ACT** The Government of Singapore is taking action pursuant to the Transboundary Haze Pollution Act 2014 against companies that started fires or allowed their concessions to be burnt, causing last year’s haze in Singapore. To date, six Indonesian-based firms have been served with notices requiring an explanation of steps and measures taken to put out or prevent fires on their land. 🌀
- **SOUTH KOREA: THE “ONESHOT” ACT TO TAKE EFFECT FROM AUGUST 2016** The National Assembly of the Republic of Korea has passed the “Special Act on Revitalizing Companies”, which is commonly referred to as the “OneShot Act”. The OneShot Act is aimed at enhancing the competitiveness of industries as well as companies and facilitating voluntary and initiative corporate restructuring. 🌀
- **UK: “CLOSE OF BUSINESS” DETERMINED** The Irish Supreme Court, in *McCann v Haplin*, has ruled that the phrase “close of business” has to be interpreted in its ordinary meaning in the context in which the phrase is used. Thus, in this case, in the context of the banking business, “close of business” means the end of a banking business day, that is 4pm, where the bank ceased to do banking business with its customers. The fact that employees remained to work in the bank after the end of its operating hours is irrelevant. 🌀

- **UK: NATIONAL MINIMUM WAGE**

**REGULATIONS AMENDED** The National Minimum Wage Regulations 2015 has been amended to introduce the mandatory National Living Wage ("NLW") for workers. With effect from 1 April 2016, the NLW requires the employers to pay an hourly rate of GBP7.20 to its workers aged 25 and above. Workers aged between 21 and 24 years, however, will continue to be paid an hourly rate of GBP6.70. 🌀

- **US: APPEAL AGAINST RULING ON**

**MONKEY SELFIE** The United States District Court for the Northern District of California has rejected the claim by the People for the Ethical Treatment of Animals (PETA), on behalf of a macaque, *Naruto*, for copyright ownership of a photograph captured by *Naruto*. PETA intends to appeal against the ruling. 🌀

- **US: "BATHROOM BILL"** A law known as the "Bathroom Bill" ("the Bill"), introduced in the State of North Carolina, restricts a transgender's access to public toilets based on the gender that corresponds with that on his birth certificate. A lawsuit has now been filed by the State of North Carolina officials at the United States Supreme Court against the Federal Government's demands to stop the implementation of the Bill. 🌀

- **US: NO "JAWS" FOR COOKING**

**CHANNEL** An application ("the Application") to trademark "JAWS" and "JAWS DEVOUR YOUR HUNGER" ("the Marks") for a streaming Internet cooking channel has been denied by the United States Patent and Trademark office. The Application was rejected as consumers may confuse the Marks with the already registered JAWS trademark, the iconic 1975 silver-screen shark. 🌀

- **VIETNAM: NEW GUIDANCE FOR REAL ESTATE BROKERS AND TRADING FLOORS**

On 30 December 2015, the Ministry of Construction issued Circular No. 11/2015/TT-BXD ("Circular 11") regulating the issuance of real estate broker's practising certificates, guiding the training on real estate brokerage and operation of real estate trading floors, and regulating the establishment and operation of real estate trading floors. Circular 11 took effect from 16 February 2016. 🌀

## COPYRIGHT LAW

**STAIRWAY TO LITIGATION?** Even if you are not a rock aficionado, you could not have escaped listening to *Stairway to Heaven* by Led Zeppelin. However, for the absolutely uninitiated, *Stairway to Heaven*, released in 1971 by English rock band, *Led Zeppelin*, is a rock song written by its members, Jimmy Page and Robert Plant.

That 'stairway' shook on 8 April 2016, when District Judge R Gary Klausner of the Central District of California, United States, decided that a jury should decide whether Plant and Page are liable for copyright infringement.

**THE HISTORY** The copyright lawsuit infringement was initiated by Michael Skidmore, a trustee for the estate of Randy Wolfe. Wolfe, who died in 1997, was the guitarist of the lesser-famed group, *Spirit*, and the man who composed the instrumental *Taurus*, which was recorded in 1967.

The lawsuit alleges that *Stairway to Heaven* was plagiarised by Page and Plant from *Taurus*, without any form of credit given to Wolfe.

The case was first filed in a Philadelphia court in 2014, the same year *Led Zeppelin* released a newly remastered version of *Stairway to Heaven*. The venue was subsequently changed to California, incidentally to the same court that recently ruled in favour of the estate of Marvin Gaye in its copyright infringement lawsuit over the 2013 hit *Blurred Lines*, by Pharrell Williams and Robin Thicke.

*Led Zeppelin* then applied for a motion to summarily dismiss the case.

**THE RULING** On 8 April 2016, United States ("US") District Judge R Gary Klausner, ruled that lawyers for the trustee of Randy Wolfe had shown enough evidence to support a case that *Stairway to Heaven* was copied from *Taurus*. According to Klausner, the subjective assessment of the concept and feel of the two works is now a task for the jury to undertake. The fourteenth of June has been diarised for this task.

**THE FACTS** The indisputable facts are as follows, namely, that (a) *Spirit* recorded *Taurus* in 1967, whilst *Led Zeppelin* released *Stairway to Heaven* in 1971; and (b) both bands played together in Denver in 1968 and again at the *Atlanta International Pop Festival* in 1969. This begs the question: if members of *Led Zeppelin* had access to the music of *Spirit*, could they have copied the latter's material. However, *Led Zeppelin* claims that *Stairway to Heaven* was written in a remote cottage in Wales.

**THE LIMITATION** Many questioned the issue of limitation, bearing in mind that the suit was initiated 43 years after *Stairway to Heaven* was written, whilst the statute of limitations for copyright infringement states that action must be taken within three years after the claim accrued. However, that issue was overcome as *Stairway to Heaven* was re-released in 2014, resulting in the creation of a new master recording, and thus forwarding the clock.

**THE CLAIM** Wolfe's estate seeks compensatory damages, profits, statutory damages, punitive damages, exemplary damages, equitable and injunctive relief, halting of sales of the infringing material, and songwriting credit.

**DÉJÀ VU** Whilst fans of *Led Zeppelin* have cried foul over the allegations, others are walking down memory lane, pointing out that *Led Zeppelin* has been the subject of several other claims, involving songs such as *Babe, I'm Gonna Leave You*, *Whole Lotta Love*, and *Dazed and Confused*.

In 1985, songwriter Willie Dixon's estate sued *Led Zeppelin* over *Whole Lotta Love*, claiming it was an infringement of Dixon's song *You Need Love* (which was recorded by *Muddy Waters*). That case was settled out of court. Another case settled out of court was the infringement suit by singer and songwriter Jake Holmes over *Dazed and Confused*. It was alleged that Holmes had written and recorded his own *Dazed and Confused* two years before *Led Zeppelin* released theirs.

*Led Zeppelin's* history is definitely not encouraging.

**THE CHALLENGE** One of the main elements to prove in a copyright infringement suit is substantial similarity between the two pieces of work, bearing in mind that it is not the quantity, but the quality of the music that is the heart of the matter.

However, many who listened to both *Taurus* and *Stairway to Heaven* have been cynical, questioning the similarities, and pointing out the fact that *Taurus* is an instrumental, whilst *Stairway to Heaven* is littered with metaphoric lyrics.

Musicologists, on the other hand, claim that the gist of the case is the guitar riff, with Judge R Gary Klausner, ruling that 'whilst the descending chromatic four-chord progression is a common convention that abounds in the music industry, the similarities here transcend this core structure. The descending bass line is played at the same pitch, repeated twice, and separated by a short bridge in both songs'.

**CONCLUSION** Fans of *Led Zeppelin* may find it disconcerting that an iconic song which was probably instrumental in shaping their childhood is now the subject matter of intellectual property theft. The trial is fixed for 14 June 2016, and unless the case is settled before that, a 12-man jury panel will decide the fate of *Stairway to Heaven*.

Although the world of Rock and Roll is again divided, it must be highlighted that it has also been plagued with copyright suits. Those who are taking notes will remember musical battles between Joe Satriani and *Coldplay* over *Viva La Vida*, the estate of Marvin Gaye and Robin Thicke/ Pharrell Williams over *Blurred Lines*, and *The Chiffons* and George Harrison over *My Sweet Lord*.

Musicians on the receiving end of these allegations either absolutely deny the claim, or they claim that it could be a case of subconscious copying or subconscious plagiarism, also known as cryptomnesia. This is based on the theory that any impression created never leaves the brain and that the mind is sufficiently powerful to recall impressions of yesteryears. In the context of intellectual property, what is based on a new creation may in fact be a recollection of subconscious memories.

Whatever the defence by *Led Zeppelin* may be, its fans have to concede that the *Stairway to Heaven* is now a 'Stairway to Litigation'.

## INDUSTRIAL RELATIONS

**NEW MINIMUM WAGES LAW...** In Malaysia, the National Minimum Wages<sup>1</sup> initiative was first introduced and announced by the Malaysian Prime Minister, Dato' Seri Najib Tun Razak in his budget speech on 15 October 2010.

In this article we examine the development of the minimum wages law in Malaysia.

**BACKGROUND** The National Minimum Wages policy ("the Policy") is one of the Government's initiatives *vide* the New Economic Model which seeks to rectify the wage-setting mechanism for low-income workers. The Policy raised the basic wages of all employees to a minimum of MYR900 in Peninsular Malaysia and MYR800 in East Malaysia (comprising the States of Sabah, Sarawak and the Federal Territory of Labuan), and was extended to foreign workers, beginning 1 January 2014.

The Minimum Wages Order 2012 ("the previous Order") commenced on 1 January 2013 for employers with more than five employees, and 1 July 2013 for employers with five or fewer employees. At the same time, guidelines were issued by the National Wages Consultative Council in September 2012 to facilitate the enforcement of the previous Order.

**RECENT DEVELOPMENTS** In October 2015, the Malaysian Prime Minister (who is also the Finance Minister), in his Budget 2016 ("the Budget") speech, revised and announced a higher rate of minimum wages for employees in Peninsular Malaysia and East Malaysia. The changes are aimed at increasing the participation of local workers, thus reducing the dependence on foreign labour in Malaysia.

Following the passage of the Budget in November 2015, the Minimum Wages Order 2016 ("the current Order") was promulgated and will come into operation on 1 July 2016. Under the current Order, the monthly minimum wages rate payable to an employee in Peninsular Malaysia have been increased from MYR900 to MYR1000, while the monthly rate of minimum wages enjoyed by


<sup>1</sup> Minimum wages are basic wages excluding allowances and other payments.

employees in East Malaysia is now MYR920, from the previous MYR800. Once the current Order takes effect, the previous Order and its guidelines will be repealed.

**APPLICATION** The application of the current Order is extended to employees who are paid on the basis of piece rate, tonnage, task, trip, or commission. The minimum rate of monthly wages for such employees is now fixed at a minimum amount of MYR1000 for those in Peninsular Malaysia, and MYR920 for employees in East Malaysia. However, it shall be noted that the current Order does not apply to a 'domestic servant'<sup>2</sup> as defined in section 2 of the Employment Act 1955, section 2 of the Sabah Labour Ordinance, and section 2 of the Sarawak Labour Ordinance.

**CONCERNS** The increase in minimum wages has caused divergent views amongst market players. The Malaysian Employers Federation (MEF), citing grounds like economic slowdown, increased operation costs, and high retrenchment rate, has urged the Government of Malaysia to postpone the implementation of the current Order. The Malaysian Trades Union Congress (MTUC), on the other hand, refutes such claims, stating that the enforcement of the current Order will not contribute to retrenchment and closure of businesses. In fact, they argue that the increment would help employees cope with the cost of living and also serve as an incentive for employees to be more productive.

*"The government has reviewed all recommendations submitted by the National Wages Consultative Council (NWCC), and has taken a balanced approach and considered the interests of both employers and employees (before issuing the order)" - Human Resources Minister Datuk Seri Richard Riot.*

**CONCLUSION** Despite disagreements over the introduction of a higher rate of minimum wages, optimists say that the current Order will boost the income of Malaysians and improve the economy of the nation. 

<sup>2</sup> A 'domestic servant' refers to a person employed in connection with the work of a private dwelling-house and not in connection with any trade, business, or profession carried on by the employer in such dwelling-house and includes a cook, house-servant, butler, child's nurse, valet, footman, gardener, washerman, washerwoman, watchman, groom and driver or cleaner of any vehicle licensed for private use.

## LEGAL PROFESSION

### ARTIFICIAL INTELLIGENCE... THE RISE OF THE MACHINES?

On 16 May 2016 it was reported that a robot was hired for the first time by *BakerHostetler*, a United States-based law firm. The robot, christened *Ross*, after the pretend-lawyer character from the television series *Suits*, was invented in December 2014 by a group of law students from the University of Toronto. It was created using IBM's artificial intelligence technology. Just ask *Ross* a question, and it will convert billions of documents into snippets of answers for you!

In this article we examine the extent of the rise of artificial intelligence over human lawyers.

**THE BACKGROUND** Although human lawyers are still relevant despite the existence of *Ross* and other similar cousins he may have, lawyers have been advised to prepare for artificial intelligence ("AI"). After all, there are already circumstances where lawyers have in fact been usurped (although not replaced entirely) by algorithms.<sup>3</sup>

**AI IN LEGAL PRACTICE** Technology has, to some extent, resulted in the democratisation and disaggregation of legal services. There are already online platforms provided by companies, which allow clients to use non-conventional law firm structures to receive deliverables at a lower price, resulting in specific lawyering areas to be replaced. Examples of these new delivery models may be seen in services provided by companies such as *LegalZoom* and *Rocket Lawyer* in the United States ("US"), *LawCanvas* in Singapore and more recently, the proposed *DIYLaw* in Malaysia.

Although such services proclaim that they do not provide legal representation, are not law firms, and are not a substitute for a lawyer or law firm, they essentially provide the deliverables that lawyers do, including contracts, wills and other legal documents. In fact it has been predicted that technology may minimise the need for people to use the court system at all. This would mean some aspects of lawyering will be replaced in future. An influx of non-lawyer service providers in the legal market is something that is already in existence, and a balance, therefore, must be maintained between minimising the cost of the replaceable parts for

legal service consumers, whilst maximising the cost of the irreplaceable parts. Thus, if there are parts of a lawyer's tasks that could be standardised or commoditised, especially grunt work that could be churned out without significant lawyer involvement, then that should be done. Law firms may have to rethink how they price their services, and attach premium charges only to bespoke or complicated matters. That may be one way for lawyers to future-proof their careers, and stay relevant in light of the gaining momentum of artificial intelligence.

**THE LIMITATIONS** However, despite what technology may offer, there are limitations in democratising legal services. Firstly it is crucial to note that the legal profession in Malaysia is governed by the Legal Profession Act 1976 which in itself prohibits an unauthorised person from acting as an Advocate and Solicitor. Therefore, although platforms offering 'do-it-yourself' services may be useful to lawyers themselves, self-lawyering may not be the imminent future.

Secondly, some legal issues are more complicated than others. Lawyers themselves frequently find it difficult to detangle all legal knots. Having a 'one-size-fits-all' document or template, therefore, may be ill-apt, and could lead to more legal complications and risks, making it a time, money and energy-consuming exercise.

Thirdly, the level of legal literacy in Malaysia is relatively low in comparison to countries such as Singapore, United Kingdom or even the US. Lay persons, therefore, may not understand the implications and ramifications of their own conduct, and as a result, subscribing to these services may cause more harm than good.

Fourthly, technology will never be able to provide the type of guarantee offered by a competent lawyer, resulting in a gap between man and machine. Lawyers are heavily regulated after having passed strict training criteria, and upon violation of any rule or regulation, will be subjected to disciplinary proceedings, and the appropriate sanction. This in itself provides some guarantee to the client.

**CONCLUSION** Lawyers, therefore, still appear to be part of the necessary structure. Technology should not be viewed as a panacea, and it is unlikely that the need for substantial human input will be completely driven out. ☁

<sup>3</sup> See for instance *Lex Machina* which is used to predict the outcome of patent lawsuits.



## BANKING/ COMMERCIAL TRANSACTIONS

**WE ARE CLOSED... FOR BUSINESS** The phrase 'close of business' or 'COB' is so frequently used in the business world, and is a global term in documents, contracts and agreements, but what exactly does the phrase mean? When exactly does business close?

We examine this phrase in light of the Irish case of *McCann v Haplin & Anor*<sup>4</sup> wherein 'close of business' was considered in the context of the appointment of a Receiver by the bank.

**WORKING 9 TO 5?** It is generally understood that normal working hours of relevant businesses is typically from 9am to 5pm. However, would the same apply to other business sectors with longer working hours? What about multi-national companies that watch the clock in different time zones?

**THE FACTS** The appellants were directors of two companies, Elektron and Crossplan ("the Companies") respectively while the respondent was a receiver ("the Receiver") appointed by the Irish Bank Resolution Corporation Limited ("the Bank"). In 2002, Elektron took a loan with the Irish Nationwide Building Society ("the Society") which was subsequently succeeded by the Bank. Under the terms of the Offer Letter, the Companies shall authorise the Bank to appoint a receiver to enforce the security when the monies became payable.

**THE DISPUTE** Elektron defaulted in repayment. A letter of demand was issued. The Bank had then notified the appellants that they would appoint the Receivers unless payment was received for the mortgages "by close of business on 17 February 2012". Payment however was not made and the Receiver was appointed at 4pm on the same day.

**THE ARGUMENTS** The appellants argued that the appointment of the Receiver was invalid since the relevant letters of demand had stated that if the monies were not received by "close of business", the Bank was entitled to proceed

to enforce its security and that 4pm was not the normal understanding of "close of business" which therefore deemed the appointment of the Receiver as premature.

**THE ISSUE** The only issue before the Supreme Court is whether the receiver was validly appointed.

**THE DECISION** The High Court decided that the appointment of the Receiver on 17 February 2002 at 4pm was valid. Aggrieved, the appellants appealed. In dismissing the appeal, the Supreme Court upheld the decision of the trial judge and held that the Receiver was validly appointed.

**MEANING OF 'CLOSE OF BUSINESS'** This is because since there are no interpretation of the phrase 'close of business' in any statutory provision or authority, the phrase had to be given its ordinary meaning, which would be interpreted in the particular context it was used. The context in the present case is in a banking context, where the relationship is that of a bank and a bank customer, thus 'close of business' must be interpreted as the end of the banking business day which is when banks would traditionally and normally close their doors to customers, i.e. 10am to 4pm. It is unreasonable to conclude 'close of business' to mean 5pm or 5.30pm merely on the ground that the bank staff were still working at the Bank.

The phrase 'close of business' is not a term of art... Neither is it a phrase which a definition is provided in the [statute], or even in any of the standard texts on statutory interpretation, or the meaning of words and phrases. ... Close of business for a pub or a restaurant might be midnight or even later, just to take a very simple example. Nevertheless one thinks of so-called normal business hours as being 9am to 5pm, but business vary in nature, and for some businesses normal business hours are different, and therefore 'close of business' will not necessarily be 5pm or 5.30pm. What is 'close of business' in any particular case will depend upon the nature of the business in question. It is a flexible phrase to be seen in any particular context: Justice Laffoy.

<sup>4</sup> [2016] IESC 11.

**LEGAL PROFESSION** – Admission as *Syarie* lawyer – Whether a non-Muslim Advocate and Solicitor may be admitted as *Syarie* lawyer – Administration of Islamic Law (Federal Territories) Act 1993, sections 59(1) and (2) – Peguam *Syarie* Rules 1993, rule 10 – Federal Constitution, articles 5, 8, and 10

**MAJLIS AGAMA ISLAM WILAYAH  
PERSEKUTUAN V VICTORIA JAYASEELE  
MARTIN** [2016] 4 CLJ 12, Federal Court

**FACTS** The appellant, a body incorporated under the Administration of Islamic Law (Federal Territories) Act 1993 (“the Act”), was empowered to admit *Syarie* lawyers. The respondent was a non-Muslim Advocate and Solicitor of the High Court of Malaya holding a Diploma in Syariah Law and Practice, who had applied to the appellant for admission as a *Syarie* lawyer. Her application was rejected on the ground that she was not a Muslim, a condition provided in rule 10 of the Peguam *Syarie* Rules 1993 (“the Rules”). Her application for judicial review was dismissed. Upon appeal, the Court of Appeal overruled the decision of the High Court. Aggrieved, the appellant appealed to the Federal Court.

**ISSUES** The issues for consideration were whether the condition that only a Muslim may practise as a *Syarie* lawyer imposed in rule 10 is *ultra vires* section 59(1) of the Act, and whether it contravened articles 5<sup>5</sup>, 8<sup>6</sup> and 10<sup>7</sup>(1)(c) of the Federal Constitution.

**HELD** In allowing the appeal, it was held that the word “qualifications” in section 59(2) of the Act was deemed wide enough, rule 10 of the Rules mandating that only Muslims may practise as a *Syarie* lawyer is not *ultra vires* the Act. It was also held that Rule 10 of the Rules did not contravene articles 5, 8, and 10(1)(c) of the Federal Constitution as the respondent was not deprived to practise as an Advocate and Solicitor in the Civil Court, the condition was deemed necessary in achieving the object of the Act and that the respondent could not force her application to be accepted. Further it was held that a *Syarie* lawyer who professed the religion of Islam was important to achieve the object of the Act. ✂

<sup>5</sup> Right to life.

<sup>6</sup> Right to equality.

<sup>7</sup> Freedom of association.

**EVIDENCE** – Privilege – Legal Profession – Leak of privileged information – Application to expunge – Whether leaked information should be expunged – Application of the (Singapore) Evidence Act – (Singapore) Evidence Act section 2

**HT SRL V WEE SHUO WOON**  
[2015] SGHC 15, Singapore High Court

**FACTS** The plaintiff company sued the defendant, its former employee in the present suit, for breach of his employment contract. After the commencement of the suit, the computer systems of the plaintiff were hacked, and emails containing legal advice were uploaded onto the Internet. Such emails contained an express proviso that they contained privileged and confidential information. Although there was no evidence to show that the defendant was involved in the hacking, he subsequently accessed those emails, using them in his application to strike out a bulk of the plaintiff’s claims. The emails were exhibited in the defendant’s affidavit in support of his application. The plaintiff applied for an order to expunge all references to such emails. The application to expunge was allowed by the Assistant Registrar. Dissatisfied, the defendant appealed.

**ISSUES** The issues to be decided were (i) whether the present case was governed by the (Singapore) Evidence Act (“EA”); (ii) whether the common law provided any basis to grant the prayer to expunge; and (iii) whether the emails should be expunged.

**HELD** In dismissing the appeal, the High Court held that the EA did not apply as subsection 2(1)<sup>8</sup> states that the EA is limited to judicial proceedings only and did not extend to evidence in affidavit. However, subsection 2(2)<sup>9</sup> of the EA allowed the common law rules of evidence to be applied, provided that such rules were consistent with the EA. It was decided by the court that confidentiality was the legal basis to have the emails expunged. The emails were protected by the law of confidence in this case, considering the plaintiff’s interests in the privileged information, the circumstances surrounding the information leak as well as the manner in which the defendant came into possession of such documents. ✂

<sup>8</sup> Subsection 2(1) of the (Singapore) Evidence Act (Chapter 97) is similar to section 2 of the Malaysian Evidence Act 1950.

<sup>9</sup> There is no equivalent of subsection 2(2) of the (Singapore) Evidence Act (Chapter 97) in the Malaysian Evidence Act 1950.

## AMENDMENT ACTS

### EMPLOYEES' SOCIAL SECURITY (AMENDMENT) ACT 2016

*National Language*

**Akta Keselamatan Sosial Pekerja (Pindaan) 2016**

No

**A1508**

*Date of coming into operation*

**1 June 2016**

*Notes*

The highlight of the amending Act is the introduction of section 74A which enables the Social Security Organisation to establish or take over companies incorporated under the Companies Act 1965 upon obtaining necessary ministerial approvals.

### EMPLOYEES PROVIDENT FUND (AMENDMENT) ACT 2016

*National Language*

**Akta Kumpulan Wang Simpanan Pekerja (Pindaan) 2016**

No

**A1504**

*Date of coming into operation*

**1 April 2016 for sections 2, 4, 12, 16, 19, 23 and paragraphs 24(b) and (c).**

*Notes*

The highlight of the amending Act is the introduction of section 69A on the application of the Public Authorities Protection Act 1948 against any actions commenced against the member, officer, and servant of the Employee Provident Fund Board ("the Board"), the Investment Panel and the Committee of the Board.

## SUBSIDIARY LEGISLATION

- Minimum Wages Order 2016 (PU(A) 116/2016) – *Effective Date: 1 July 2016*
- Loans Guarantee (Bodies Corporate) (Remission of Tax and Stamp Duty) Order 2016 (PU(A) 92/2016) – *Effective Date: 13 April 2016*

### GUIDELINES/RULES/CIRCULARS/ DIRECTIVES AND PRACTICE NOTES ISSUED BETWEEN APRIL AND JUNE 2016 BY BANK NEGARA MALAYSIA, BURSA MALAYSIA AND SECURITIES COMMISSION MALAYSIA

## BANK NEGARA MALAYSIA (BNM)

- BNM Guidelines on Compliance – *Date issued: 10 May 2016*
- BNM Guidelines on Operational Risk – *Date issued: 10 May 2016*
- BNM Concept Paper on Corporate Governance – *Date issued: 20 April 2016*
- BNM Discussion Paper on Microinsurance and Microtakaful – *Date issued: 18 April 2016*
- BNM Concept Paper on Wa'd – *Date issued: 11 April 2016*

## BURSA MALAYSIA

- Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd In Relation to the Introduction of Margin on Trading Clearing Participants – *Effective Date: 20 June 2016*
- Amendments to the Rules of Bursa Malaysia Depository Sdn Bhd Consequential to the Amendments to the Rules of Bursa Malaysia Securities Clearing Sdn Bhd relating to Margin – *Effective Date: 20 June 2016*

- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to Margin Financing for Foreign Securities – *Date issued: 13 May 2016*
- Consolidated Rules of Bursa Malaysia Securities Bhd – *Date issued: 13 May 2016*
- Consolidated Main Market Listing Requirements – *Date issued: 3 May 2016*
- Consolidated ACE Market Listing Requirements – *Date issued: 3 May 2016*
- Consolidated Rules of Bursa Malaysia Securities Clearing Sdn Bhd – *Date issued: 3 May 2016*
- Consolidated Rules of Bursa Malaysia Depository Sdn Bhd – *Date issued: 3 May 2016*
- Consolidated Rules of Bursa Malaysia Derivatives Clearing Bhd – *Date issued: 3 May 2016*

## SECURITIES COMMISSION MALAYSIA

- Guidelines on Recognised Markets – *Effective date: 2 May 2016*

### WORD OF THE BRIEFCASE...

#### **pro bono:**

It originates from the phrase '*pro bono publico*', a Latin phrase which means '*for the public good*'. The phrase '*pro bono*' means '*legal work undertaken without charges*'.

Examples of *pro bono* in a sentence: -

1. Despite a tight work schedule, he also offers *pro bono* services to the community.
2. Lawyers who engage in *pro bono* work donate their time and expertise to defend the rights of the others in the community.

The BriefCase is published for the purposes of updating its readers on the latest development in case law as well as legislation. We welcome feedback and comments and should you require further information, please contact the Editors at:

[look@zulrafique.com.my](mailto:look@zulrafique.com.my)

You may also access the BriefCase at [www.zulrafique.com.my/index.php/knowledge/look](http://www.zulrafique.com.my/index.php/knowledge/look)

This publication is intended only to provide general information and is not intended to be, neither is it a complete or definitive statement of the law on the subject matter. The publisher, authors, consultants and editors expressly disclaim all and any liability and responsibility to any person in respect of anything, and of the consequences of anything, done or omitted to be done by any such person in reliance, whether wholly or partially, upon the whole or any part of the contents of this publication.

All rights reserved. No part of this publication may be produced or transmitted in any material form or by any means, including photocopying and recording or storing in any medium by electronic means and whether or not transiently or incidentally to some other use of this publication without the written permission of the copyright holder, application for which should be addressed to the Editors.

The contributors for this **BriefCase** are:

- *Mariette Peters*
- *Amylia Soraya*
- *Foo Yuen Wah*

Publisher:  
**ZUL RAFIQUE & partners** Consultancy Sdn Bhd  
D3-3-8, Solaris Dutamas, No.1, Jalan Dutamas 1  
50480 Kuala Lumpur, Malaysia

Printer:  
**Enviropress Sdn Bhd**  
No.48, Jalan PBS 14/4, Taman Perindustrian Bukit Serdang,  
43300 Seri Kembangan, Selangor Darul Ehsan, Malaysia