

THE BRIEF *Case*

ZUL RAFIQUE & partners wins Real Estate Law Firm of the Year
at the ALB Malaysia Law Awards 2018



The Corporate Real Estate Practice Group:
Seated from left: **Ainal Marlinda Md Said**, **Tang Ai Leen**, **Leong May Ling**
Standing from left: **Lee Kah Ling**, **Neo Yong Keng**, **Erna Farhana Hamzah**,
Tan Chu Liang, **Connie Ho Suk Mun**, **Amanda Chu Siu Wyei** and **Chee Lai Yi**

ASIAN LEGAL BUSINESS
**MALAYSIA
LAW AWARDS 2018**

Winner





A BRIEF NOTE...

by Dato' Zulkifly Rafique

Continual growth and progress...

It has been a great year for **ZUL RAFIQUE & partners**. We had won the **Asia Deals of the Year 2017** by *Asia Business Law Journal* for the Maxis Broadband Sdn Bhd unrated Islamic Medium Term Notes Programme. We also received two awards in the recent *Asian Legal Business* (ALB) Malaysia Law Awards 2018 ceremony held in Kuala Lumpur, on 22 March 2018.

We were named **Real Estate Law Firm of the Year** and had also won the **Debt Market Deal of the Year (Premium)** for our involvement in the PNB Merdeka Ventures Sdn Bhd's Sukuk Programme. I would like to congratulate the Corporate Real Estate team as well as the Banking & Finance team for their contributions and achievement.

At **ZUL RAFIQUE & partners**, we place much importance on the quality of our services and constantly strive to better ourselves in the best interest of our clients.

As said by Benjamin Franklin, "Without continual growth and progress, such words as improvement, achievement, and success have no meaning".

With that said, we hope you enjoy this issue of the BriefCase, and to all our Muslim friends, *Salam Aidilfitri, Maaf Zahir dan Batin*.

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- **ZUL RAFIQUE & partners WINS ALB MALAYSIA LAW AWARDS 2018**

ZUL RAFIQUE & partners has won the Asian Legal Business Law Awards 2018 as Real Estate Law Firm of the Year and Debt Market Deal of the Year (Premium). 🌀

- **BOND TRADING RULES TO BE LIBERALISED**

The Securities Commission Malaysia (SC) will liberalise its regulatory rules to allow greater retail access in the corporate bond and *sukuk* market in Malaysia. This would involve, among others, the review of issuance processes in the primary market and its disclosure requirements, the introduction of a "Seasoning Framework" in the secondary market to facilitate retail access to existing corporate bonds and *sukuk*, and the establishment of Bond+Sukuk Information Exchange (BIX), a centralised bond and *sukuk* information centre. 🌀

- **CRYPTOCURRENCY EXCHANGES AS REPORTING INSTITUTION**

The Central Bank of Malaysia has announced that cryptocurrency exchanges will be deemed as reporting institutions under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA) and will be required to provide detailed information on the traders of cryptocurrencies from 2018. AMLA also requires the reporting institutions to undertake preventive measures to prevent their institutions from being used as a medium for money laundering and financing terrorism activities. 🌀

- **EMPLOYMENT INSURANCE SYSTEM ACT 2017 ENFORCED**

The Employment Insurance System Act 2017 ("the Act") came into effect on 1 January 2018. The Act provides for the Employment Insurance System administered by the Social Security Organisation to provide for certain benefits and a re-employment placement programme for insured persons in the event of loss of employment. 🌀

- **FC: INTENTION MUST BE PROVEN IN SEDITION CASE**

The Federal Court in *Kerajaan Malaysia v Mat Shuhaimi Shafiei* has quashed a Court of Appeal decision, ruling that intention must be proven in every sedition case. This would

mean that section 3(3) of the Sedition Act 1948 is valid, where conviction is warranted once it is proven that seditious statements were made by the accused. 🌀

- **GST RATE REDUCED TO ZERO STARTING**

JUNE The Finance Ministry has announced that the Goods and Services Tax (GST), which was charged at the standard rate of six per cent will be reduced to zero rate commencing from 1 June onwards. This however does not include the goods and services listed in the Goods and Services Tax (Exempt Supply) Order 2014 which will remain to be exempted from GST. 🌀

- **KLRCA RENAMED AIAC**

The Kuala Lumpur Regional Centre for Arbitration (KLRCA) has been officially renamed as the Asian International Arbitration Centre (Malaysia) (AIAC) effective 28 February 2018. 🌀

- **NEWLY LAUNCHED MALAYSIAN**

JUDGMENT PORTAL The Malaysian public now has access to Malaysian court judgments online free of charge via the newly launched Malaysian Judgment Portal, www.judgements.my. The portal is the initiative of the Malaysian Judiciary, together with the ASEAN Legal Information Centre and the Malaysian Law Deans' Council. 🌀

- **RIGHT TO BE HEARD FOR HOUSE BUYERS**

The Court of Appeal in a landmark decision held that house buyers have the right to be heard before developers are given more time to complete their project. There have been calls for the law to be amended to ensure developers consider the views of the buyers before they apply for an extension of time. 🌀

- **UNILATERAL CONVERSION OF CHILDREN DECLARED NULL AND VOID**

The Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*, has nullified the conversion of her three children to Islam by her ex-husband. It was ruled that consent of both parents must be sought and that the word "parent" under Article 12(4) of the Federal Constitution cannot be construed literally. 🌀

AROUND THE WORLD... IN-BRIEF

- **AUSTRALIA: UNSENT TEXT VALID WILL** The Brisbane Supreme Court has ruled that the unsent text composed by a dead man as his official will. Justice Susan Brown stated that the wording of the text message, which ended with the words "my will", indicated that he intended it to act as his will. In the message, the deceased instructed for his ashes to be kept in the back garden, and also provided the details of his bank account and the hidden money in his house.
- **AUSTRALIA: NEW LAWS AGAINST CORPORATE CRIME** Australian companies will be held responsible for bribery committed by employees and contractors under the new laws which aims to combat corporate crime. The new laws make investigating and prosecuting offenders simpler while strengthening offences for companies operating offshore. Incentives will also be provided for firms to come forward and work with government agencies.
- **EU: LIONEL MESSI TRADEMARKS OWN NAME** The General Court of the European Union has ruled that Lionel Messi, one of the world's top earning footballer, can trademark his own name, "MESSI" for sports equipment and clothing. The trademark was previously challenged by the Spanish cycling brand, Massi. It was held that he is too famous to be confused with other businesses.
- **GERMANY: NETZDG LAW ENFORCED** The Netzwerkdurchsetzungsgesetz (NetzDG) law ("the Law"), a statute requiring social media sites to remove hate speech, fake news, and illegal material, has come into force in October 2017. The Law requires social networks and media sites to act within 24 hours after they have been notified about offensive and illegal materials, and to put in place a comprehensive complaints structure to enable effective reporting. The violation and non-compliance to the Law would warrant fines of up to EUR50 million.
- **INDIA: "LIVING WILLS" FOR TERMINALLY ILL** India's Supreme Court has ruled that terminally ill patients are allowed to draw up "living wills", which sets out a person's wishes regarding how they want to be treated if they are seriously ill. This effectively allows the practice known as passive euthanasia whereby medical treatment can be withdrawn to hasten a person's death.
- **INDIA: REFUSAL TO ALLOW ENTRY FOR FOREIGN LAW FIRMS** The Supreme Court of India has refused to allow entry of foreign law firms in India to practice law in court. It was held that foreign lawyers can only advise their clients in India on foreign laws on a temporary "fly in, fly out basis". This essentially means that only lawyers registered with the Bar Council of India and governed by the Advocates Act are allowed to practice law in India and that foreign law firms are not allowed to set up permanent offices in the country.
- **SINGAPORE: BAR FOR DUAL-CLASS SHARE LISTINGS LOWERED** The Singapore Stock Exchange (SGX) plans to allow firms with an expected market capitalisation of SGD300 million to list with dual-share class, compared to the earlier proposed minimum of SGD500 million. Other proposals include safeguards against expropriation and entrenchment risks. In order to address those risks, the SGX will require shareholders to vote via an enhanced voting process and to allow each multiple vote share to carry a maximum of 10 voters, and limiting initial holders of multiple vote shares to only directors.
- **SINGAPORE: CYBERSECURITY ACT 2018** The Singapore Cybersecurity Bill was passed on 5 February 2018 and has received the President's assent on 2 March 2018. The Cybersecurity Act 2018 aims to establish a legal framework for the oversight of national cybersecurity in Singapore, emphasising on the designation and protection of critical information infrastructure.

- **SINGAPORE: PUBLIC ORDER AND SAFETY (SPECIAL POWERS) ACT** The Public Order and Safety (Special Powers) Act (POSSPA) has come into force on 16 May 2018. POSSPA gives the police more powers in dealing with serious incidents including terrorist attacks. Under POSSPA, a “communications stop order” may be issued which effectively prevents the public and media from taking videos, pictures, audio recordings, or text messages that may compromise the ongoing security operations. 🌀
- **SINGAPORE: SENTENCING FRAMEWORK FOR MAID ABUSE CASES** The Singapore High Court has laid out a sentencing framework for maid abuse cases. Under the framework, the court will determine whether the harm caused to the victim was predominantly physical, or both physical and psychological. The indicative prison sentencing range for a charge involving less psychological harm but more serious physical harm is between six and 18 months. However, if it involves both psychological and physical harm, the range is between 20 and 30 months in prison. 🌀
- **SINGAPORE: THE VULNERABLE ADULTS ACT** The Singapore Parliament has passed the Vulnerable Adults Act (“the Act”) on 18 May 2018. The Act aims to protect seniors and people with disabilities from abuse and neglect. Under the Act, officials from the Ministry of Social and Family Development are allowed to enter private premises to assess a person’s well-being and to relocate such vulnerable adults to safe places, such as shelters and disability homes. 🌀
- **UK: GOOGLE LOSES ‘RIGHT TO BE FORGOTTEN’ CASE** A businessman has won his legal action against Google in a landmark ‘right to be forgotten’ case. The UK High Court has ordered Google to remove search results of the man’s past criminal convictions. The ‘right to be forgotten’ is a concept in European law that allows people to request information about themselves to be removed from the internet on the basis that it is no longer relevant. 🌀
- **UK: SOLICITORS LIABLE IN PROPERTY FRAUD CASE** In a landmark decision, the Court of Appeal in *Dreamvar (UK) Limited v Mishcon de Reya* held that both the buyer’s and the seller’s solicitors liable to the innocent buyers for the damages arising from a fraudulent property transaction. 🌀
- **UK: UNMARRIED WOMAN WON SUIT FOR BEREAVEMENT DAMAGES** The Court of Appeal has allowed an appeal of a woman who was denied bereavement damages when her partner, with whom she had a long term relationship with, died due to medical negligence. Currently, a fixed sum of bereavement damages is only available for the spouses or civil partners of a person who dies due to negligence. The ruling is significant as it provides better rights and protection for unmarried individuals that lose their long-term partners. 🌀
- **US: BITCOIN TRADING APPROVED** A US Regulator, the Commodity Futures Trading Commission, has approved two traditional exchanges, CME Group and CBOE Global Markets, to begin trading in Bitcoin-related financial contracts. 🌀
- **US: MONKEY LOSES APPEAL IN SELFIE CASE** A US Appeals Court has ruled against the People for the Ethical Treatment of Animals (PETA) stating that lawsuits cannot be filed claiming animals have copyright to photos. PETA had initially filed a lawsuit on behalf of a macaque monkey seeking to declare the monkey as the author and owner of the photograph. 🌀
- **US: WORLD’S FIRST BLOCKCHAIN-BASED NATIONAL SECURITIES EXCHANGE** CryptoSecurities Exchange LLC (CSX) will be the world’s first fully transparent, code-regulated, blockchain-based National Securities Exchange registered with the United States Securities and Exchange Commission (SEC). The company will operate under the state of Delaware’s new cryptosecurities law which allows stock to be digitised and transferred electronically via a distributed shareholder register in a blockchain-based private network. 🌀

CORPORATE

CRYPTOCURRENCIES AND ICOS...

Cryptocurrencies and Initial Coin Offerings (ICO) have hit both local and international news headlines since last year. The fluctuating graph of *Bitcoin* value, the banning of ICO by the world's second largest economy – China, as well as the ban introduced by *Facebook* on the advertisements of cryptocurrencies and ICO really stirred investors up. In this article, we share with our readers on the legal position of cryptocurrencies and ICO in Malaysia.

BACKGROUND The emergence of cryptocurrencies and Initial Coin Offerings (ICO) has generated hypes and craze worldwide. Domestically, the Central Bank of Malaysia, also known as *Bank Negara Malaysia* (BNM) reported that the cryptocurrency transactions on four digital currencies exchanges is worth an average of MYR75 million each month in Malaysia.

CopyCash Foundation, a Singapore-based blockchain¹ startup has attempted to launch an ICO in January 2018. The launch had resulted in a heated discussion on the legitimacy of ICO when the Securities Commission Malaysia (SC) issued a Cease and Desist Order to the startup that put a halt to the launch. In light of the recent developments, one might be concerned about the legality of such instrument and arrangement in Malaysia.

CRYPTOCURRENCIES Cryptocurrencies, commonly referred to as digital currency, in which encryption techniques are used to regulate the generation of units of currency and verify the transfer of funds, operates independently of a central bank. In Malaysia, digital currency is legally defined as a digital representation of value that functions as a medium of exchange and is interchangeable with any money, including through the crediting or debiting of an account, but does not include electronic money issued by an approved issuer of electronic money under the Financial Services Act 2013 and the Islamic Financial Services Act 2013².

In 2014, BNM issued a statement declaring that cryptocurrencies are not recognised as legal tender in Malaysia. However, the trading of cryptocurrencies is not banned in Malaysia. In order to promote greater transparency in the use of cryptocurrencies and to prevent the use of cryptocurrencies for money laundering or terrorism financing, digital currency exchanges will be subject to obligations under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001 (AMLA) as a reporting institution pursuant to the First Schedule of AMLA.

“Basically, we are going to make the promoter of the cryptocurrency, which include bitcoin, ethereum and ripple, to be more transparent, the methodology transparent and the people behind it transparent too. Hopefully, by doing this, the people can make their decision on whether to invest in cryptocurrency.” - Tan Sri Muhammad Ibrahim, former Governor of the Central Bank of Malaysia.

A reporting institution under AMLA³ is defined as any person who provides any or a combination of the following services: (i) exchanging digital currency for money; (ii) exchanging money for digital currency; or (iii) exchanging one digital currency for another digital currency, regardless of whether in the course of carrying on a digital currency exchange business, or otherwise. It is irrelevant that the person is not domiciled in Malaysia when providing the aforesaid services⁴.

The minimum requirements and standards to be observed by reporting institutions under AMLA have been set out in the policy document⁵ (“the Document”), which came into effect on 27 February 2018. The stipulated obligations of a reporting institution under the Document, among others, is to take appropriate steps to assess their money laundering or terrorist financing risks (“Risks”), have policies to manage and mitigate the identified Risks, to conduct risk profiling on their customers, perform customer due diligence, identify and assess Risks that arise in the development of new digital currencies, products, services and business practices.

¹ A system in which a record of transactions made in bitcoin or another cryptocurrency are maintained across several computers that are linked in a peer-to-peer network.

² Paragraph 6 of the Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6)

³ Paragraph 25(1) of the First Schedule to Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001

⁴ Paragraph 4.2 of Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6)

⁵ Anti-Money Laundering and Counter Financing of Terrorism (AML/CFT) – Digital Currencies (Sector 6)

INITIAL COIN OFFERINGS According to BNM, ICO is “the offering of digital token in exchange for digital currency or any form of payment and incidental activities thereof”. ICO is also known as initial token offerings, token pre-sale, and token crowd-sale. SC observed that ICO may be structured in various forms, which include direct investments in projects which enable the investors to have a share of the returns from the projects, seeking funding through foundations where the investors are not entitled to any returns on their investment, and issuance of tokens which allow the investors to enjoy rights to a future product or service.

ICO has attracted the interest of venture capital companies. This is because ICO is a cost effective and faster option to raise funds, as it does not have to fulfill stringent regulatory processes. Similar to an Initial Public Offering (IPO), an ICO is a fundraising platform for companies, but using blockchain technology. In an ICO, a whitepaper, the equivalent of prospectus in an IPO which provides details on the purpose of the raised funds, will be issued. The difference between an IPO and an ICO is that companies issue cryptocurrencies in an ICO, instead of shares in an IPO, at a specified value to the investors. Further, investors in an ICO will not have an equity interest, unlike in an IPO. Thus, an ICO investor will not have any legal claim on the companies' assets in the event of liquidation.

In Malaysia, SC and BNM in a joint statement issued in January 2018, has cautioned that the launching of ICOs, without proper authorisation, is an offence in Malaysia. This is because such an act involves regulated activities that fall within the purview of laws administered by SC and the Bank. Although a comprehensive and clear regulation framework for ICO in Malaysia is yet to be issued by SC and BNM, the SC and BNM established a Brokerage Industry Digitisation Group (BRIDGE) to accelerate and review digitisation of the stockbroking industry.

CONCLUSION The regulation of cryptocurrencies and ICO in Malaysia is in its infancy. As the regulation of ICO is lacking, investors are reminded to be prudent with the associated risks of ICOs, especially since some of the ICO structures might limit the legal recourse available to the investors. ICO operators are advised to seek legal consultation as no person is allowed to carry out regulated activities such as, fund raising, fund management, and other dealings in capital market products without first obtaining SC's approval.

TORT

MEDICAL NEGLIGENCE – A NEW TEST

In a landmark decision, the Singapore Court of Appeal in the case of *Hii Chii Kok v Ooi Peng Jin London Lucien and another*⁶ has adopted a new legal test in determining whether a doctor has been negligent in dispensing medical advice.

In this article, we examine the facts, issues, and rulings of the case.

INTRODUCTION Medical law is an expanding legal field, evolving with the times. Doctors were previously thought to know best, leaving patients with little or no say in the choice of treatments. However, access to knowledge, medical or otherwise, has seen a change in the nature of the doctor-patient relationship, with more emphasis given to patient autonomy. This landmark decision, in an attempt to strike a balance between both interests, has modified the *Montgomery* test and adopted a new three-stage test in determining the standard of care expected from a doctor in giving medical advice to his patients.

THE FACTS In 2013, the appellant, Tan Sri Clement Hii Chii Kok (“the Patient”) was found to have pancreatic lesions which were diagnosed to be tumours. Several treatment options were presented and surgery for the removal of the pancreatic lesions was decided. Post-operative findings showed that the Patient’s pancreas had a hyperplasia and not tumours. Nevertheless, the Patient recovered well after surgery and was discharged from the hospital. The Patient subsequently developed complications and had to undergo further consultations and operations. After being discharged, the Patient brought a claim against his surgeon, Professor Ooi Peng Jin London Lucien (“Dr Ooi”) and the National Cancer Centre of Singapore Pte Ltd (“NCCS”) (“the Respondents”) for negligence.

THE ISSUES The main issues discussed were (i) what the applicable test(s) is/are in relation to the assessment of the standard of care in medical negligence, and (ii) whether the Respondents fell below that standard of care.

⁶ [2017] SGCA 38

THE DECISIONS The High Court dismissed the claim in its entirety. The Court of Appeal agreed with the decision of the High Court and held that the applicable standards in relation to the entirety of the Respondents' interaction with the Patient were not breached.

RATIO DECIDENDI (THE REASONING) Medical care is broadly divided into three aspects, namely, (i) diagnosis, (ii) advice, and (iii) treatment. The Singapore Court of Appeal had decided to depart from the *Bolam*⁷ test (supplemented by the *Bolitho*⁸ addendum) in determining the standard of care required from a doctor in dispensing medical advice and had, instead, adopted a new three-stage test, a modified version of what is known as the *Montgomery*⁹ test. The standard of care for the duty of diagnosis and treatment however remains the same.

The applicable tests

Bolam test The *Bolam* test states that a doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in the particular art, even if there is a body of opinion who would take the contrary view.

Bolitho addendum The *Bolam* test was later supplemented in *Bolitho*. The *Bolitho* addendum required that the body of opinion relied upon must also satisfy a threshold test of logic, failing which the court could disregard that body of opinion.

The Montgomery test The *Montgomery* test provided that, in addition to risks or alternative treatments which a reasonable patient in a similar position would wish to know of, the doctor is also expected to advise the patient as to risks or alternative treatments which the specific patient would in fact have wished to know of for reasons known, or which should have been known, to the doctor. However, the exceptions for withholding such information are, (i) if disclosure would be seriously detrimental to the patient's health, or (ii) necessity.

The Modified Montgomery test ("the New Test")

The New Test, formulated by the Singaporean Court of Appeal, consists of three stages, namely (1) sufficiency of information, (2) possession of information, and (3) justification for withholding information.

Stage 1 – Sufficiency of information


The patient must identify the exact nature of the information ("Information") that he alleged was not given to him and establish why such Information would be regarded as relevant and material. Doctors are expected to disclose (a) relevant and material information to a reasonable patient situated in the particular patient's position, or (b) information that a doctor knows is important to the particular patient in question. The question of whether such information is reasonable material is one that is measured by common sense.

Stage 2 – Possession of information

The court will determine on whether the doctor was in possession of the Information. The question would be whether the doctor ought to have ordered the relevant tests or apprised himself of the medical knowledge, which would have furnished him with the information.

Stage 3 – Justification for withholding information

The court must be satisfied that the non-disclosure was justified having regard to the doctor's reasons for withholding information and to consider whether it was a sound judgment having regard to the standards of a reasonable and competent doctor. Three exceptions however may justify the withholding of such information, namely, (i) waiver¹⁰, (ii) emergency situation¹¹, and (iii) therapeutic privilege¹².

CONCLUSION Although several concerns has been raised claiming that the decision would lead to a number of issues including the increase in the cost of healthcare, frequency of litigation, as well as the practice of defensive medicine on the part of the doctors, it would seem that the decision would give rise to a more collaborative relationship between doctors and patients, striking a healthy balance between the interests of both patient and doctor. 

⁷ *Bolam v Friern Hospital Management Committee* [1957] 1 WLR 582

⁸ *Bolitho (Administratrix of the Estate of Patrick Nigel Bolitho (deceased)) v City and Hackney Health Authority* [1997] 4 All ER 771

⁹ *Montgomery v Lanarkshire Health Board* [2015] UKSC 11

¹⁰ Waiver should ordinarily be expressed or extremely clear.

¹¹ Threat of death or serious harm to the person and the person temporarily lacks decision-making capacity and there is no appropriate substitute decision-maker.

¹² Where the doctor reasonably believes that the very act of giving particular information would cause the patient serious physical or mental harm.

EMPLOYMENT & INDUSTRIAL RELATIONS

EMPLOYERS BEWARE: REFERENCE

CHECK... Job applicants are generally required to provide references from their former employers, which is then used by the prospective employers to assess the applicant's character and abilities. No standard of care was previously set in preparing such references until the landmark case of *Ramesh s/o Krishnan v AXA Life Insurance Singapore Pte Ltd*¹³. The Singapore Court of Appeal in that case had laid out the standard of care expected of an employer to their former employees.

In this article, we examine the facts, issues and the standard of care set out in the case.

THE FACTS The appellant, Mr. Ramesh s/o Krishnan, was an adviser and financial services associate manager engaged by the respondent, his former principal, AXA Life Insurance Singapore Pte Ltd. Disagreements arose between the appellant and the respondent's management, which resulted in the appellant's resignation. Shortly after, the appellant applied to join Prudential Assurance Company Singapore Pte Ltd ("Prudential"). Prudential had sent a reference check request to the respondent. The respondent replied providing information on his persistency ratio and compliance issues which reflected negatively on the appellant. Prudential then made the appellant an offer of employment subject to several conditions, including the successful clearance of his reference check and his fulfilment of the requirements under the Monetary Authority of Singapore's ("MAS") guidelines. Prudential continued to seek clarification from the respondent on the information provided but to no avail. Prudential withdrew its application and decided not to hire the appellant. The appellant then applied for a job at Tokio Marine Life Insurance Singapore Limited ("Tokio Marine") but was rejected after a similar reference check was sent by the respondent to Tokio Marine. The appellant sued the respondent on three causes of action, namely, defamation, malicious falsehood, and negligence. All three claims were dismissed. The appellant appealed against the decision on negligence.

¹³ [2016] SGA 47

THE ISSUES The relevant issues before the Court of Appeal were (1) what is the standard of care expected of an employer in its preparation of a reference form for a former employee; and (2) whether there was a breach of that duty.

THE DECISION The Court of Appeal in allowing the appeal in part, found that the respondent had breached its duty of care and that damages worth SGD4 million was granted to the appellant by the High Court.

STANDARD OF CARE The Court of Appeal held that an employer who writes a reference for its employee (former or present) owes a duty of care to the employee in preparing the reference.

The Court of Appeal summarised the applicable standard of care expected of a reasonable employer when writing a reference for its employee as follows:-

1. Reasonable care to ensure that the facts and opinions stated in the reference are true.
2. Reasonable care to ensure that the reference does not give an unfair or misleading overall impression of the employee, even if the discrete pieces of information which it contains are factually correct.
3. Reasonable care to disclose any information that relates to information which has already been provided, where to withhold such further information would render the information that has been disclosed incomplete, inaccurate or unfair.
4. Subject to foregoing qualifications, the employer is not required to give a full and comprehensive reference or to include all material facts about the employee.
5. The employer should not include in the reference, explicitly or implicitly, complaints or other allegations against the employee that the employee had no knowledge of and had not been given an opportunity to explain or defend himself against.
6. In assessing what constitutes reasonable care, regard shall be had to the gravity of any adverse suggestion or inference contained in the reference.

CONCLUSION We have always placed little to no weight in the preparation of references for our former employees. Thus, with this landmark case, employers must now approach with caution when preparing references in order to avoid unjustifiably prejudicing the former employees' job prospects. ❄️

BANKING & FINANCE – Stamp duty – *Ad valorem* stamp duty – Facility agreement – Application for remission under Stamp Duty (Remission) (No.2) Order 2012 (“Remission Order”) – Negative pledge – Security – Whether negative pledge in a banking facility agreement was a ‘security’ within the meaning of Remission Order – Whether entitled to remission under Remission Order – Stamp Act 1949

**MUhibbah Engineering (M) Bhd v
Pemungut Duti Setem** [2017] 10 CLJ 66,
Court of Appeal

FACTS Maybank Islamic Berhad (“Maybank”) provided banking facility to the appellant, a company. A facility agreement was executed between the appellant and Maybank for the transfer/refinancing of the appellant’s combined tradeline facilities from MYR330 million to Islamic combined tradeline facilities amounting to MYR595 million. The appellant paid *ad valorem* stamp duty on the facility agreement amounting to MYR1.98 million. Maybank issued the receipt for stamping. The respondent, Pemungut Duti Setem, then received a letter from the appellant appealing against the stamp duty and seeking application of paragraph 2 of the Stamp Duty (Remission) (No.2) Order 2012 (“Remission Order”)¹⁴ to the facility agreement. This was rejected by the respondent. The appellant appealed for reconsideration together with the supplemental amendment and restatement agreement, but was rejected. Aggrieved, the appellant appealed to the High Court. The High Court dismissed the appeal holding that the facility agreement was with security and therefore subject to payment of stamp duty. Hence, this appeal.

ISSUES The issues were whether (i) negative pledge in a banking facility agreement was a ‘security’ within the meaning of the Remission Order; and (ii) they were entitled to remission under the Remission Order.

HELD The Court of Appeal held that the negative pledge by the appellant was not a security but a mere pledge to abstain from creating any form of charge, encumbrance or security. There does not exist in the facility agreement any security for any sum or sums of money repayable on demand or in single bullet repayment, therefore the facility agreement is a loan agreement without security and is entitled to remission under the Remission Order.

¹⁴ Sub-sub item 22 (1)(b) of the First Schedule to the Stamp Act 1949 read with paragraph 2 of the Remission Order provides that stamp duty that is chargeable on a loan agreement or loan instrument without security for any sum or sums of money repayable on demand or in single bullet repayment, is remitted.

PERBANKAN & KEWANGAN – Duti Setem – Duti setem *ad valorem* – Perjanjian Kemudahan – Permohonan peremitan di bawah Perintah Duti Setem (Peremitan) (No. 2) 2012 (“Perintah Peremitan”) – Ikrar negatif – Cagaran – Sama ada ikrar negatif dalam perjanjian kemudahan perbankan adalah ‘cagaran’ dalam maksud Perintah Peremitan – Sama ada berhak untuk peremitan di bawah Perintah Peremitan – Akta Setem 1949

**MUhibbah Engineering (M) Bhd v
Pemungut Duti Setem** [2017] 10 CLJ 66,
Mahkamah Rayuan

FAKTA-FAKTA Maybank Islamic Berhad (“Maybank”) telah memberikan kemudahan perbankan kepada perayu, sebuah syarikat. Satu perjanjian kemudahan telah ditandatangani untuk pemindahan/pembiayaan semula gabungan pinjaman perdagangan perayu berjumlah MYR330 juta kepada gabungan pinjaman perdagangan Islamik berjumlah MYR595 juta. Perayu membayar duti setem *ad valorem* atas perjanjian kemudahan berjumlah MYR1.98 juta. Maybank mengeluarkan resit setem. Pihak responden, Pemungut Duti Setem, kemudian menerima surat dari perayu yang merayu terhadap duti setem dan memohon penggunaan perenggan 2 Perintah Duti Setem (Peremitan) (No.2) 2012 (“Perintah Peremitan”)¹⁵ terhadap perjanjian kemudahan tersebut. Responden menolak rayuan perayu. Perayu merayu semula dengan mengemukakan pindaan tambahan dan perjanjian pernyataan semula tetapi juga ditolak. Terkilan, perayu merayu ke Mahkamah Tinggi. Mahkamah Tinggi menolak rayuan perayu dan memutuskan bahawa perjanjian kemudahan adalah dengan cagaran dan oleh itu, tertakluk pada bayaran duti setem. Dengan itu, rayuan ini.

ISU-ISU Isu-isu utama adalah (i) sama ada ikrar negatif dalam perjanjian kemudahan perbankan adalah ‘cagaran’ dalam maksud Perintah Peremitan dan (ii) sama ada mereka berhak untuk peremitan bawah Perintah Peremitan.

KEPUTUSAN Mahkamah Rayuan memutuskan bahawa ikrar negatif perayu bukan cagaran tetapi merupakan ikrar semata-mata yang dibuat oleh perayu untuk tidak meletakkan sebarang gadaian, bebanan atau cagaran. Perjanjian kemudahan itu tidak mempunyai sebarang cagaran untuk apa-apa jumlah wang atau sejumlah yang perlu dibayar apabila dituntut atau bayaran balik secara sekaligus. Oleh itu, perjanjian kemudahan yang dibuat merupakan perjanjian pinjaman tanpa cagaran dan layak mendapat peremitan di bawah Perintah Peremitan.

¹⁵ Sub-perkara 22(1)(b) Jadual Pertama Akta Setem 1949 dibaca bersama perenggan 2 Perintah Peremitan memperuntukkan bahawa duti setem yang dikenakan pada perjanjian pinjaman atau instrumen pinjaman tanpa cagaran untuk sebarang jumlah atau jumlah wang yang perlu dibayar atas permintaan atau pembayaran sekaligus, adalah diremitkan.

CONSTITUTIONAL LAW – Conversion of religion – Whether civil court has jurisdiction to review decision by Registrar of Muallaf – Administration of the Religion of Islam (Perak) Enactment 2004, sections 96 and 106 – Federal Constitution, article 12(4)

**INDIRA GANDHI A/P MUTHO V PENGARAH
JABATAN AGAMA ISLAM PERAK & 2 ORS**
[2018] 2 AMR 313, Federal Court

FACTS The appellant and respondent's marriage was registered under the Law Reform (Marriage and Divorce) Act 1976 ("civil marriage"). They had three children. The respondent converted to Islam subsequently. A dispute arose when the respondent converted the children to Islam without the appellant's consent and obtained custody of the children from the Syariah Court. Certificates of conversion to Islam ("the Certificates") and registration document of their conversion were delivered to the appellant. However, the children were not present before the Registrar of Muallaf and did not utter the two clauses of the Affirmation of Faith required by the Administration of the Religion of Islam (Perak) Enactment 2004 ("the Perak Enactment"). The appellant filed a judicial review application at the High Court and was granted an order ("the Order") to quash the Certificates and custody of the three children. Her divorce petition for civil marriage was also allowed. The Court of Appeal set aside the Order. The appellant appealed.

ISSUES The issues were whether (i) the High Court has jurisdiction to review the Registrar's actions; (ii) a child of a civil marriage aged below 18 years old must comply with the statutory requirements¹⁷ before the Registrar registers his conversion; and (iii) the surviving mother and father of a child of a civil marriage must consent before the Certificates can be issued.

HELD The Federal Court held that the High Court is seised with jurisdiction to review the Registrar's decision, as such judicial power is essential in the basic structure of the Federal Constitution and is not ousted by article 121(1A) of the Federal Constitution. The Federal Court also ruled that the Registrar has no jurisdiction to issue the Certificates, as the requirements under sections 96(1) and 106(b) of the Perak Enactment are not fulfilled. On a purposive interpretation of article 12(4) read with the Eleventh Schedule of the Federal Constitution, and the application of sections 5 and 11 of the Guardianship of Infants Act 1961, it was decided that the consent of both the appellant and the husband are required before the Certificates can be issued. ﷺ

¹⁷ Sections 96(1) and 106(b) of the Administration of the Religion of Islam (Perak) Enactment 2004

PERLEMBAGAAN – Penukaran agama – Sama ada mahkamah sivil mempunyai bidang kuasa untuk menyemak keputusan Pendaftar Muallaf – Enakmen Pentadbiran Agama Islam (Perak) 2004, seksyen-seksyen 96 dan 106 – Perlembagaan Persekutuan, perkara 12(4)

**INDIRA GANDHI A/P MUTHO V PENGARAH
JABATAN AGAMA ISLAM PERAK & 2 YANG
LAIN** [2018] 2 AMR 313, Mahkamah Persekutuan

FAKTA-FAKTA Perkahwinan perayu dan responden didaftarkan di bawah Akta Membaharui Undang-Undang (Perkahwinan dan Penceraian) 1976 ("perkahwinan sivil"). Mereka mempunyai tiga orang anak. Responden kemudian memeluk Islam. Pertikaian berlaku apabila responden menukar agama anak-anaknya ke Islam dan mendapat hak penjagaan anak daripada Mahkamah Syariah tanpa kebenaran perayu. Sijil pengislaman ("Sijil-sijil") dan dokumen pendaftaran pengislaman mereka telah dihantar ke perayu. Namun, anak-anak tersebut tidak hadir di hadapan Pendaftar Muallaf dan tidak mengucap dua kalimah syahadah seperti yang disyaratkan dalam Enakmen Pentadbiran Agama Islam (Perak) 2004 ("Enakmen Perak"). Perayu memfailkan permohonan semakan kehakiman di Mahkamah Tinggi dan telah mendapat perintah untuk Sijil-sijil serta hak penjagaan ketiga-tiga anak tersebut dibatalkan. Petisyen pembatalan perkahwinan sivil perayu juga dibenarkan. Mahkamah Rayuan menolak perintah yang diberikan oleh Mahkamah Tinggi. Perayu membuat rayuan lanjutan.

ISU-ISU Isu-isu utama adalah sama ada (i) Mahkamah Tinggi mempunyai bidang kuasa untuk membuat semakan terhadap tindakan Pendaftar; (ii) anak yang dilahirkan dalam perkahwinan sivil berusia 18 tahun ke bawah harus akur dengan syarat-syarat statutori¹⁸ bagi membolehkan Pendaftar mendaftarkan pengislaman anak tersebut; dan (iii) ibu dan bapa seorang anak dari perkahwinan sivil perlu memberi kebenaran sebelum Sijil-sijil dikeluarkan.

KEPUTUSAN Mahkamah Persekutuan memutuskan bahawa Mahkamah Tinggi mempunyai bidang kuasa untuk menyemak keputusan Pendaftar. Kuasa kehakiman merupakan salah satu struktur penting dalam Perlembagaan Persekutuan dan ianya tidak terbatal oleh perkara 121(1A). Mahkamah juga memutuskan bahawa Pendaftar tidak mempunyai kuasa untuk mengeluarkan Sijil-sijil kerana syarat dalam seksyen 96(1) dan 106(b) Enakmen Perak tidak dipenuhi. Berdasarkan tafsiran perkara 12(4) dibaca bersama dengan Jadual Kesebelas Perlembagaan Persekutuan, dan seksyen 5 dan 11 Akta Penjagaan Budak 1961, disimpulkan bahawa kebenaran pihak perayu dan suaminya diperlukan sebelum Sijil-sijil dikeluarkan. ﷺ

¹⁸ Seksyen-seksyen 96(1) dan 106(b) Enakmen Pentadbiran Agama Islam (Perak) 2004

ACT

EMPLOYMENT INSURANCE SYSTEM ACT 2017

National Language

Akta Sistem Insurans Pekerjaan 2017

No

A800

Date of coming into operation

1 January 2018

Notes

This is an Act to provide for the Employment Insurance System administered by the Social Security Organisation to provide certain benefits and a re-employment placement programme for insured persons in the event of loss of employment which will promote active labour market policies, and for matters connected therewith.

AMENDMENT ACTS

ARBITRATION (AMENDMENT) (NO.2) ACT 2018

National Language

Akta Timbang Tara (Pindaan) (No.2) 2018

No

A1569

Date of coming into operation

8 May 2018

Notes

The highlights of the amending Act are the expansion of the term 'arbitral tribunal' under section 2 and definition of what amounts to an arbitration agreement under section 9. New section 3A deals with freedom of representation, new sections 19A to 19J deals with the powers of the arbitral tribunal in providing interim relief, and new sections 41A and 41B deals with confidentiality clauses.

DANGEROUS DRUGS (AMENDMENT) ACT 2017

National Language

Akta Dadah Berbahaya (Pindaan) 2017

No

A1558

Date of coming into operation

15 March 2018

Notes

The highlight of the amending Act is the amendment of section 39B which removes the mandatory death sentence for drug offences. It also provides judges with discretion in imposing the sentence of imprisonment for life and whipping of not less than fifteen strokes for the convicted drug traffickers.

ARBITRATION (AMENDMENT) ACT 2018

National Language

Akta Timbang Tara (Pindaan) 2018

No

A1563

Date of coming into operation

28 February 2018

Notes

The highlight of the amending Act is the change of name and substitution of the words "Kuala Lumpur Regional Centre for Arbitration" to "Asian International Arbitration Centre (Malaysia)".

MALAYSIAN AVIATION COMMISSION (AMENDMENT) ACT 2018

National Language

Akta Suruhanjaya Penerbangan Malaysia (Pindaan) 2018

No
A1559

Date of coming into operation
9 February 2018

Notes

The highlight of the amending Act is the introduction of a new subsection 65(4) which allows the Malaysian Aviation Commission to impose a financial penalty for any non-compliance of any guidelines issued under section 65.

PRIVATE EMPLOYMENT AGENCIES (AMENDMENT) ACT 2017

National Language

Akta Agensi Pekerjaan Swasta (Pindaan) 2017

No
A1554

Date of coming into operation
1 February 2018

Notes

The highlight of the amending Act includes section 7 which provides the requirement for person carrying on recruiting activity to have a licence. Any contravention would warrant a fine of not exceeding MYR200,000 or imprisonment of not more than three years, or both. New sections 13A, 13B, 13C, 13D, 13E, 13F, and 13G are inserted to govern matters relating to the licence including replacement, assignment or transfer, and rent or lease. The First Schedule providing fees is replaced.

VALUERS, APPRAISERS AND ESTATE AGENTS (AMENDMENT) ACT 2017

National Language

Akta Penilai, Pentaksir dan Ejen Harta Tanah (Pindaan) 2017

No
A1550

Date of coming into operation
2 January 2018

Notes

The highlights of the amending Act include the introduction of Part VB governing registration and qualifications of property managers and probationary property managers, property management practice and its restriction. In addition, the Board of Valuers, Appraisers and Estate Agents has been renamed to Board of Valuers, Appraisers, Estate Agents and Property Managers.

STRATA TITLES (AMENDMENT) ACT 2016

National Language

Akta Hakmilik Strata (Pindaan) 2016

No
A1518

Date of coming into operation
1 January 2018 for section 29

Notes

The highlight of the amending Act is the amendment to the Fifth Schedule of the Strata Titles Act 1985 which provides for the enforcement of section 29 which provides for the "Computerisation System of Strata Titles".

LAND ACQUISITION (AMENDMENT) ACT 2016

National Language

Akta Pengambilan Tanah (Pindaan) 2016


No

A1517

Date of coming into operation

1 December 2017

Notes

The highlights of the amending Act include new section 19A which requires the Land Administrator to conduct a full enquiry and to make an award for compensation, although the possession of land has been taken pursuant to the Certificate of Urgency issued under section 19 of the Land Acquisition Act 1960. Section 57 has also been amended whereby a land can be acquired for temporary occupation or use for not more than three years, if such land has been indicated in a development plan under the town and country planning laws. The new section 58(2A) allows the Land Administrator to obtain written opinion on the value of the land from a valuer before making an offer for compensation. 

LEGAL AID (AMENDMENT) ACT 2017

National Language

Akta Bantuan Guaman (Pindaan) 2017


No

A1548

Date of coming into operation

1 December 2017

Notes

The highlights of the amending Act include a new section 2A stating the scope of legal aid services within the purview of Legal Aid Act 1971. Section 29(4) is also amended which provides that a person seeking legal advice shall apply to, and satisfy, the Director General of Legal Aid that 'he cannot afford to obtain the legal advice in the ordinary way'. A new Part VB on legal companion services is another notable feature, especially the provision on legal companion services to a child who is a victim of sexual offences. 

SUBSIDIARY LEGISLATION

- PU(A) 89/2018: Capital Markets and Services (Amendment of Schedules 6 and 7) Order 2018 – *Effective date: 5 April 2018*
- PU(A) 88/2018: Capital Markets and Services (Prescription for Excluded Offers and Invitations and Excluded Issues for Seasoned Bonds) Order 2018 – *Effective date: 5 April 2018*
- PU(A) 87/2018: Capital Markets and Services (Fees) (Amendment) Regulations 2018 – *Effective date: 5 April 2018*
- PU(A) 67/2018: Commissioners for Oaths Rules 2018 – *Effective date: 1 March 2018*
- PU(A) 65/2018: Stamp Duty (Exemption) Order 2018 – *Effective date: 1 March 2018*
- PU(A) 64/2018: Companies (Corporate Rescue Mechanism) Rules 2018 – *Effective date: 1 March 2018*
- PU(A) 47/2018: Labuan Financial Services and Securities (Amendment) Regulations 2018 – *Effective date: 1 July 2018*
- PU(A) 26/2018: Rules of the Court of Appeal (Amendment) 2018 – *Effective date: 1 March 2018*
- PU(A) 25/2018: Rules of the Federal Court (Amendment) 2018 – *Effective date: 1 March 2018*
- PU(A) 24/2018: Rules of Court (Amendment) 2018 – *Effective date: 1 March 2018*
- PU(A) 22/2018: Capital Markets and Services (Amendment of Schedule 5) Order 2018 – *Effective date: 1 April 2018*
- PU(A) 15/2018: Companies (Amendment) Regulations 2018 – *Effective date: 1 February 2018*
- PU(A) 14/2018: Interest Schemes (Amendment of Second Schedule) Order 2018 – *Effective date: 31 January 2018*
- PU(A) 13/2018: Companies Commission of Malaysia (Amendment of First Schedule) Order 2018 – *Effective date: 1 February 2018*
- PU(B) 106/2018: Companies Act 2016 – *Effective date: 1 March 2018*

**GUIDELINES/RULES/CIRCULARS/
DIRECTIVES AND PRACTICE NOTES ISSUED
BETWEEN
JANUARY AND MAY 2018
BY BANK NEGARA MALAYSIA,
BURSA MALAYSIA AND
SECURITIES COMMISSION MALAYSIA**

BANK NEGARA MALAYSIA (BNM)

- BNM Policy Document on Credit Risk – *Effective dates: 1 July 2018, 1 July 2019 and 1 January 2021*
- BNM Additional Requirements for the Money Services Business Compliance Officers – *Effective date: 22 May 2018*
- BNM Policy Document on Bai' al-Sarf (Currency Exchange) – *Date issued: 11 April 2018*
- BNM Interoperable Credit Transfer Framework – *Date issued: 16 March 2018*
- BNM Capital Adequacy Framework (Basel II – Risk-Weighted Assets) – *Date issued: 2 February 2018*
- BNM Policy Document on Operating Cost Controls for Life Insurance and Family Takaful Business – *Effective date: 1 January 2018*

BURSA MALAYSIA

- Consolidated Rules of Bursa Malaysia Derivatives Bhd – *As at: 24 May 2018*
- Consolidated Rules of Bursa Malaysia Derivatives Clearing Bhd – *As at: 24 May 2018*
- Amendments to the Rules of Bursa Malaysia Securities Berhad in relation to Intraday Short Selling – *Effective date: 16 April 2018*
- Consolidated Rules of Bursa Malaysia Securities Bhd – *As at: 16 April 2018*
- Consolidated Main Market Listing Requirements – *As at: 9 April 2018*

- Amendments to Bursa Malaysia Securities Berhad Main Market Listing Requirements in relation to Collective Investment Scheme and Business Trust – *As at: 2 April 2018*
- Consolidated ACE Market Listing Requirements – *As at: 26 January 2018*

SECURITIES COMMISSION

- SC Guidelines on Tax Exemption for Wholesale Money Market Funds – *Revised on: 24 April 2018*
- SC Lodgement Kit: Unlisted Capital Market Products under the Lodge and Launch Framework – *Effective date: 16 April 2018*
- SC Guidelines on Listed Real Estate Investment Trusts – *Effective date: 9 April 2018*
- SC Guidelines on Real Estate Investment Trusts – *Effective date: 9 April 2018*
- SC Guidelines on Implementation of Targeted Financial Sanctions Relating to Proliferation Financing for Capital Market Intermediaries – *Effective date: 6 April 2018*
- SC Guidelines on Contracts for Difference – *Date issued: 6 April 2018*
- SC Licensing Handbook – *Effective date: 6 April 2018*
- SC Guidelines on Prospectus – *Effective date: 1 March 2018*
- SC Guidelines on Compliance Function for Fund Management Companies – *Effective date: 5 January 2018*

WORD OF THE BRIEFCASE

Prima facie:

It is a Latin phrase which means 'at first sight' or 'on the face of it'.

Therefore, a *prima facie* case means a case in which the evidence before the trial is sufficient to prove the case unless there is evidence to rebut otherwise.



The Banking & Finance Practice Group of **ZUL RAFIQUE & partners** wins **Debt Market Deal of the Year (Premium)** at the ALB Malaysia Law Awards 2018

From left: *Iris Koh Siau Wei, Loh Mei Mei, Celine Rangithan, Ashela Ramaya, Thong Chee Whei, Chan Kwan Hoe, Renee Fong Siew Ern, Nurul Atilia Mat Deris, Kung Suan Im and Leanda Theepa Arul*

THE BRIEFCASE

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look@zulrafique.com.my

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The contributors for this *BriefCase* are:

- *Wong Keat Ching*
- *Amylia Soraya*
- *Farrab Yakın*

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