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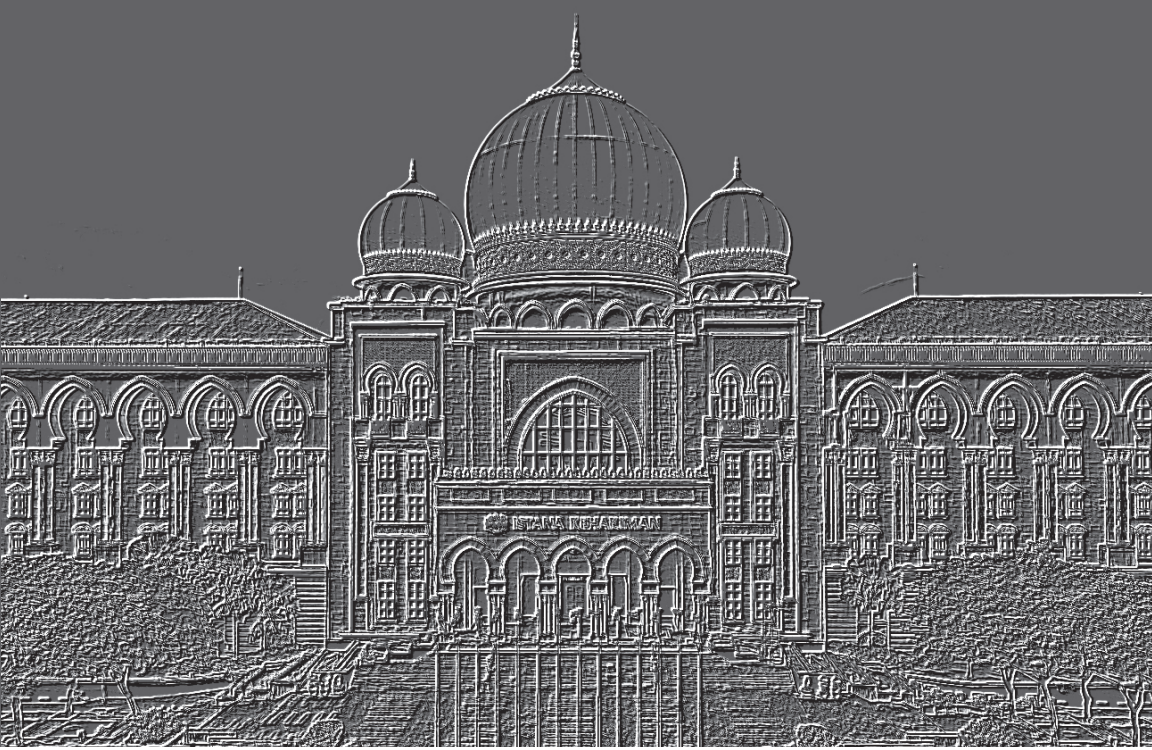

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PREFACE

Legal scholarship requires evolution. Rather like Zeno's paradox, the classical mathematical theory that postulates that motion is an illusion, in that you can never reach an end-point, the law is always approaching, but never reaching consistency. It continually evolves, adopting new principles to meet the necessities of the times, and the present state of things, while retaining its old principles from history which have not been shed.[1] It is this transformation of ideas in the law which evidences the evolution of legal scholarship.

In its own distinct style, the *Journal of the Malaysian Judiciary* encourages and makes contribution to such legal evolution in the context of the continually evolving Malaysian common law. It fosters the scrutiny and review of seemingly self-sufficient theories of law. Our learned and knowledgeable contributors have examined and analysed a varied range of legal subjects, which are both stimulating and of topical interest.

These articles range from the insightful analyses in contract law questioning, inter alia, the seemingly settled position relating to implied terms in Justice Wong Kian Kheong's treatise, and the ever-challenging law of restitution with its nexus to section 71 of the Contracts Act 1950 in Low Weng Tchung's discourse, to the consideration of the timeless issue of the right to counsel under the Federal Constitution with its varied complexities and permutations by Justice Wan Ahmad Farid bin Wan Salleh.

Of considerable topical and practical importance is the article by Justice Wong Hok Chong on the law relating to committal proceedings in civil contempt. This is a complex issue fraught with technical matters of procedure apart from the difficulties of the substantive law. His treatment of the subject is skillful and thorough, giving the reader an up-to-date account of the subject, which is easy to comprehend. It will undoubtedly be of substantial use for reference.

The law relating to insurance and indemnity for directors is comprehensively and meticulously explained in the context of the Companies Act 2016 and contrasted with the previous position under the former Companies Act 1965 by Justice Quay Chew Soon. It provides the reader with a complete digest on the subject.

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1 See article entitled "Oliver Wendell Holmes Jr and the Darwinian Common Law Paradigm" by Allen Mendenhall in the *European Journal of Pragmatism and American Philosophy*, December 2015.

Datuk Dr. Prasad Abraham, former Judge of the Federal Court, who is the present Deputy Director of the Asian International Arbitration Centre, has favoured us with an edifying article reviewing recent decisions in our courts, and advocating the use of section 37(6) of the Arbitration Act 2005 in appropriate cases, as an alternative to a less interventionist approach by the courts.

Recent developments in the common law, in relation to tortious claims by secondary victims in the United Kingdom, constitute the subject matter of the article by our overseas referee, David Pittaway QC, who is renowned for his expertise in this area. The article is co-authored by Thomas Crockett and points to the seemingly endless problem the English Judiciary has grappled with, in an attempt to find a just and workable classification of the "control measures" for secondary victim claims, which properly balance the competing interests of society.

In the area of constitutional law, we have the benefit of an article from Dr. Gan Chee Keong, Senior Federal Counsel in the legal division of the Ministry of Domestic Trade and Consumer Affairs. It explores the range of constitutional rights and remedies provided for in relation to fundamental rights in India, and as such, presents an informative and useful study which serves to stimulate and provoke debate on the comparative position in our jurisdiction.

Readers will no doubt enjoy the invigorating and novel contribution from Justice Faizah Jamaludin and Dato' Mohammad Faiz Azmi, which underscores the evolution of the law into areas like climate change. The contributors undertake a fascinating journey through this subject on both a national and an international level before relating it to our corporate governance principles (more particularly in relation to directors' duties) and highlighting the need for specific legislation in this regard.

In this our 12th edition, we, the Editorial Committee, are both grateful and appreciative of the contributions made by our contributors. The time and effort they dedicated, is evident from the quality of their legal writing. It was a considerable pleasure to curate this series of articles.

On behalf of the Editorial Committee
Nallini Pathmanathan

CONTENTS

When Can a Contractual Term be Implied?

by

*Justice Wong Kian Kheong**

A. Introduction

[1] Our Contracts Act 1950[1] is silent on when a term can be implied in an agreement.

[2] In this article, I will discuss the following matters:

(a) when a contractual term is not implied by written law,[2] by custom or usage of a particular trade or industry[3] or by a course of dealing,[4] the court can imply a term based on a cumulative application of two tests, i.e. the "officious bystander" test and "business efficacy" test ("2 tests"). The 2 tests have been laid down by Peh Swee Chin FCJ in the Federal Court case of *Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong*[5] ("*Sababumi*").

In contradistinction to the 2 tests, should Malaysian courts apply Lord Hoffmann's interpretative approach ("interpretative approach")? According to the interpretative approach which has been applied in, among others, *Investors' Compensation Scheme Ltd v West Bromwich Building Society & other cases*[6] ("*Investors' Compensation Scheme*") and *Attorney General of Belize & Ors v Belize Telecom Ltd & Anor*[7] ("*AG of Belize*"), whether a contractual term

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* Judge of the High Court of Malaya.

1 Act 136.

2 E.g. conditions implied by ss 15, 16(1)(a), (b), 17(2)(a), (b) and (c) of the Sale of Goods Act 1957 [*Act 382*] in a contract of sale of goods.

3 Proviso (e) to s 92 of the Evidence Act 1950 [*Act 56*] allows evidence of a custom or usage to be proved.

4 E.g. *Re WW Duncan & Co* [1950] 1 Ch 307 at 312.

5 [1998] 3 MLJ 151 at 169–170. Certain authors on the law of contract have described this kind of implication of a contractual term as "implied in fact", see e.g. NC Seddon and RA Bigwood, *Cheshire & Fifoot, Law of Contract*, 11th Australian edn (2017), para [10.39]. J Bailey has however used the description "implied ad hoc" in *Construction Law*, 3rd edn, Vol 1 (2020), para [3.103].

6 [1998] 1 WLR 896.

7 [2009] 2 All ER 1127.

can be implied depends on what the contract, read against the relevant background, would reasonably be understood to mean;

(b) whether the 2 tests should complement each other and not be applied cumulatively; and

(c) should there be a difference in the application of the 2 tests for "informal" agreements?

B. 2 tests

[3] The 2 tests have been explained by Peh Swee Chin FCJ in *Sababumi* as follows:[8]

> Implied terms are of three types. The first and most important type is an implied term which the court infers from evidence that the parties to a contract must have intended to include it in the contract though it has not been expressly set out in the contact. …
>
> *Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in Shirlaw v Southern Foundries (1926) Ltd [1939] 2 KB 206 at p 227, that such a term to be implied by a court is "something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common 'Oh, of course'."*
>
> *The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in Luxor (Eastbourne) Ltd & Ors v Cooper* [1941] AC 108 at p 137*, that in regard to an implied term, "… it can be predicated that 'It goes without saying', some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended". Business efficacy in my opinion, simply means the desired result of the business in question. …*
>
> *Both tests in my opinion must be satisfied before a court infers an implied term. Thus, Lord Wilberforce in Liverpool City Council v Irwin & Anor* [1977] AC 239 at p 254 *spoke of an implied term as a matter of necessity, so that the element of "business efficacy is inseparable". Lord Simon of*

8 See n 5 above.

> *Glaisdale in BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 16 ALR 363 *described both tests as conditions the compliance of which the court must be satisfied, in addition to what I may describe as other requirements, of existing law. Closer to home, Chong Siew Fai J (as he then was) in Yap Nyo Nyok v Bath Pharmacy Sdn Bhd* [1993] 2 MLJ 250 *held that both tests must be satisfied. If the implied term was not necessary to give business efficacy, the answer to the officious bystander, would have been a testy answer of "Oh, don't talk rubbish".*
>
> *The two tests referred to earlier are to enable the court to decide as to whether it should or should not infer that the implied term contended for is a term which parties to a contract must have intended to include in the contract.*[9]
>
> (Emphasis added.)

[4] The 2 tests have been affirmed by the Federal Court in a judgment delivered by Zulkefli Ahmad Makinudin PCA in *See Leong Chye @ Sze Leong Chye & Anor v United Overseas Bank Bhd & another appeal*[10] ("*See Leong Chye*").

[5] The 2 tests have also been applied by our Court of Appeal[11] and High Court.[12]

C. Interpretative approach

[6] The interpretative approach was laid down by Lord Hoffmann in a trilogy beginning with *Investors' Compensation Scheme*. According to Lord Hoffmann in the House of Lords in *Investors' Compensation Scheme*:[13]

> *But I think I should preface my explanation of my reasons with some general remarks about the principles by which contractual documents are nowadays construed. I do not think that the fundamental change which has overtaken this branch of the law, particularly as a result of the speeches of Lord Wilberforce in Prenn v. Simmonds* [1971] 1 W.L.R. 1381, 1384-1386 *and Reardon Smith Line Ltd. v. Yngvar Hansen-Tangen* [1976] 1 W.L.R. 989, *is always sufficiently appreciated. The result has been, subject to one*

9 Ibid. Peh Swee Chin FCJ's judgment regarding the implication of a contractual term was concurred by Zakaria Yatim FCJ, at pp 180–181. Lamin PCA however dissented on the issue regarding an implied term, at p 156.

10 [2019] 1 MLJ 25 at [74]–[76].

11 E.g. *Zhou Xing Chen v Ong Eng Lock & Ors* [2017] MLJU 964 at [30].

12 E.g. *Eontat Sdn Bhd v Budget Kitchen Sdn Bhd* [2021] 3 MLRH 304 at [16]–[18].

13 See n 6 above at pp 912–913.

important exception, to assimilate the way in which such documents are interpreted by judges to the common sense principles by which any serious utterance would be interpreted in ordinary life. Almost all the old intellectual baggage of "legal" interpretation has been discarded. The principles may be summarised as follows.

(1) Interpretation is the ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract.

(2) The background was famously referred to by Lord Wilberforce as the "matrix of fact," but this phrase is, if anything, an understated description of what the background may include. Subject to the requirement that it should have been reasonably available to the parties and to the exception to be mentioned next, it includes absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man.

(3) …

(4) The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. The background may not merely enable the reasonable man to choose between the possible meanings of words which are ambiguous but even (as occasionally happens in ordinary life) to conclude that the parties must, for whatever reason, have used the wrong words or syntax: see Mannai Investments Co. Ltd. v. Eagle Star Life Assurance Co. Ltd. [1997] AC 749.

(5) The "rule" that words should be given their "natural and ordinary meaning" reflects the common sense proposition that we do not easily accept that people have made linguistic mistakes, particularly in formal documents. On the other hand, if one would nevertheless conclude from the background that something must have gone wrong with the language, the law does not require judges to attribute to the parties an intention which they plainly could not have had. Lord Diplock made this point more vigorously when he said in Antaios Compania Naviera S.A. v. Salen Rederierna A.B. [1985] AC 191, 201*:*

> *"if detailed semantic and syntactical analysis of words in a commercial contract is going to lead to a conclusion that flouts*

> *business common sense, it must be made to yield to business common sense.*"
>
> (Emphasis added.)

[7] The above judgment in *Investors' Compensation Scheme* has been applied by Lord Hoffmann in the House of Lords in *Chartbrook Ltd v Persimmon Homes Ltd*[14] ("*Chartbrook*") as follows:

> [14] *There is no dispute that the principles on which a contract (or any other instrument or utterance) should be interpreted are those summarised by the House of Lords in Investors Compensation Scheme Ltd v West Bromwich Building Society* [1998] 1 WLR 896, 912-913. *They are well known and need not be repeated. It is agreed that the question is what a reasonable person having all the background knowledge which would have been available to the parties would have understood them to be using the language in the contract to mean. …*
>
> (Emphasis added.)

[8] The interpretative approach is further explained by Lord Hoffmann in a judgment of the Privy Council in *AG of Belize*[15] (an appeal from Belize) as follows:

> [16] *Before discussing in greater detail the reasoning of the Court of Appeal, the Board will make some general observations about the process of implication. The court has no power to improve upon the instrument which it is called upon to construe, whether it be a contract, a statute or articles of association. It cannot introduce terms to make it fairer or more reasonable. It is concerned only to discover what the instrument means. However, that meaning is not necessarily or always what the authors or parties to the document would have intended. It is the meaning which the instrument would convey to a reasonable person having all the background knowledge which would reasonably be available to the audience to whom the instrument is addressed: see [Investors' Compensation Scheme]. It is this objective meaning which is conventionally called the intention of the parties, or the intention of Parliament, or the intention of whatever person or body was or is deemed to have been the author of the instrument.*
>
> [17] *The question of implication arises when the instrument does not expressly provide for what is to happen when some event occurs.* The most

14 [2009] AC 1101 at [14].
15 See n 7 above at [16]–[21].

usual inference in such a case is that nothing is to happen. If the parties had intended something to happen, the instrument would have said so. Otherwise, the express provisions of the instrument are to continue to operate undisturbed. If the event has caused loss to one or other of the parties, the loss lies where it falls.

[18] *In some cases, however, the reasonable addressee would understand the instrument to mean something else. He would consider that the only meaning consistent with the other provisions of the instrument, read against the relevant background, is that something is to happen. The event in question is to affect the rights of the parties. The instrument may not have expressly said so, but this is what it must mean. In such a case, it is said that the court implies a term as to what will happen if the event in question occurs. But the implication of the term is not an addition to the instrument. It only spells out what the instrument means.*

[19] *The proposition that the implication of a term is an exercise in the construction of the instrument as a whole is not only a matter of logic (since a court has no power to alter what the instrument means) but also well supported by authority. In Trollope & Colls Ltd v North West Metropolitan Regional Hospital Board* [1973] 2 All ER 260 at 267–268, [1973] 1 WLR 601 at 609, *Lord Pearson, with whom Lord Guest and Lord Diplock agreed, said:*

> *"[T]he court does not make a contract for the parties. The court will not even improve the contract which the parties have made for themselves, however desirable the improvement might be. The court's function is to interpret and apply the contract which the parties have made for themselves. If the express terms are perfectly clear and free from ambiguity, there is no choice to be made between different possible meanings: the clear terms must be applied even if the court thinks some other terms would have been more suitable. An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract: it is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them: it must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, though tacit, formed part of the contract which the parties made for themselves." (Lord Pearson's emphasis.)*

[20] More recently, *in Equitable Life Assurance Society v Hyman* [2000] 3 All ER 961 at 970, [2002] 1 AC 408 at 459, *Lord Steyn said: "If a term is to be implied, it could only be a term implied from the language of [the instrument] read in its commercial setting."*

> [21] *It follows that in every case in which it is said that some provision ought to be implied in an instrument, the question for the court is whether such a provision would spell out in express words what the instrument, read against the relevant background, would reasonably be understood to mean. It will be noticed from Lord Pearson's speech that this question can be reformulated in various ways which a court may find helpful in providing an answer – the implied term must "go without saying", it must be "necessary to give business efficacy to the contract" and so on – but these are not in the Board's opinion to be treated as different or additional tests. There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?*
>
> (Emphasis added.)

[9] In an appeal to the Privy Council from Jamaica, *Thompson & Anor v Goblin Hill Hotels Ltd (Jamaica)*,[16] Lord Dyson has applied the interpretative approach.

D. Reception of the interpretative approach in Malaysia

[10] The interpretative approach was first recognised by Gopal Sri Ram FCJ in the Federal Court case of *Berjaya Times Square Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd*[17] *("Berjaya Times Square")*. In the words of Gopal Sri Ram FCJ in *Berjaya Times Square*:

> [42] *Here it is important to bear in mind that a contract is to be interpreted in accordance with the following guidelines.* First, a court interpreting a private contract is not confined to the four corners of the document. It is entitled to look at the factual matrix forming the background to the transaction. Second, the factual matrix which forms the background to the transaction includes all material that was reasonably available to the parties. Third, the interpreting court must disregard any part of the background that is declaratory of subjective intent only. *Lastly, the court should adopt an objective approach when interpreting a private contract. See Investors Compensation Scheme Ltd v West Bromwich Building Society; Investors Compensation Scheme Ltd v Hopkins & Sons (a firm) & Ors; Alford v West Bromwich Building Society & Ors; Armitage v West Bromwich Building Society & Ors* [1998] 1 All ER 98.

16 [2011] 1 BCLC 587 at [27].
17 [2010] 1 MLJ 597 at [42] and [43].

…

[43] … *The most recent statement of the guideline to interpretation of contracts, statutes and other instruments is to be found in [AG of Belize], where when delivering the advice of the board, Lord Hoffmann said: …*[18]

(Emphasis added.)

[11] There was further acceptance of the interpretative approach by our Federal Court in *SPM Membrane Switch Sdn Bhd v Kerajaan Negeri Selangor*[19] ("*SPM Membrane Switch*"). According to Zainun Ali FCJ in *SPM Membrane Switch*:[20]

[27] *In recent times, the restatement of principles in the landmark case of [Investors Compensation Scheme] provides a helpful starting point for the consideration of the relevant principles. The judgment of Lord Hoffmann is as reproduced below, where His Lordship stated that:*

…

[28] *However, there are reservations to a wholesale adoption and approval of [Investors Compensation Scheme] principles. The applicability of the second [Investors Compensation Scheme] principle, specifically vis-a-vis the question of the admissibility of extrinsic evidence including pre-contractual negotiations, is doubted. This has been alluded to in the recent judgment of this court in Menta Construction Sdn Bhd v Lestari Puchong* [2015] 6 MLJ 633 *for reasons that I will not repeat here. Save for this reservation, the remaining [Investors Compensation Scheme] principles are good law.*

(Emphasis added.)

[12] In *Catajaya Sdn Bhd v Shoppoint Sdn Bhd & Ors*[21] ("*Catajaya*"), Hasnah Hashim FCJ has delivered a judgment of the Federal Court which has accepted the interpretative approach.

[13] The learned author of *Law of Contract*[22] has described the interpretative approach as a "new principle of law, in what is now regarded as the authoritative 'restatement of the law' on the subject".

18 The judgment of Gopal Sri Ram FCJ has been concurred by Zulkefli Ahmad Makinudin FCJ (as he then was), ibid, at [1].
19 [2016] 1 MLJ 464.
20 Ibid, at [27] and [28].
21 [2021] 2 MLJ 374 at [50] and [53].
22 Visu Sinnadurai, *Law of Contract*, 4th edn (2011), para [4.28].

E. Whether the court implies a contractual term or merely interprets the contract

[14] I am of the respectful view that a contractual term cannot be read into a contract merely because the contract "*read as a whole against the relevant background, would reasonably be understood to mean*" that term. The reasons why I am not in favour of the interpretative approach are as follows.

[15] First, premised on the *ratio decidendi* of our two Federal Court judgments in *Sababumi* and *See Leong Chye*, a contractual term can only be implied if the 2 tests are satisfied cumulatively. According to the doctrine of *stare decisis*, *Sababumi* and *See Leong Chye* constitute binding legal precedents until and unless our Federal Court overrules these two judgments.

[16] Second, the material facts of *Berjaya Times Square*, *SPM Membrane Switch* and *Catajaya* ("3 Federal Court cases") do not concern the question of whether a term can be implied in an agreement. Hence, the *dicta* expressed in the 3 Federal Court cases regarding the interpretative approach do not apply with respect to the implication of contractual terms. Furthermore, the 3 Federal Court cases did not refer to, let alone discuss, the 2 tests as laid down in *Sababumi*.

[17] Third, *Investors' Compensation Scheme* concerned the interpretation of the contents of a form to claim compensation from Investors Compensation Scheme Ltd, a body established under section 54 of the United Kingdom's ("UK") Financial Services Act 1986 to compensate persons with unsatisfied claims against those authorised to carry on investment business in UK. There was no question of implying any contractual term in *Investors' Compensation Scheme*. Similarly, no issue regarding the implication of a contractual term arose in *Chartbrook*. *AG of Belize* actually concerned the construction of a company's articles of association.

[18] Fourth, although the implication of a contractual term ("implication process") involves an interpretation of the agreement, the implication process is a concept which is distinct from the question of contractual interpretation. I rely on the following judgments:

(a) in *Philips Electronique Grand Public SA & Anor v British Sky Broadcasting Ltd and another case*[23] ("*Philips Electronique*"), Lord

23 [1995] EMLR 472 at 481.

Thomas Bingham MR (as he then was) has decided as follows in the UK Court of Appeal:

> *The courts' usual role in contractual interpretation is, by resolving ambiguities or reconciling apparent inconsistencies, to attribute the true meaning to the language in which the parties themselves have expressed their contract. The implication of contract terms involves a different and altogether more ambitious undertaking: the interpolation of terms to deal with matters for which, ex hypothesi, the parties themselves have made no provision. It is because the implication of terms is so potentially intrusive that the law imposes strict constraints on the exercise of this extraordinary power.*
>
> (Emphasis added.);

(b) in a judgment of the Court of Appeal of Singapore in *Foo Jong Peng & Ors v Phua Kiah Mai & Anor*[24] ("*Foo Jong Peng*"), Andrew Phang Boon Leong JCA has explained as follows:

> [31] *As we shall see, the observations in [MFM Restaurants Pte Ltd and another v Fish & Co Restaurants Pte Ltd and another appeal*[25]*], although rendered by way of obiter dicta, are significant inasmuch as they embody what is, with respect, the fundamental difficulty with the Belize test. And it is that whilst the process of implication (of terms) is, when viewed in a more general sense, also a process of interpretation, the process of implication itself is, in the final analysis, just one specific conception of the broader concept of "interpretation". In particular, the process of implication is separate and distinct from the more general process relating to the interpretation of documents. Indeed, the process of implication of terms proceeds, ex hypothesi, on the absence of an express term of the contract. Hence, the implication of a term, whether in fact or in law* (for the distinction between these two categories of implied terms, see generally *Forefront* (at [41]–[44]); reference may also be made to the decision of this court in *Jet Holding Ltd v Cooper (Singapore) Pte Ltd* [2006] 3 SLR(R) 769 at [90]–[91]), *involves tests as well as techniques that are not only specific but also different from those which operate in relation to the interpretation of documents in general and the (express) terms contained therein in particular* (see also the observation of Lord Steyn in the House of Lords decision of *Equitable Life Assurance Society v Hyman* [2002] 1 AC 408 at 458

24 [2012] 4 SLR 1267 at [31] and [36].
25 [2011] 1 SLR 150.

as well as the perceptive observations by Prof Gerard McMeel in *The Construction of Contracts – Interpretation, Implication, and Rectification* (2nd ed, Oxford University Press, 2011) at para 10.04). *The (general) concept of "interpretation" has much in common with the implication of terms inasmuch as both entail an objective approach. However, it is, in our view, incorrect to conflate the tests as well as techniques which accompany both the aforementioned processes. Before proceeding to elaborate further, it would be appropriate at this juncture – consistently with the views just expressed – to note the very pertinent observations by a learned author, as follows (see Paul S Davies, "Recent developments in the law of implied terms"* [2010] LMCLQ 140 ("*Davies*") at p 144):

> *"Lord Hoffmann's speech in Belize may be seen to assimilate further implication within interpretation. Indeed, this was Lord Hoffmann's stated aim, since 'the implication of the term is not an addition to the instrument. It only spells out what the instrument means'. Yet this is questionable as a matter of logic: if the contract is silent on a point, by implying a term the court is supplementing, or replacing, this silence. It is submitted that it is stretching the boundaries of interpretation too far to suggest that implication is not an addition to the instrument, or that it simply gives effect to what the instrument means. An implied term may give effect to what the instrument should, ideally, have expressly provided for, but not what the instrument means in the form in which it was agreed by the parties.*
>
> *There is no utility in artificially forcing the doctrine of implication within the confines of interpretation. Indeed, it may actually be dangerous. This is exemplified by the fact that it no longer matters if the parties would not have responded to the officious bystander with a cursory, 'Oh, of course!' Why should a term be imposed upon a party if it would not have instantly agreed to such a term upon being asked by a bystander? ... Belize suggests that the subjective intentions of the parties are now irrelevant, and that the only matter of importance is what the reasonable observer would understand the contract to mean."*
>
> …

The status of the Belize test in Singapore

[36] *In summary, although the process of the implication of terms does involve the concept of interpretation, it entails a specific form or*

conception of interpretation which is separate and distinct from the more general process of interpretation (in particular, interpretation of the express terms of a particular document). Indeed, the process of the implication of terms necessarily involves a situation where it is precisely because the express term(s) are missing that the court is compelled to ascertain the presumed intention of the parties via the "business efficacy" and the "officious bystander" tests (both of which are premised on the concept of necessity). In this context, terms will not be implied easily or lightly. Neither does the court imply terms based on its idea of what it thinks ought to be the contractual relationship between the contracting parties. *The court is concerned only with the presumed intention of the contracting parties because it can ascertain the subjective intention of the contracting parties only through the objective evidence which is available before it in the case concerned. In our view, therefore, although the Belize test is helpful in reminding us of the importance of the general concept of interpretation (and its accompanying emphasis on the need for objective evidence), we would respectfully reject that test in so far as it suggests that the traditional "business efficacy" and "officious bystander" tests are not central to the implication of terms. On the contrary, both these tests (premised as they are on the concept of necessity) are an integral as well as indispensable part of the law relating to implied terms in Singapore* (as noted above at [27]–[28]).

(Emphasis added.); and

(c) the decision in *Foo Jong Peng* has been affirmed by Singapore's Court of Appeal in *Sembcorp Marine Ltd v PPL Holdings Pte Lte & Anor and another appeal*[26] ("*Sembcorp Marine*"). According to Sundaresh Menon CJ in *Sembcorp Marine*:[27]

> [30] … *We refer to ("Goh (JBL)") where Asst Prof Goh Yihan ("Asst Prof Goh") highlighted (at 244) the views of Prof Gerard McMeel ("Prof McMeel") and Sir Thomas Bingham MR (as he then was) on the distinction between the interpretative and implication process, both of whose views we agree with. Prof McMeel proposes that the process of implication "goes further [than interpretation] and permits the court to plug what it perceives to be gaps in the express terms or explicit language of the parties' agreement": Gerard McMeel, The Construction*

26 [2013] 4 SLR 193 at [76] and [77].
27 Ibid, at [30].

> *of Contracts* (Oxford University Press, 2nd Ed, 2011) ("McMeel") at p 315. ….
>
> (Emphasis added.)

[19] Fifth, a majority of the UK Supreme Court in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd & Anor*[28] ("*Marks and Spencer*") has decided that *AG of Belize* does not apply in the UK. Lord Neuberger PSC has decided as follows in *Marks and Spencer*:[29]

> [22] *Before leaving this issue of general principle, it is appropriate to refer a little further to the Belize Telecom case, where Lord Hoffmann suggested that the process of implying terms into a contract was part of the exercise of the construction, or interpretation, of the contract. In summary, he said at para 21 that "There is only one question: is that what the instrument, read as a whole against the relevant background, would reasonably be understood to mean?" There are two points to be made about that observation.*
>
> …
>
> [24] *It is necessary to emphasise that there has been no dilution of the requirements which have to be satisfied before a term will be implied, because it is apparent that the Belize Telecom case [2009] 1 WLR 1988 has been interpreted by both academic lawyers and judges as having changed the law. … And in Foo Jong Peng v Phua Kiah Mai [2012] 4 SLR 1267, paras 34–36, the Singapore Court of Appeal refused to follow the reasoning in the Belize Telecom case at least in so far as "it suggest[ed] that the traditional 'business efficacy' and 'officious bystander' tests are not central to the implication of terms" (reasoning which was followed in Sembcorp Marine Ltd v PPL Holdings Pte Ltd [2013] SGCA 43). The Singapore Court of Appeal were in my view right to hold that the law governing the circumstances in which a term will be implied into a contract remains unchanged following the Belize Telecom case.*
>
> …
>
> [31] *It is true that the Belize Telecom case [2009] 1 WLR 1988 was a unanimous decision of the Judicial Committee of the Privy Council and that the judgment was given by Lord Hoffmann, whose contributions in so many areas of law have been outstanding. However, it is apparent that Lord*

28 [2016] AC 742 at [22], [24] and [31].

29 Ibid. Lord Neuberger PSC's judgment has been agreed by Lord Sumption JSC, Lord Hodge JSC and Lord Clarke JSC (who also agreed with the interpretative approach).

> *Hoffmann's observations in the Belize Telecom case, at paras 17–27, are open to more than one interpretation on the two points identified in paras 23–24 and 25–30 above, and that some of those interpretations are wrong in law. In those circumstances, the right course for us to take is to say that those observations should henceforth be treated as a characteristically inspired discussion rather than authoritative guidance on the law of implied terms.*
>
> (Emphasis added.)

I should point out that Lord Carnwath JSC has accepted the interpretative approach in *Marks and Spencer*.[30] Lord Clarke JSC has sought to reconcile the interpretative approach with Lord Neuberger PSC's view as follows:[31]

> [75] *I agree that the appeal should be dismissed for the reasons given by Lord Neuberger of Abbotsbury PSC. I only add a few words of my own because of the debate between Lord Neuberger PSC and Lord Carnwath JSC on Lord Hoffmann's view on the relationship between the approach to construction and the approach to the implication of a term which he expressed on behalf of the Judicial Committee of the Privy Council in Attorney General of Belize v Belize Telecom Ltd* [2009] 1 WLR 1988. I do so in part in order to clarify what I said in the cases referred to by Lord Carnwath JSC, *Mediterranean Salvage and Towage Ltd v Seamar Trading and Commerce Inc* [2010] 1 All ER (Comm) 1 and *Aberdeen City Council v Stewart Milne Group Ltd* 2012 SC (UKSC) 240.
>
> [76] *As Lord Carnwath JSC says, at para 62, I did not doubt Lord Hoffmann's observation that "the implication of a term is an exercise in the construction of the contract as a whole". I recognise, however, in the light of Lord Neuberger PSC's judgment, especially, at paras 22–31, that Lord Hoffmann's view involves giving a wide meaning to "construction" because, as Lord Neuberger PSC says, at para 27, when one is implying a word or phrase, one is not construing words in the contract because the words to be implied are ex hypothesi and not there to be construed. However, like Lord Neuberger PSC (at para 26) I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. On that basis it can properly be said that both processes are part of construction of the contract in a broad sense.*

30 See n 28 above at [58]–[74].
31 Ibid, at [75]–[74].

> [77] *I agree with Lord Neuberger PSC and Lord Carnwath JSC that the critical point is that in the Belize case [2009] 1 WLR 1988 the Judicial Committee was not watering down the traditional test of necessity. I adhere to the view I expressed at para 15 of my judgment in the Mediterranean Salvage and Towage case [2010] 1 All ER (Comm) 1 (which is quoted by Lord Carnwath JSC, at para 62) that in the Belize case, although Lord Hoffmann emphasised that the process of implication was part of the process of construction of the contract, he was not resiling from the often stated proposition that it must be necessary to imply the term and that it is not sufficient that it would be reasonable to do so. Another way of putting the test of necessity is to ask whether it is necessary to do so in order to make the contract work: see the detailed discussion by Lord Wilberforce in Liverpool City Council v Irwin* [1977] AC 239, 253–254.
>
> (Emphasis added.)

[20] Lord Neuberger PSC's decision in *Marks and Spencer* has been applied by, among others, the UK Court of Appeal in *The Law Debenture Trust Corp plc v Ukraine*.[32]

[21] Sixth, I accept a criticism of the interpretative approach by Professor Goh Yihan.[33] According to Professor Goh:

> However, *although it is true that Lord Hoffmann in Belize did expressly say that a court might find the traditional tests helpful, the fact is that Lord Hoffmann actually undermined the strict requirement of "necessity" by referencing the criterion of "reasonableness". As has been pointed out: the test of "interpretation", which Lord Hoffmann says applies to the entire process of implication, broadens the traditional requirement of "necessity" in relation to the implication of terms in fact to one of "reasonableness". This is because, according to Investors Compensation Scheme Ltd v West Bromwich Building Society, interpretation is the "ascertainment of the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract". Thus the restriction which Lord Hoffmann placed on the word "necessity" in the context of the "business efficacy" test is no longer whether the implication is necessary to give effect to business efficacy, but whether the implication is necessary to convey the meaning as understood by a reasonable person.*

32 [2019] QB 1121 at [206].

33 Goh Yihan, "Terms Implied in Fact Clarified in Singapore" [2013] JBL 237 at 245.

> *The criterion of "reasonableness" has instead become the governing test over that of "necessity".*
>
> (Emphasis added.)

As explained by Professor Goh, an adoption of the interpretative approach may replace the strict requirement of necessity (which underpins the 2 tests) ("necessity requirement") with the "*reasonableness*" criterion ("reasonableness criterion"). It is to be noted that reasonableness criterion as the sole test for the implication process has been previously advanced by Lord Denning MR in the UK Court of Appeal in *Liverpool City Council v Irwin*[34] but this approach has been expressly rejected on appeal to the House of Lords.[35]

F. Should the 2 tests complement each other?

[22] Our Federal Court in *Sababumi* and *See Leong Chye* has clearly applied the 2 tests in a cumulative manner ("cumulative approach").

[23] In the High Court of Singapore in *Forefront Medical Technology (Pte) Ltd v Modern-Pak Pte Ltd*[36] ("*Forefront Medical Technology*"), Andrew Phang Boon Leong J (as he then was) has explained that the 2 tests should be applied in a complementary manner ("complementary approach") as follows:

> [32] Both these tests are firmly established in the local case law … with regard to the "business efficacy" and "officious bystander" tests, respectively.
>
> [33] *The relationship, however, between the tests is not wholly clear. Surprisingly, this appears to be the situation not only in the local context but also in England as well. …*
>
> [34] *On one view, the "business efficacy" and "officious bystander" tests are viewed as being wholly different tests* (see, for example, the cases cited at [39] below). *Looked at in this light, both tests could be utilised as alternatives. Such an approach, however, tends towards more complexity (and, possibly, confusion) in what is an already relatively general (even vague) area of the law.*

34 [1975] 3 All ER 658 at pp 664–665.
35 [1977] AC 239, please see Lord Wilberforce at pp 253–254, Lord Cross at pp 257–258, Lord Salmon at pp 262–263 and Lord Edmund-Davies at pp 265–266.
36 [2006] 1 SLR (R) 927 at [32]–[36], [39] and [40].

[35] *On another view, however, the two tests are complementary. This is the view I prefer as it is not only simple, albeit not simplistic, but is also consistent with the relevant historical context.* In the English Court of Appeal decision of *Reigate v Union Manufacturing Company (Ramsbottom), Limited and Elton Cop Dyeing Company, Limited* [1918] 1 KB 592 ("*Reigate*"), for example, that great commercial judge, Scrutton LJ, observed (at 605) thus:

> "A term can only be implied if it is necessary in the business sense to give efficacy to the contract; that is, if it is such a term that it can confidently be said that if at the time the contract was being negotiated someone had said to the parties, 'What will happen in such a case,' they would both have replied, 'Of course, so and so will happen; we did not trouble to say that; it is too clear.' Unless the Court comes to some such conclusion as that, it ought not to imply a term which the parties themselves have not expressed."
>
> (Emphasis added.)

[36] *An even cursory perusal of the above statement of principle by Scrutton LJ will reveal the integration as well as complementarity of the "business efficacy" and "officious bystander" tests. This is especially evident by the learned judge's use of the linking phrase "that is" in the above quotation. Indeed, the plain and natural meaning of this quotation is too clear to admit of any other reasonable construction or interpretation. And it is this: that the "officious bystander" test is the practical mode by which the "business efficacy" test is implemented. It is significant that the observations of Scrutton LJ in Reigate ([35] supra) antedated the more prominent pronouncement of the "officious bystander" test by MacKinnon LJ in Shirlaw ([31] supra) by some two decades. Of not insignificant historical interest, in this regard, is the fact that MacKinnon LJ was in fact Scrutton LJ's pupil and had close ties with him: on both professional as well as academic levels* (see generally *The Dictionary of National Biography* 1941-1950 (LG Wickham Legg & ET Williams eds) (Oxford University Press, 1959) pp 557–559 at p 557).

…

[39] *It should, however, be noted that there are other possible approaches as well. For example, there is some authority in the local context which suggests that the "business efficacy" and "officious bystander" tests can be utilised interchangeably, thus signalling that there is no real difference in substance between the two tests* (see, for example, the Singapore Court of Appeal decisions of *Bank of America National Trust and Savings*

Association v Herman Iskandar [1998] 2 SLR 265 at [45]; *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association* [2000] 4 SLR 137 at [42]; *Hiap Hong & Co Pte Ltd v Hong Huat Development Co (Pte) Ltd* [2001] 2 SLR 458 at [18]; *Tan Chin Seng v Raffles Town Club Pte Ltd (No 2)* [2003] 3 SLR 307 at [33]; and *Romar Positioning Equipment Pte Ltd v Merriwa Nominees Pty Ltd* [2004] 4 SLR 574 at [29]; as well as the Singapore High Court decision of *Loh Siok Wah v American International Assurance Co Ltd* [1999] 1 SLR 281 at [32]). *There is yet other authority suggesting that these two tests are cumulative (see, for example, the Malaysian Federal Court decision of Sababumi (Sandakan) Sdn Bhd v Datuk Yap Pak Leong* [1998] 3 MLJ 151 at 170). *It might well be that the approach from complementarity may be very close, in practical terms, to this suggested approach. However, the former could nevertheless still lead to different results and, in any event, does not comport with the background described briefly above.* Finally, there is some authority suggesting that both the "business efficacy" and "officious bystander" tests are not only different but that the criterion of "necessity" is only applicable to the former test (see the Malaysian High Court decision of *Chua Soong Kow & Anak-Anak Sdn Bhd v Syarikat Soon Heng (sued as a firm)* [1984] 1 CLJ 364 at [7]). This last-mentioned approach is probably the least persuasive of all since the criterion of "necessity" ought to be equally applicable to both tests (see, in this regard, *Miller Freeman Exhibitions Pte Ltd v Singapore Industrial Automation Association*, cited earlier in this paragraph).

[40] *Given the persuasive historical and judicial background as well as the general logic concerned, I would suggest that the approach from complementarity ought to prevail (see [36] above). It should also be noted that none of the cases in the preceding paragraph suggesting different approaches actually canvasses the rationale behind the respective approaches advocated.*

(Emphasis added.)

[24] In *Foo Jong Peng*[37] and *Sembcorp Marine*,[38] the Singapore Court of Appeal has accepted the complementary approach as laid down in *Forefront Medical Technology*.

[25] In addition to the reasons elucidated in *Forefront Medical Technology*, I am of the following view:

37 See n 24 above at [28].
38 See n 26 above at [90] and [98].

(a) as stated by Bowen LJ in the UK Court of Appeal case of *The Moorcock*,[39] a contractual term is implied by the court so as to give effect to the presumed intention of the contracting parties ("parties' presumed intention"). In ascertaining the parties' presumed intention, there is no hard and inflexible rule that the 2 tests should be applied cumulatively in the implication process;

(b) the application of the complementary approach in the implication process does not dilute in any manner the strict necessity requirement. There is also no risk that the necessity requirement will be substituted by the reasonableness criterion if the complementary approach is adopted; and

(c) there is neither principle nor policy consideration which requires the 2 tests to be applied in a cumulative manner.

[26] Premised on the reasons explained in *Forefront Medical Technology* and the above paragraph 25, it is my hope that our Federal Court may revisit the cumulative approach *vis-à-vis* the complementary approach.

G. Should informal contracts be treated differently?

[27] In this article, I use the term "informal" agreements to refer to the following agreements ("informal agreements"):

(a) oral agreements;

(b) contracts which are partly oral and partly in writing; and

(c) agreements in the form of written documents but the parties have not reduced their agreements in a "complete written form" as explained by Deane J in the High Court of Australia in *Hawkins v Clayton & Ors*[40] ("*Hawkins*").

In contradistinction to informal agreements, I will employ the term "complete written agreements" to mean written contracts which appear *ex facie* to contain all the terms that have been agreed by the parties.

39 (1889) 14 PD 64 at 68.
40 (1988) 78 ALR 69 at 91.

[28] The nature of informal agreements has been recognised by Lord Wilberforce in the House of Lords in *Liverpool City Council v Irwin*[41] ("*Liverpool City Council*") as follows:

> *We have then a contract which is partly, but not wholly, stated in writing. …*
>
> *To say that the construction of a complete contract out of these elements involves a process of "implication" may be correct; it would be so if implication means the supplying of what is not expressed. But there are varieties of implications which the courts think fit to make and they do not necessarily involve the same process. Where there is, on the face of it, a complete, bilateral contract, the courts are sometimes willing to add terms to it, as implied terms: this is very common in mercantile contracts where there is an established usage: in that case the courts are spelling out what both parties know and would, if asked, unhesitatingly agree to be part of the bargain. In other cases, where there is an apparently complete bargain, the courts are willing to add a term on the ground that without it the contract will not work – this is the case, if not of The Moorcock (1889) 14 PD 64 itself on its facts, at least of the doctrine of The Moorcock as usually applied. This is, as was pointed out by the majority in the Court of Appeal, a strict test – though the degree of strictness seems to vary with the current legal trend – and I think that they were right not to accept it as applicable here. There is a third variety of implication, that which I think Lord Denning M.R. favours, or at least did favour in this ease, and that is the implication of reasonable terms. But though I agree with many of his instances, which in fact fall under one or other of the preceding heads, I cannot go so far as to endorse his principle; indeed, it seems to me, with respect, to extend a long, and undesirable, way beyond sound authority.*
>
> *The present case, in my opinion, represents a fourth category, or I would rather say a fourth shade on a continuous spectrum. The court here is simply concerned to establish what the contract is, the parties not having themselves fully stated the terms. In this sense the court is searching for what must be implied.*
>
> (Emphasis added.)

[29] Based on the above judgment of Lord Wilberforce in *Liverpool City Council*, there is a "continuous spectrum" of agreements ("spectrum") for the court to imply a contractual term.

[30] At one end of the spectrum is complete written agreements for which the courts can only imply a term if the necessity requirement

41 See n 35 above at 253–254.

is fulfilled by way of an application of the 2 tests (either by way of the cumulative approach or complementary approach). Beyond complete written agreements lies a wide spectrum of informal agreements with varying degrees of "informality" ("informalities"). There are various reasons for the informalities, such as (which are not exhaustive):

(a) the relationship between the contracting parties;

(b) the nature, value and subject-matter of the informal agreements;

(c) the circumstances leading to the conclusion of the informal agreements; and

(d) any one or more of the contracting parties may not have the benefit of:

(i) legal advice; and

(ii) the drafting skills of a competent lawyer.

[31] For informal agreements, I am of the view that the complementary approach (not the cumulative approach) should apply.

[32] Firstly, *Sababumi* and *See Leong Chye* do not concern informal agreements. In *Sababumi*, the Federal Court implied a term in a complete written agreement. *See Leong Chye* involved a letter of undertaking to a bank which did not constitute an informal agreement.

[33] In support of the above view, I rely on the following two judgments of the High Court of Australia:

(a) in *Hawkins*,[42] Deane J has decided as follows:

> *Care must be taken to avoid an automatic or rigid application of the ordinary cumulative criteria for determining whether a term should be implied in a written contract to a case where the contract is oral or partly oral or where it is apparent that the parties have never attempted to reduce their agreement to complete written form* (cf *Hospital Products Ltd v United States Surgical Corp* (1984) 156 CLR 41 at 121; 55 ALR 417). *The cases in which those criteria were laid down or accepted as the cumulative ingredients of an overall test were concerned with the*

42 See n 40 above at 91–92.

question whether a term should be implied in a formal contract which was complete upon its face (see, in particular, *BP Refinery (Westernport) Pty Ltd v Hastings Shire Council* (1977) 52 ALJR 20 at 26; 16 ALR 363 at 376; *Secured Income Real Estate (Australia) Ltd v St Martins Investments Pty Ltd* (1979) 144 CLR 596; 26 ALR 567; *Codelfa Construction Pty Ltd v State Rail Authority of NSW* (1982) 149 CLR 337; 41 ALR 367). *In such cases, the insertion of an additional term effectively involves an alteration to what the parties have formally accepted as the complete written record of the compact between them. As the judgment of Mason J in Codelfa (CLR at 345–7; Stephen and Wilson JJ concurring with his Honour's comments on this aspect of the case) clearly indicates, the cumulative criteria formulated or accepted in such cases cannot be automatically applied to cases such as the present where the parties have not attempted to spell out all the terms of their contract but have left most or some of them to be inferred or implied. Where that is so, there is no question of effectively altering the terms in which the parties have seen fit to embody their agreement; the function of a court is, as Lord Wilberforce pointed out in Liverpool City Council v Irwin* [1977] AC 239 at *254, "simply … to establish what the contract is, the parties not having themselves fully stated the terms".*

(Emphasis added.); and

(b) in *Byrne v Australian Airlines Ltd*:[43]

(i) a joint judgment by Brennan CJ, Dawson and Toohey JJ has accepted the above decision by Deane J in *Hawkins*;[44] and

(ii) McHugh and Gummow JJ[45] have delivered the following joint judgment:

> Secondly, *where the contract is not in writing and is oral or partly oral or it appears that the parties themselves did not reduce their agreement to a complete written form, caution is required against an automatic or rigid application of the cumulative criteria identified in [BP Refinery (Westport) Pty Ltd v Hastings Shire Council][46]. We should proceed on the footing that the present case is to be approached in this way.*
>
> (Emphasis added.)

43 (1995) 131 ALR 422.
44 Ibid, at p 428.
45 See n 43 above at 443–444.
46 (1977) 180 CLR 266.

H. Conclusion

[34] As early as 1958, Viscount Simonds in the House of Lords' case of *Davie v New Merton Board Mills Ltd*[47] has recognised that implication of a contractual term is controversial. This is understandable because it may be difficult for the courts to ascertain the parties' presumed intention in the implication process. Hence, the three matters raised in this article will continue to evoke lively, if not passionate, discussion.

[35] Premised on the above cases and reasons, I opine as follows:

(a) the interpretative approach should not apply in the implication process; and

(b) for the court to imply a contractual term, the 2 tests should apply in a complementary manner, especially for informal agreements.

47 [1959] AC 604 at 619.

A Social Licence to Operate: The Impact of Climate Change on Directors' Duties in Malaysia

by

*Justice Dato' Faizah Jamaludin** and *Dato' Mohammad Faiz Azmi***

"*Climate change mitigation and pollution prevention have increasingly become important as businesses continue to seek a social licence to operate*."

Datuk Seri Mustapa Mohamed, Minister in the Prime Minister's Department for Economic Affairs, May 5, 2021[1]

Introduction

[1] We live in difficult times. Weather patterns are increasingly erratic, floodings are becoming more common and we are expecting longer periods of drought. There is a growing awareness globally and locally that these changes are due to climate change and that climate change itself is caused by human behaviour. As a species, we are utilising more and more of the planet's resources for our own use. According to the 2021 edition of the National Footprint and Biocapacity Accounts,[2] the world's population is currently over using the existing resources we have and that it now takes the Earth one year and eight months to regenerate what we use in a year. Clearly this is not sustainable.

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* Judge of the High Court of Malaya.

** Executive Chairman, PricewaterhouseCoopers, Malaysia.

1 Datuk Seri Mustapa Mohamed, Minister in the Prime Minister's Department for Economic Affairs, in his Keynote Address in "Climate and Sustainability Ambitions of our Trading Partner" webinar, organised by Climate Governance Malaysia, on May 5, 2021.

2 The National Footprint and Biocapacity Accounts is updated annually by the Global Footprint Network, an international think tank promoting and driving sustainable policy decisions. The Footprint and Biocapacity Accounts measures ecological resource use and resource capacity over time. The calculations are based on data of more than 200 countries from 1961 to 2017 from the United Nations or UN-affiliated data sets, including the Food and Agriculture Organization, UN Commodity Trade Statistics Database, the UN Statistics Division and the International Energy Agency. https://www.footprintnetwork.org/resources/data/.

[2] One of the consequences of this overuse of resources are activities that have increased greenhouse gas emissions, which in turn has caused global temperatures to rise. This rise in temperatures is the prime cause of climate change. Global temperatures have been rising steadily compared to pre-industrial days. Scientists anticipate that if temperatures rise by 1.5°C or higher, it will lead to an increase in heavy rain as well as shrinking glaciers and thawing permafrost, which will increase sea levels and affect weather patterns.

[3] A global attempt was made to tackle climate change in December 2015 where 195 countries, including Malaysia, agreed to adopt the Paris Agreement.[3] It was a landmark agreement in that it included the aim to strengthen the global response to the threat of climate change by "holding the increase in the global average temperature to well below 2°C above pre-industrial levels and pursuing efforts to limit the temperature increase to 1.5°C above pre-industrial levels, recognizing that this would significantly reduce the risks and impacts of climate change".[4]

[4] However, these efforts have not resulted in the desired impact. In 2019, the United Nations Intergovernmental Panel on Climate Change ("IPCC") in their Special Report: Global Warming of 1.5°C concluded that human-induced warming has already reached 1°C above pre-industrial levels,[5] and if the current warming rate continues, the world will reach human-induced global warming of 1.5°C around 2040.[6] In May 2021, it was estimated that the global temperature was already 1.2°C above pre-industrial levels and there is a 40% probability that the temperature increase may hit 1.5°C by 2024.[7] Sea level rises are expected to impact Asia more as more coastlines are very low compared to sea level. The UN estimates the impact to Asia would be

3 The Paris Agreement is an agreement within the United Nations Framework Convention on Climate Change ("UNFCCC") on climate change mitigation, adaptation and finance, signed in Paris, France on December 12, 2015 and entered into force on November 4, 2016.

4 Paris Agreement, Art 2(1)(a).

5 The IPCC Special Report on Global Warming of 1.5°C, see n 6 below, uses the reference period 1850–1900 to represent pre-industrial temperatures.

6 A full copy of the IPCC Special Report on Global Warming of 1.5°C can be downloaded from https://www.ipcc.ch/site/assets/uploads/sites/2/2019/06/SR15_Full_Report_High_Res.pdf.

7 World Meteorological Organization ("WMO") Climate Update, May 27, 2021.

approximately USD675 billion a year, with 60% coming from droughts and an estimated 15% reduction in rice yield per 1°C rise.[8]

[5] All these consequences — if we fail to contain the temperature increase — add to the sense of urgency and why there is so much focus now on the commitments (or lack thereof) of both governments and corporations to climate change mitigation. The IPCC in their Special Report on Global Warming of 1.5°C showed that recent trends in emissions deviate from the aim of limiting warming to well below 2°C, and concluded that:

> Without increased and urgent mitigation ambition in the coming years, leading to a sharp decline in greenhouse gas emissions by 2030, global warming will surpass 1.5°C in the following decades, leading to irreversible loss of the most fragile ecosystems, and crisis after crisis for the most vulnerable people and societies.

[6] As a nation, Malaysia is not a major emitter of greenhouse gases. We emitted a net 75 million tonnes of global greenhouse gases in 2017, as compared to total world output of 51 billion tonnes. We contributed less than 0.7% of total global emissions. We were net zero emissions in 2004. The reason why our emissions are relatively small is that we are blessed with forest and jungle cover which is a natural carbon sink that absorbs carbon. In addition, our Borneo rainforests are older than the Amazon rainforest and have the highest density of plant species in the world.[9]

[7] But if the world is to reduce its temperatures by 1.5°C, all countries must take significant and difficult steps in the next 10 years to reduce their greenhouse emissions, or the worst will happen. In Southeast Asia, it is estimated that 77% of the population living by the coast or low lying deltas will be affected by sea level rises. Our sea-level rises are higher than the global average as Malaysia is closer to the equator. Malaysia has a coastline of 4,800 km, where 13% of her total land area is within 5 km of the coastline. Selangor and Johor in particular — two states with very low lying coastal plains — will be adversely impacted

8 Report of the United Nations Secretary General on Oceans and the Law of the Sea 2020, "Sea-level rise and its impact", contribution by the WMO.

9 Alex Shoumatoff, "Vanishing Borneo: Saving One of the World's Last Great Places", Yale School of the Environment, May 18, 2017.

by rising sea levels.[10] Bank Negara Malaysia in April 2021 stated that the impact from climate change in Malaysia has been significant in the last 20 years, where more than 50 climate-related natural disasters have resulted in over RM8 billion in monetary losses and affected the lives and livelihoods of more than 3 million people in Malaysia through displacements, injuries and death.[11]

[8] Article 4.2 of the Paris Agreement requires state parties to prepare and maintain successive "nationally determined contributions", geared to the overall objective of reducing emissions and pursuing "domestic mitigation measures with the aim of achieving the objectives of such contributions." Malaysia in its Intended Nationally Determined Contribution ("INDC") that was submitted to the United Nations Framework Convention on Climate Change ("UNFCCC") in November 2015, had committed to an unconditional reduction of emission intensity by 35% by 2030 from its 2005 baseline, with a further 10% reduction upon receipt of climate finance, technology transfer and capacity building from developed countries.[12]

[9] Datuk Seri Mustapa Mohamed, the Minister in the Prime Minister's Department for Economic Affairs, in his Keynote Address in a Climate Governance Malaysia webinar on Climate and Sustainability Ambitions of our Trading Partners on May 5, 2021 stated that although Malaysia contributed less than 1% of global greenhouse gases, the government is taking the issue of climate change seriously. Malaysia aspires to become a carbon-neutral nation in the future as it views climate change and sustainability as issues of high significance. The minister stressed that "as we aspire to become a carbon-neutral nation, priority will be on low-carbon and climate-resilient economy, as well as conservation of natural resources". He asked Malaysian companies to look ahead and develop robust green strategies in reducing greenhouse gas emissions and resource consumption. He also said that Malaysia's National Energy Policy, which is expected

10 Sofia Ehsan *et al*, "Current and Potential Impacts of Sea Level Rise in the Coastal Areas of Malaysia", 2019 IOP Conference Series: Earth and Environmental Science.

11 Bank Negara Malaysia, "Climate Change and Principle-based Taxonomy", April 30, 2021 citing Zurairi AR (October 2018), "Climate-related natural disasters cost Malaysia RM8b in last 20 years".

12 Intended Nationally Determined Contribution of the Government of Malaysia, available online at https://www4.unfccc.int/sites/submissions/INDC.

to be launched in the second half of 2021, will serve as the planning and development agenda for the country's energy sector to transition towards a low-carbon future.

This Article

[10] This article aims to discuss what climate change and Malaysia's aspirations to become a carbon-neutral economy mean for company directors — in terms of their fiduciary duty to act for a proper purpose and in good faith in the best interest of the company; their duty to exercise reasonable care, skill and diligence; and their disclosure obligations to their shareholders and the various regulators under Malaysia's corporate governance framework. It will also discuss the risks that company directors may face as regards climate change issues; such risks may materialise in the form of civil litigation by their shareholders, interest groups and other stakeholders, as well as personal criminal liability for their companies' climate change-related offences under the existing Environmental Quality Act 1974 or a new Climate Change Act.

[11] This article begins by discussing (i) the history and science behind climate change; (ii) the corporate governance framework in Malaysia. It will then discuss (iii) the climate change governance in terms of a possible climate change legislation and the expectations of Malaysian regulators as regards climate change adaptation and risk management goals. Included in this section are initiatives by the Joint Committee on Climate Change ("JC3") formed on September 27, 2019 by Bank Negara Malaysia ("BNM") and the Securities Commission Malaysia ("SC"); the increasing expectation on financial institutions to understand their customers' business models; and the evolving interest of BNM, Bursa Malaysia Berhad ("Bursa") and the SC in this area, which culminated in the issuance by the SC of the updated Malaysian Code of Corporate Governance 2021 ("MCCG 2021") on April 28, 2021, and the issuance by BNM of its Climate Change and Principle Based Taxonomy ("the Taxonomy") guidance paper on April 30, 2021.

[12] It will then go on to discuss (iv) the trends in the private sector on climate change that company directors would need to heed; and (v) climate-related litigation internationally, in order to illustrate the types of actions that could be taken against directors on climate change risks. This includes the recent decisions of the English High Court in the Volkswagen "*Dieselgate*" emissions cheating case and the

Hague District Court, where in May 2021, it held Royal Dutch Shell plc to be in violation of its obligations to reduce its greenhouse gas emissions globally.

[13] Finally, this article will conclude with what, in our view, is the likely impact of climate change on Malaysian company directors.

[14] The views expressed in this article and the conclusions reached herein are the authors' own and do not represent either the views of the Malaysian Judiciary or PricewaterhouseCoopers, Malaysia.

I. The history and science behind climate change

[15] Climate change must be placed in its historical and scientific context, in order for us to understand why it is currently a boardroom agenda, why Malaysian regulators such as BNM and the SC have introduced new practices and guidance papers to address the urgent need for companies to focus on environmental, social and governance ("ESG") risks and opportunities; and why banks such as HSBC and CIMB have announced that they are phasing out coal and coal-fired power stations from their financing portfolio by 2040.

[16] In the financial and corporate sector, there has been a realisation that the profit maximisation objective for shareholders, practised since the first days of limited liability companies in Victorian England, was too narrow. Companies thrive in the environment they operate in and over the last 30 years, companies have accepted new objectives that include consideration for the community and their other stakeholders.

[17] These new objectives can be neatly summarised by the phrase the "triple bottom line" of "people, planet, profits", which was coined some 27 years ago by a writer named John Elkington. As explained in *The Economist*:[13]

> [Elkington's] argument was that companies should be preparing three different (and quite separate) bottom lines. One is the traditional measure of corporate profit—the "bottom line" of the profit and loss account. The second is the bottom line of a company's "people account"—a measure in some shape or form of how socially responsible an organisation has been throughout its operations. The

13 "Triple Bottom Line: It consists of three Ps: profit, people, planet", *The Economist*, November 17, 2009.

> third is the bottom line of the company's "planet" account—a measure of how environmentally responsible it has been. The triple bottom line (TBL) thus consists of three Ps: profit, people and planet. It aims to measure the financial, social and environmental performance of the corporation over a period of time. Only a company that produces a TBL is taking account of the full cost involved in doing business.

[18] With this new thinking, certain phrases or concepts have entered the vocabulary of the corporate world such as "sustainability", "ESG principles", "biodiversity" and "climate change".

Sustainability

[19] Sustainable development as a concept was first discussed in the Brundtland Report[14] in 1987 issued by the World Commission on Environment and Development. The Commission defined "sustainable development" as "development that meets the need of the present without compromising the ability of future generations to meet their own needs".

[20] World leaders at that time agreed to implement strategies that aim to help make the way they use resources in their countries more sustainable. Over the next two decades, the UN had made various attempts to obtain consensus on sustainable development. In 2015, the UN announced its 2030 Agenda for Sustainable Development which sought to define 17 goals, known as Sustainable Development Goals ("SDGs") that should be achieved by 2030. These goals ranged from aspirational ones — like SDG 1: no poverty; SDG 2: zero hunger; and SDG 16: peace, justice and strong institutions — to goals that talked about equality such as SDG 4: quality education; SDG 5: gender equality; and SDG 10: reduced inequalities, and those that relate to conservation of the environment such as SDG 7: affordable clean energy; SDG 12: responsible consumption and production; and SDG 13: climate change.

[21] 193 UN member states, including Malaysia, agreed to implement these SDGs from January 2016. The task of corporates under these SDGs is to first do business responsibly and then pursue opportunities to solve societal challenges through business innovation and collaboration. By

14 World Commission on Environment and Development, *Our Common Future* (Oxford University Press, 1987).

reason of the SC's MCCG and Bursa's Listing Requirements, many public listed companies in Malaysia have included SDGs in their purpose.

ESG principles

[22] "ESG principles" is a term commonly used by corporates and investors. The term takes on and develops further the ideas behind Elkington's "people, planet, profits" and was first mentioned in the United Nations' Principles for Responsible Investment ("PRI") that was launched by the then United Nations Secretary General, Kofi Annan, at the New York Stock Exchange in April 2006. The PRI was developed by a group of the world's largest institutional investors invited by Kofi Annan in early 2005, where a 20-person investor group drawn from institutions in 12 countries was supported by a 70-person group of experts from the investment industry, intergovernmental organisations and civil society.[15]

[23] The PRI is based on the idea that ESG issues can affect the performance of investment portfolios. It defines responsible investment as a strategy and practice to incorporate ESG factors in investment decisions and active ownerships.

- "E" stands for the environmental criteria that considers how a company performs as a steward of nature. It includes matters relating to climate change, waste disposal and the impact to the environment by its activities.
- "S", the social criteria, examines how a company manages its relationships with employees, suppliers, customers and the communities where it operates. These have recently manifested as concerns over worker treatment and rights of employees.
- "G" is for governance. It deals with a company's leadership, executive pay, audits, internal controls and shareholder rights. This area of governance was where regulators traditionally focused on. However, over the years, they have extended their interest to environmental and social matters too — the "E" and "S" in "ESG".

15 https://www.UNPRI.org.

[24] At its launch in 2006, 63 signatories had signed up to PRI to incorporate screening of ESG issues into their investments — they agreed, among others, to incorporate ESG issues into their investment analysis and decision-making processes and to seek appropriate disclosures on ESG issues by the entities in which they invest. These 63 signatories had some USD6.5 trillion assets under their management then. As of March 31, 2020, there are 3,038 signatories to PRI representing USD103.4 trillion worth of assets including Malaysia's Employees Provident Fund ("EPF"), Khazanah Nasional Berhad ("Khazanah") and Kumpulan Wang Persaraan (Diperbadankan) ("KWAP").[16]

Biodiversity

[25] "Biodiversity" is another term that is often raised in discussions. It is defined as all the different kinds of life you will find in an area — the variety of animals, plants, fungi, and microorganisms such as bacteria that make up our natural world. Each of these species and organisms work together in ecosystems, like an intricate web, to maintain balance and support life.

[26] The impact humans have had on biodiversity can best be explained by reference to Sir David Attenborough's October 2020 Netflix documentary entitled *A Life on Our Planet*. Sir David, a renowned 93-year-old British documentary maker, made the documentary as a witness statement to what has happened to biodiversity in his lifetime and his vision of our future.

[27] Sir David's message in *A Life on Our Planet* is that he has seen the biodiversity of the world gradually disappear over his professional career because of the behaviour of mankind. The issues, he believes, are the destruction of forests and wildlife habitat and the non-sustainable use of resources by man, which have collectively caused the planet's natural ecosystem to fall out of balance, as a result of which, the planet is more unstable now than it has been for thousands of years. To support his contention, Sir David points to the reduction of summer sea ice in the Arctic by 40% in 40 years — less ice means less reflected heat of the sun; the fact that we have replaced wildlife with tame ones

16 Ibid; https://www.businesstoday.com.my/2021/04/21/epf-khazanah-nasional-kwap-signs-pri-for-newly-launched-sustainable-investment-platform/.

to eat — wildlife populations have halved in the last 30 years; 70% of birds in the world are domesticated and comprise mainly chicken; and fish stocks have been overfished such that they have reduced by 30%. Southeast Asia features in the documentary too: in the 1950s he estimated that three-quarters of Borneo was covered by rainforest but by the year 2000 it had reduced to half. Globally, half of the world's forests have been cut down. Deforestation not only destroys biodiversity and collapses the local ecosystem, but it also reduces the capacity of the planet to capture and lock carbon.

[28] He points out that in the history of the planet there have been five mass extinction events and before these events, the level of carbon in the air was extremely high. In 1937, carbon comprised only 200 parts per million in the air, but in 2020 it has now risen to 415 parts per million. Scientists believe that when carbon is at 500 parts per million or more, the full impact of temperature on the climate and the consequential impact of global warming will be universally apparent and perhaps irreversible.

[29] Sir David's solution to restore biodiversity is to rewild the world, reduce population growth and stop new deforestation. In his words, "If we take care of nature, nature will take care of us." He went on to say that we need to realise that we share this planet with others and if we are not careful, nature and the planet will move on as they have before, but we will not as a species.

Climate change

[30] The phrase "climate change" includes both global warming driven by human-induced emissions of greenhouse gases and the resulting large-scale shifts in weather patterns.

[31] The largest driver of global warming is the emission of gases that create a greenhouse effect, of which more than 90% are carbon dioxide (CO_2) emissions and net non-CO_2 emissions due to methane (CH_4), black carbon, and nitrous oxide (N_2O). CO_2 and N_2O are long-lived greenhouse gases — studies show that N_2O last for over a century and CO_2 lasts for hundreds of thousands of years.[17] Fossil

17 The IPCC Special Report on Global Warming of 1.5°C, see n 6; citing Myhre, G *et al*, *Anthropogenic and natural radiative forcing* (2013).

fuel burning (coal, oil and natural gas) for energy consumption is the main source of these emissions, with additional contributions from agriculture, deforestation and manufacturing.

[32] The human cause of climate change is not disputed by any scientific body of national or international standing. Temperature rises are accelerated or tempered by events, such as loss of sunlight-reflecting snow and ice cover, increased water vapour and changes to land and ocean carbon sinks. Increased greenhouse emissions have caused global temperatures to rise by trapping heat. This rise in temperatures is the prime cause of climate change.

[33] The consequences of climate change would directly affect us humans and our environment. They include loss of food production, water crises and health risks, especially in developing countries, through rising air temperatures and heatwaves, and the increasing spread of pests and pathogens. There will be loss of biodiversity too, due to the impact on flora and fauna, as well as ocean acidification due to increased bicarbonate (HCO_3) concentrations in the water as a consequence of increased CO_2 concentrations.[18]

II. Malaysia's corporate governance framework

[34] In Malaysia, the duties of company directors are governed through a corporate governance framework comprising legislation and guidelines issued by the regulators – BNM, SC, Bursa and the Companies Commission of Malaysia ("SSM"). These guidelines are SC's Malaysian Code of Corporate Governance ("MCCG"), BNM's Guidelines on Corporate Governance, Bursa's Listing Requirements, and SSM's Code of Ethics for Company Directors/Company Secretaries.

[35] The main legislations are the Companies Act 2016 [*Act 777*] ("CA 2016"), the Capital Markets and Services Act 2007 [*Act 671*], and the Financial Services Act 2013 [*Act 758*], with the CA 2016 being the primary source of corporate governance in Malaysia.

[36] The principle of corporate governance is statutorily codified in the CA 2016: it replaced the Companies Act 1965 [*Act 125*] ("CA 1965")

18 R Cho, "How Climate Change Will Alter our Food", Columbia Climate School, July 25, 2018; "CO2 and Ocean Acidification: Causes, Impacts, Solutions", Union of Concerned Scientists, February 6, 2019.

and is a product of the Corporate Law Reform Committee established by the SSM to review the CA 1965.

Companies Act 2016

[37] The CA 2016 does not introduce any new duties and responsibilities for directors. A director of a company is still required to at all times exercise his powers "for a proper purpose and in good faith in the best interest of the company"[19] and to "exercise reasonable care, skill and diligence".[20] However, the most significant development in terms of directors' duties is section 210 of the CA 2016 — it extends the directors' fiduciary duties and duty of care, skill and diligence, to the chief executive officer ("CEO"), chief financial officer ("CFO"), chief operating officer ("COO") or any other person responsible for the management of the company.

[38] A director's duty to act in good faith and in the best interest of the company under section 213(1) of the CA 2016 is based on general fiduciary principles. In *Petra Perdana Bhd v Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors*,[21] Nallini Pathmanathan J (now FCJ) said as regards a director's fiduciary duty:

> [219] … Case-law establishes under the scope of a director's fiduciary duty that he must exercise his powers bona fide and in the best interests of the company as a whole. This is similar to, and captured by the duties imposed by statute (see s 132(1)). The essence of the fiduciary duty is a duty to act bona fide in the interests of the company and not for a collateral purpose …. Although the directors are vested with powers which carry implicitly some degree of discretion, such powers must be exercised bona fide, meaning for the purpose for which they were conferred and not arbitrarily or at the will of the directors, but in the interests of the company …

[39] Section 214 of the CA 2016 introduces a statutory business judgment rule, which is linked to a director's fiduciary duties and duty of care, skill and diligence. "Business judgment" is defined as any decision on whether or not to take action in respect of a matter relevant to the business of the company. The business judgment rule "in essence asserts the judicial policy embedded in the common law

19 CA 2016, s 213(1).
20 Ibid, s 213(2).
21 [2014] 11 MLJ 1; [2014] 1 LNS 236; [2014] AMEJ 385.

principle that the Court will not interfere with management decisions honestly arrived at to achieve proper purpose and in good faith in the best interest of the company".[22]

[40] The Court of Appeal in *Pioneer Haven Sdn Bhd v Ho Hup Construction Co Bhd & Anor and Other Appeals*[23] ("*Pioneer Haven*") held that what is in the "best interest of the company" depends on the factual circumstances. Zainun Ali JCA (later FCJ) held that in deciding whether a director had acted in good faith and in the best interest of company, the "old case laws relating to the duty to act honestly continues to be relevant".[24] The Court of Appeal applied the test promulgated by the English High Court in *Charterbridge Corporation Ltd v Lloyds Bank Ltd*[25] (the "*Charterbridge* principle"), where in deciding whether a director had acted in the best interest of the company, the court is entitled to look objectively at the reasons given by the directors in taking a particular action.

[41] The Federal Court in *Tengku Dato' Ibrahim Petra Tengku Indra Petra v Petra Perdana Bhd and Another Appeal*[26] restored and affirmed the decision of Nallini Pathmanathan J (now FCJ) and approved the *Charterbridge* principle applied by the Court of Appeal in *Pioneer Haven*. The Federal Court held that the correct test as to whether directors acted in the best interest of the company is a combination of both subjective and objective tests. Azahar Mohamed FCJ (now CJ (Malaya)) said:

> [166] In our judgment, the correct test combines both subjective and objective tests. The test is subjective in the sense that the breach of the duty is determined on an assessment of the state of mind of the director; the issue is whether the director (not the court) considers that the exercise of discretion is in the best interest of the company. In this regard, … the director's conduct is tested by reference to an essentially subjective barometer. … The duty is to act in what the director believes, not what the court believes, to be the best interest of the company …

22 Loh Siew Chang, *Corporate Powers Accountability*, 3rd edn (LexisNexis, 2018), para 7-3.
23 [2012] 3 MLJ 616; [2012] 5 CLJ 169; [2013] 3 AMR 297.
24 Ibid at [233].
25 [1970] Ch 62.
26 [2018] 2 CLJ 641; [2018] 2 MLJ 177; [2018] 1 AMR 517, FC.

> [167] The test is objective in the sense that the director's assessment of the company's best interest is subject to an objective review or examination by the courts …

[42] The subjective element lies in the court's consideration as to whether a director had exercised his discretion *bona fide* in what he considered (and not what the court considers) to be in the company's best interest.

[43] The objective element in the test relates to the court's supervision over directors who claim to have been genuinely acting to promote the company's interest, even though, objectively, the transactions were not in the company's interests. It is important to note that the objective test in determining whether a director had acted in the best interest of the company is "the intelligent and honest man" test. The barometer is not the reasonable man on the Clapham omnibus but "the intelligent and honest man", namely "whether an intelligent and honest man in the position of a director of the company, could in the whole of the existing circumstances, have reasonably believed that the transactions were for the benefit of the company".[27]

III. Malaysia's climate change governance framework

Climate change legislation?

[44] Currently, there is no specific legislation governing climate change in Malaysia, unlike the UK where the Climate Change Act 2008 is the framework legislation.

[45] The Secretary General of the Ministry of Environment and Water was reported as saying in September 2020 that the government is planning to conduct a "scoping review" on the need for climate change legislation and will either draft a new Climate Change Act or amend the existing Environmental Quality Act 1974 [*Act 127*] ("EQA 1974" or "the Act") to include matters relating to climate change, sustainability, and greenhouse gases management and reporting.[28] At the time of writing this article, it is not evident from publicly available material whether the Ministry has commenced the review and if so, whether the decision has been made to draft a separate Climate Change Act

27 *Pioneer Haven*, n 23 above at [239].

28 https://themalaysianreserve.com/2020/09/23/govt-plans-to-assess-the-need-for-climate-change-legislation/.

or amend the existing EQA 1974 to include provisions relating to climate change.

[46] The EQA 1974 is the main legislation in Malaysia for environmental protection and pollution control. The basic premise of the EQA 1974 is "polluter pays", i.e. the person or company that pollutes or causes pollution in contravention of the Act is guilty of an offence and shall be liable to a fine or to imprisonment or to both as provided in the Act.

[47] Currently, under the EQA 1974, a company can potentially be criminally liable for environmental pollution. Pursuant to section 43(2) of the EQA 1974, a corporation is vicariously liable for any contravention of the provisions of the EQA 1974 and any of the regulations made under the Act, by any of its employees and agents acting in the course of employment, unless the company proves to the satisfaction of the court that the contravention was committed without its knowledge or consent or that the company had exercised all such diligence to prevent the contravention and to ensure that its employees and agents observe all the provisions of the EQA 1974 and any regulations made thereunder. Section 43(2) of the EQA 1974 states:

> (2) Whenever it is proved to the satisfaction of the court that a contravention of the provisions of this Act or any regulations made thereunder has been committed by any clerk, servant or agent when acting in the course of his employment *the principal shall also be held liable for such contravention and to the penalty provided thereof unless he proves to the satisfaction of the court that the same was committed without his knowledge or consent or that he had exercised all such diligence as to prevent the same and to ensure the observance of such provisions*: …
>
> (Emphasis added.)

[48] The authors of the book, *Criminal Law in Malaysia and Singapore*,[29] expressed the view that "the justification for imposing corporate criminal liability is two-fold: it rightly pins culpability where it belongs; and it serves to deter corporate activities which pose harm to the public".[30] In the English case of *R v Great North of England*

29 Stanley Yeo, Neil Morgan and Chan Wing Cheong, *Criminal Law in Malaysia and Singapore*, 2nd edn (LexisNexis, 2012).

30 Ibid, para 37.11.

Railway Co,[31] which is one of the earliest common law cases that held a company can be liable for an offence, Lord Denman CJ held:

> There can be no effectual means for deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation, acting by its majority: and there is no principle which places them beyond the reach of the law for such proceedings.

[49] However, under the EQA 1974, it is not only the corporation that is held criminally liable. Where a company is found to have committed an offence under the EQA 1974, section 43(1) of the Act deems the directors, CEO and manager of the company to be guilty of the offence. To disprove his guilt, the director, CEO and/or manager (as the case may be), has to prove that the offence was committed "without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised, having regard to the nature of his functions in that capacity and to all the circumstances." This is set out in section 43(1) of the EQA 1974 which states:

> (1) Where an offence against this Act or any regulations made thereunder has been committed by a company, firm, society or other body of persons, any person who at the time of the commission of the offence was a director, chief executive officer, manager, or other similar officer or a partner of the company, firm, society or other body of persons or was purporting to act in such capacity *shall be deemed to be guilty of that offence unless he proves that the offence was committed without his consent or connivance and that he had exercised all such diligence as to prevent the commission of the offence as he ought to have exercised,* having regard to the nature of his functions in that capacity and to all the circumstances.
>
> (Emphasis added.)

[50] However, as discussed earlier, pursuant to section 210 of the CA 2016, the "manager" of a company includes not only the CEO but also the CFO, COO or "any other person primarily responsible for the management of the company".

31 (1846) 9 QB 315 at 327; 115 ER 1294 at 1298.

[51] The effect of the statutory presumption in section 43(1) of the EQA 1974 is to negate the common law presumption that a man is innocent until proven guilty. Instead of the prosecution having to prove that the offence is committed "with the consent or connivance of, or attributable to any neglect on" the part of the director or managers of the company (e.g. in section 67 of the Patents Act 1983 [*Act 291*]), the EQA 1974 requires the director, CEO and/or manager of a company (as the case may be) to prove that he was not complicit in the commission of the offence. He is also required to prove that that he had exercised "all due diligence" to prevent the commission of the offence.

[52] It is settled law that where a statutory presumption is available to the prosecution to prove guilt on the part of the defendant, the burden of proof to rebut such presumption shifts to the defence. Hence, in cases where a company has been found to have committed an offence under the EQA 1974, the burden of proof shifts onto the directors, the CEO and/or the manager of the company (as the case may be) to rebut the statutory presumption.

[53] The Federal Court in *Public Prosecutor v Yuvaraj*,[32] held that where a statutory presumption of guilt comes into effect, the burden of proof upon an accused person would be the same as that applied in civil proceedings, i.e. the balance of probabilities. The Federal Court's decision was upheld by the Privy Council. In the case of *Akin Khan bin Abdul Rahman v Public Prosecutor*[33] ("*Akin Khan*"), the Supreme Court referred to *Public Prosecutor v Yuvaraj* as the *locus classicus* on the shift of burden of proof, where there is a statutory presumption of guilt. The Supreme Court in *Akin Khan* confirmed that once a statutory presumption of guilt comes into effect, the burden of proof on the accused is proof on the balance of probabilities.

[54] Therefore, for a company found guilty of an offence under the EQA 1974, its directors, CEOs and managers would have to prove on the balance of probabilities that they did not consent or connive in the commission of the environmental offence under the EQA 1974 and that they had exercised all due diligence to prevent the commission of the offence in order to escape personal liability.

32 [1969] 2 MLJ 89; [1968] 1 LNS 116.
33 [1987] 2 MLJ 217; [1987] CLJ Rep 40.

[55] The statutory obligations imposed on directors under the EQA 1974 are highly onerous — much more so than the duty to act in the best interest of the company and the duty to act with reasonable, care and skill required under the CA 2016. Under the CA 2016, a director is under a duty to act with "reasonable diligence", whereas the EQA 1974 requires a director to prove that he had exercised "all such diligence as he ought to have exercised" in order to rebut the statutory presumption of guilt for any environmental offence committed by the company.

[56] Therefore, if after completing its "scoping review" on the need for climate change legislation, the Ministry of Environment and Water decides to amend the EQA 1974, or to enact a new Climate Change Act with a similar statutory presumption of guilt, directors, CEOs and managers of companies (which by virtue of section 210 of the CA 2016, includes the CFOs and COOs) would, correspondingly, be deemed to be guilty of the company's failure to comply with statutory provisions relating to climate change, sustainability and greenhouse gases. To rebut the statutory presumption of guilt, the burden of proof will be on them to prove that they were not complicit in the offence and had exercised "all due diligence as they ought to have exercised" to prevent the commission of the offence.

What has been the expectations of regulators in tackling climate change?

[57] Regulators signal their expectations of company directors by regulation, enforcement action and publication of guidelines. In the absence of legislation on climate change, Malaysia is currently addressing climate change through directives and guidance documents issued by our regulators, namely, BNM, SC and Bursa.

[58] In Malaysia, the SC, as our capital market regulator, had undertaken a series of initiatives laid down in its Capital Market Masterplan 2, published on April 12, 2011 to support the sustainability agenda.[34] The focus on maintaining our global leadership in the Islamic capital markets was important given that shariah principles are consistent with sustainable and inclusive development. In 2014, the SC developed the Sustainable and Responsible Investment ("SRI") Sukuk framework which benchmarked certain sukuk issuance against

34 https://www.sc.com.my/resources/publications-and-research/cmp2.

the Green Bonds Principles.[35] The SC has worked with other ASEAN regulators on the ASEAN Green Bond standards and the ASEAN Sustainability Bond Standards to facilitate funding of sustainable development and continue to bring into the Malaysian capital markets other initiatives.

[59] As discussed in the Introduction section above, the SC's MCCG, first published in 2000, was amended in April 2021 to explicitly address environmental and sustainability concerns in the MCCG. The MCCG 2021 introduces new requirements for directors to take into account sustainability considerations in exercising their duties and for corporate disclosures to include information on the company's sustainability risks and opportunities that focus "on substance and not merely form".[36]

[60] The MCCG 2021 requires company directors to take on responsibility for sustainability matters, which includes ESG considerations. They are to embed these considerations into their business strategies and operations, to better engage internal and external stakeholders and to increase the level of disclosure over the targets, gaps and the actions to address them. The SC is currently working on developing an SRI taxonomy or classification system, to help investors understand better what they are investing in.

[61] There is increased focus on the need for relevant corporate disclosures and better engagement with stakeholders. To meet this need, the MCCG 2021 expects more granular disclosures, target setting and gap analysis and actions to close the gaps disclosed. Such disclosures will require a review of the process for the capture of data, particularly non-financial data, to ensure it is verifiable, accurate and robust. Key assumptions and models used will need to be reviewed independently to ensure the targets and achievements are seen as being science based and defensible. There is an expectation that the performance evaluation framework for both the board and management will be amended to reflect some accountability for what

35 "Green Bond Principles" are voluntary process guidelines that recommend transparency and disclosure and promote integrity in the development of the green bond market by clarifying the approach for issuance of a green bond, i.e. a bond created to fund projects that have positive environmental and/or climate benefits.

36 Securities Commission Malaysia, Malaysian Code of Corporate Governance, April 28, 2021, available at https://www.sc.com.my.

is being represented and achieved in a reporting period and to be reported on externally.

[62] Financial institutions ("FIs") play a big role in funding corporates and as a result, banking regulators are keen to ensure banks know enough about what their customers are doing, to manage their own risks. There is also pressure on Malaysian banks to do more in encouraging their customers to behave in a more sustainable way. BNM first issued its Taxonomy as a discussion paper in December 2019 and on April 30, 2021 issued it as a final guidance document for financial institutions to assess and classify their customers' economic activities, identifying those that contribute to climate change mitigation and adaptation.[37] BNM views "climate-related risks as a risk driver that has an impact on most of the commonly known risks managed by FIs, namely credit, market liquidity, insurance/takaful, operational and strategic risks".[38]

[63] Although BNM's Taxonomy is stated to be a "guidance paper", the paper makes it mandatory for FIs to include in their due diligence assessment of existing and prospective customers, the following guiding principles: (GP1) *Climate change mitigation*: The customer's economic activity to reduce or prevent the emission of greenhouse gases into the atmosphere; (GP2) *Climate change adaptation*: The customer's economic activity to lower the negative effects and/or moderate harm caused by climate change; (GP3) *No significant harm to the environment*: The customer's economic activity and overall business must not be at risk of causing significant harm to the environment; (GP4) *Remedial measure to transition*: The remedial measures taken by the customer to address the significant harm identified from its economic and/or business activities; and (GP5) *Prohibited activities*: the customer's economic activities being considered and/or financed are not illegal and do not contravene environmental laws.

[64] Part C, paragraph 7.2 of BNM's Taxonomy states:

> 7.2 In applying the taxonomy, the key elements of its guiding principles *should be* embedded in the due diligence assessment of existing and prospective customers. GP1 and GP2 are assessed at transaction

37 Bank Negara Malaysia, Climate Change and Principle-based Taxonomy, April 30, 2021, available at https://www.bnm.gov.my.

38 Ibid, Part B, para 5.2.

> level (e.g. upon origination and extension of credit, investment in financial assets, and structuring of capital market transactions). A more holistic assessment of the customer's overall business *is required* to evaluate compliance with GP3, GP4 and GP5. Effective and transparent engagements between FIs and their customers, as well as access by FIs to relevant and verifiable information *will be required* to support assessments against the principles.
>
> (Emphasis added.)

[65] Moreover, FIs licensed under the Financial Services Act 2013 [*Act 758*] ("FSA 2013"), i.e. banks, investments banks, international Islamic banks, Islamic banks, insurers, reinsurers, takaful operators, retakaful operators and prescribed development financial institutions, are supervised by BNM. They are legally required under the FSA 2013 to comply with "any standards, notice, direction, condition, specification or requirement" specified or issued by BNM. Hence, they are required to comply with the "guiding principles" in the Taxonomy.

[66] Bursa, too, has played a role in managing climate change risks. It launched the FTSE4Good Bursa Malaysia Index in December 2014 to profile ESG-compliant companies. And in 2015, Bursa introduced sustainability reporting through its Main Market Listing Requirements. Hence, whilst the MCCG 2021 is a set of corporate governance "best practices" for companies to adopt, Bursa's Main Markets Listing Requirements makes it mandatory for the board of directors of a public listed company to provide in its annual report, an overview statement of the company's application of the principles set out in the MCCG. A listed company must also disclose to Bursa in its Corporate Governance Report, the application of each best practice set out in the MCCG during the financial year and announce the same together with the announcement of its annual report.[39]

[67] The key motivator for these regulators is risk, as arguably a company that has not considered how climate change risks impact its business model and strategy, would be a risky investment. The wider context is that globally, as climate change becomes an increasingly major focus, local corporates need to be cognizant of the increasing expectations of stakeholders around the world who do business with them and how it could impact their businesses in the long term.

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39 Bursa Malaysia Berhad Listing Requirements, Ch 15, Part E, para 15.25, Disclosure of Corporate Governance Related Information.

[68] This sense of shared purpose between regulators has also manifested itself in the setting up of the JC3 that is co-chaired by BNM and SC. Its members comprise senior officials from Bursa and 19 industry players. The work of JC3 is to support efforts to build resilience against climate and environmental-related events and secure an orderly transition to a more sustainable economy. A statement released in conjunction with JC3's inaugural meeting in September 2019 states:

> The JC3 recognised the urgent need to accelerate responses towards ensuring a smooth and orderly transition to a low-carbon economy. This includes managing exposures to climate risks and facilitating businesses to transition towards sustainable practices.

IV. What are the trends in the private sector on climate change that company directors need to heed?

[69] Climate change and the attendant risks to a company's business and sustainability is not only of interest to regulators. There has been much debate among equity investors, debt market holders of bonds and financial institutions about the impact climate change can have on their customers' or investees' businesses and also on their own returns and investments.

[70] Over time, stakeholder activism, as opposed to shareholder activism, started to increase — companies were being asked to consider their impact on employee welfare, community and corporate social responsibility. The focus moved from governance to social matters. This led to the increase in corporate social responsibility ("CSR") initiatives by the corporate sector to give back to the communities they operate in. It also created an expectation that paying taxes alone was not enough for the local communities.

[71] The then Governor of the Bank of England, Mark Carney, in his famous Tragedy of the Horizons speech to the Lloyd's insurance exchange in September 2015 likened the issue of climate change for finance and business to the "Tragedy of the Commons", a situation where individuals neglect the well-being of society in pursuit of personal gain — common resources are plundered by all without any eye to the future, so everyone loses out. He suggested that climate change risks being a "Tragedy of the Horizons", in that the detrimental effects of climate change lie beyond the horizons of the business cycle

and the political cycle and beyond the horizons of the mandate of regulatory authorities such as central banks.[40]

[72] The World Economic Forum Global Risk Report 2020 shared a survey of CEOs views on the risks they face, where for the first time, the top five global risks identified by CEOs were all environmental ones. These increasing demands from institutional shareholders, their banks and analysts for more and better disclosures of the climate change-related risks has been seen as a further burden to a company's operations. However, ignoring these issues could potentially affect the company's ability to continue funding itself in the future.

[73] Institutional equity owner Blackrock informed its clients in May 2020 that "we are on the front end of a profound, long term structural shift in global investor preferences towards sustainability that is not fully priced into the market today" and "we believe sustainability should be our new standard for investing".[41] Blackrock, together with Calpers, Schroders, DWS, and other major asset owners around the world, have signalled their expectations of investees to prioritise non-financial impacts and to disclose and address ESG risks. Climate Action 100+, which represents investors managing USD47 trillion of funds worldwide, urges companies to set a net zero emissions target and plans to hold them accountable.

[74] Even Malaysian government-linked investment funds ("GLICs") such as EPF, Khazanah and KWAP are beginning to ask for the same clarity and disclosures from their investees. The former CEO of EPF, Tunku Alizakri Alias, was quoted as saying:

> While sustainability has always been at the heart of what EPF does, the time is ripe for us to be a force of positive change in moving from "doing no evil" to actively "doing good".[42]
>
> We (EPF) think ESG is the best barometer for companies that are well run. If you practice ESG well, your company is most likely bound to succeed. [At EPF], we look into companies that embrace the social aspects of their businesses and turn them into real businesses.[43]

40 Mark Carney, "Breaking the Tragedy of the Horizon – climate change and financial stability", Bank of England, September 29, 2015.

41 https://www.blackrock.com/corporate/investor-relations/2020-blackrock-client-letter.

42 "Rethinking ESG in a Post-Covid 19 World", PWC Malaysia, November 2020.

43 https://www.theedgemarkets.com/article/glics-could-play-effective-role-pushing-esg-agenda-says-epf-chief, July 7, 2020.

[75] On the debt side, banks and institutions providing credit or purchasing bonds are already considering their positions on climate change. Some are refusing to fund certain projects such as coal-fired plants and other industries that negatively impact the environment. HSBC, for example, announced in March 2021 that they were seeking shareholders' approval to phase out financing for coal-fired power stations and thermal coal mining by 2030 in EU and OECD countries, and worldwide by 2040. Sumitomo Mitsui Financial Group Inc said in May 2021 that it is halting new financing for all coal-fired power plants, becoming the first major Japanese lender to make such a pledge amid increasing pressure on Japanese banks to cut coal-based funding. G7 Ministers, in May 2021, also agreed to stop direct funding of coal-fired power stations in poorer nations by the end of 2021. In December 2020, CIMB announced that it will phase out coal from its portfolio by 2040, in an effort to align itself with the Paris Agreement's goal of reducing the global temperature by 1.5°C. It is the first Malaysian and Southeast Asian bank to commit to a coal exit strategy.

[76] Malaysia is a trading nation. Our main exports are oil and gas, palm oil and manufacturing products. Increasingly, Malaysian companies are being challenged by global purchasers to comply with higher standards relating to ESG principles including climate change. A good example has been the pressures on the palm oil industry to adopt more sustainable practices and to stop deforestation and the development of peat land. Now, industries like agriculture and medical goods producers who use foreign labour are being challenged on their poor treatment of their foreign employees. These pressures have not gone unnoticed by regulators as can be seen from the issuance of SC's MCCG 2021 and BNM's Taxonomy.

V. Climate change related litigation in other jurisdictions

[77] Given that climate change is a global issue, it may be instructive to see what the experience in other jurisdictions is. It has been reported that as of May 2020, there were 1,587 instances of climate-related litigation filed around the world.[44] The majority of these cases were

44 Setzer J and Byrnes R, "Global Trends in Climate Change Litigation: 2020 Snapshot", Grantham Research Institute of Climate Change and the Environment and Centre for Climate Change Economics and Policy, London School of Economics and Political Science.

in the United States, Australia and Europe but some have also been initiated in Indonesia and the Philippines.

[78] In 2015, Volkswagen was exposed as having rigged 11 million diesel vehicles by installing "defeat devices" to pass emission tests, resulting in costs including €27.4 billion in penalties and fines. Investors took Volkswagen to court in Germany to seek compensation for the devaluation of the carmaker's share price from the diesel emissions scandal (known as "*Dieselgate*"). It was reported in March 2021 that Volkswagen AG (the parent company of the Volkswagen Group) has commenced legal action against its former CEO and chairman of its board of management and the former Audi CEO for breaches of duty of care related to Dieselgate. Audi and Porsche have also brought legal action against their former board members for breaches of duty of care.

[79] In the United Kingdom, about 90,000 motorists brought a class action against Volkswagen, as well as Audi, SEAT and Skoda, which are also owned by the Volkswagen Group, over the installation of emissions cheating devices in its diesel vehicles. On April 6, 2020, the English High Court in *Anthony Joseph Champian Crossley & Ors v Volkswagen Aktiengessellschaft*[45] ruled that the software installed by Volkswagen in its cars was a "defeat device" within the meaning of Article 3(10) of the EU Parliament and Council Regulation 715/2007 dated June 20, 2007. It also ruled that the UK will adhere to the decision of the German Federal Motor Transport Authority (KBA), which concluded that Volkswagen had installed the software in millions of cars and that the software did constitute a defeat device. Volkswagen sought leave to appeal against the High Court's decision, which application was dismissed by the Court of Appeal in August 2020.

[80] In the United States of America, minority shareholders of Exxon Mobil Corp ("Exxon") filed derivative suits in *Re Exxon Mobil Corp Derivative Litigation*[46] in 2019 against certain Exxon directors and officers for common law breach of fiduciary duty, waste of corporate assets and unjust enrichment. The plaintiffs claimed that the Exxon directors and officers had breached their fiduciary duties of care, loyalty and good faith because they knew, were reckless, or were grossly negligent in not knowing that Exxon's actual investment and

45 [2019] EWHC 783, QB.
46 No 19-cv-01067-K (N D Tex).

asset valuation did not incorporate greenhouse gas or carbon proxy costs consistent with its public representations or internal policies. As a result of this, Exxon could not satisfy the US Securities and Exchange Commission's (SEC) definition for "proved reserves" and certain gas operations were, thus, impaired and required an impairment charge in financial statements. The plaintiffs alleged that these wrongful acts and omissions forced Exxon to defend itself in other cases and governmental investigations, and that the directors and officers were unjustly enriched by receiving remuneration while breaching their fiduciary duties towards Exxon.

[81] In Europe, Dutch environmental group, Milieudefensie (Friends of the Earth Netherlands) together with other non-governmental organisations ("NGOs") and 17,000 citizens filed an action in April 2019 against Shell in the Hague District Court in *Milieudefensie et al v Royal Dutch Shell PLC*,[47] where they claimed that Shell's inadequate contributions to climate change violate its duty of care under Dutch law and human rights obligations. According to the Carbon Majors Database Report 2017, Shell was the ninth largest global emitter of greenhouse gases from 1988 to 2015.[48]

[82] The plaintiffs claimed that Shell was breaching article 6:162 of the Dutch Civil Code and violating articles 2 and 8 of the European Convention on Human Rights ("ECHR"), i.e. the right to life and the right to family, by causing danger to others when alternative measures could have been taken. In its defence, Shell pleaded, among others, that there is no legal standard, statutory or otherwise, that would establish that it is acting in conflict with an unwritten legal standard by failing to comply with emissions caps. Shell also argued that the plaintiffs' claims were too general to fall within the scope of Articles 2 and 8 of the ECHR.

[83] The Hague District Court, in its decision delivered on May 26, 2021, ordered Shell to reduce its emissions by 45% by 2030, relative to 2019, across all activities including both its own emissions and end-use emissions. The court found Shell's sustainability policy to be insufficiently concrete — that they were "intangible, undefined and non-binding plans for the long-term" and "dependent on the pace

47 C/09/571932/HA ZA 19-379.
48 https://www.cdp.net.

at which global society moves towards the climate goals of the Paris Agreement", allowing it to move more slowly, and that the "emissions reduction targets for 2030 are lacking completely." The court held that the applicable standard of care requires Shell to reduce all global emissions that will harm Dutch citizens, where it said:

> RDS' [Royal Dutch Shell plc] reduction obligation ensues from the unwritten standard of care laid down in Book 6 Section 162 Dutch Civil Code, which means that acting in conflict with what is generally accepted according to unwritten law is unlawful.

Rejecting Shell's argument that there was no legal basis for the case as governments alone are responsible for meeting the Paris Agreement targets, the court found that "since 2012 there has been broad international consensus about the need for non-state action, because states cannot tackle the climate issue on their own". The full judgment of the Hague District Court can be downloaded from the link in the footnote below.[49]

[84] The significance of the Shell case is that it is the first time that a court has ordered a private company to comply with the Paris Agreement. The decision would serve as a precedent for other NGOs and stakeholders to take legal action against other major polluters and carbon emitters, although at the time of writing, whether the legal approach taken by the plaintiffs in the Shell case will be replicated against oil companies or big polluters outside the Netherlands remains to be seen.

VI. Conclusion

[85] What is the likely effect of climate change on company directors? One of the earliest analysis on this question was done in 2016 by Noel Hutley SC and Sebastian Hartford-Davis in an opinion commissioned the Australian Centre for Policy Development (CPD) on how Australian law requires company directors to consider, disclose and respond to climate change. In their 2016 opinion, Hutley and Hartford-Davis found that directors of Australian companies who do not properly manage climate risks could be held liable for breaching their legal duty of care and diligence under section 180(1) of the Australian

49 http://climatecasechart.com/climate-change-litigation/wp-content/uploads/sites/16/non-us-case-documents/2021/20210526_8918_judgment-2.pdf.

Corporations Act 2001. In an updated legal opinion issued in March 2019,[50] Hutley and Hartford-Davis said regulators and investors now expect "much more from companies than cursory acknowledgment and disclosure of climate change risks" and given the effect climate change will have on the economy, it will become "increasingly difficult for directors of companies of scale to pretend that climate change will *not* intersect with the interests of their firms". They concluded that the risk for directors of Australian companies has increased since their 2016 opinion and "the exposure of individual directors to 'climate change litigation' is increasing, probably exponentially, with time".

[86] Lord Sales, Justice of the UK Supreme Court, in his speech to the Anglo-Australian Law Society Sydney in 2019[51] expressed the view that the position of company directors in relation to climate change can be analysed under three heads:

> First, they will have obligations to comply with the various regulatory and legal disclosure requirements now being specified.
>
> Second, in so far as the law imposes fines in relation to polluting activities or creates tax incentives to encourage a shift to low carbon activity, directors will have a responsibility in the usual way to assess the financial impacts of these on their companies. …
>
> Thirdly, apart from this regulatory and state action, the general fiduciary obligations of directors owed to their companies – representing as the case may be in the interests of shareholders or, in certain circumstances, creditors – may permit directors to have regard to climate change effects as a factor in their decision making.

[87] In April 2021, a group of senior lawyers in Singapore, instructed by the Commonwealth Climate and Law Initiative (CLLI) to advise on the obligations of directors as regards issues associated with climate change, published a legal opinion on "Directors Responsibilities and Climate Change under Singapore Law".[52] Upon reviewing the

50 N Hutley SC and S Hartford-Davis, "Climate Change and Directors' Duties: Supplementary Memorandum of Opinion", March 26, 2019, The Centre for Policy Development, http://cpd.org.au.

51 Lord Sales, "Directors' Duties and Climate Change: Keeping Pace with Environmental Challenges", August 29, 2019.

52 Jeffrey WT Chan *et al*, "Legal Opinion on Directors' Responsibilities and Climate Change under Singapore Law", April 14, 2021.

existing laws in Singapore, together with listing and other disclosure requirements, they concluded:

> 79. At this time, directors in Singapore are obliged when carrying out their responsibilities as directors, to take into account climate change and its associated risks, particularly insofar as those risks are or may be material to the interests of the company. … Significantly, directors who fail to give due consideration to climate change risks, or who wilfully or recklessly fail to comply with their disclosure obligations, may face the spectre of criminal prosecution by the relevant governmental agencies, as well as potential liability for their defaults.

[88] In Malaysia, responsibilities of boards of directors and management of public listed companies have exponentially increased in the SC's MCCG 2021 to include specific expectations on determining the company's sustainability strategies, priorities and targets. Regulators have included climate change and sustainability requirements on public listed companies and financial institutions, as is evident from the SC's MCCG 2021 and BNM's Taxonomy. As this explicit expectation has to be measured and reported on, it has given rise to a possibility of further increases to the board's liabilities to external parties in the future, as more details are required to be represented externally, albeit on future matters, combined with the fact that there are no objective standards in place to measure the appropriateness of these disclosures. Additionally, GLICs such as EPF, Khazanah and KWAP, which have over RM1 trillion assets under management, have publicly stated that climate change and ESG issues are important factors in their analysis of investee companies, and in allocating investment funds in the capital market.

[89] It remains to be seen how these new climate change expectations and requirements will be adopted by Malaysian companies, given that many are still shareholder run or family owned.

[90] In discharging his fiduciary duties and his duty of care, a director would have to actively manage the climate change risks that arise. He must be equally prepared to explain climate change risks to stakeholders in a verifiable and accurate manner and how the company will be financially impacted by the outcomes, whether good or bad. This is much more onerous than stewardship, oversight and being accountable for the company's actions as a whole. Based on the

"intelligent and honest director" test in determining whether a director has acted in the best interest of the company, it would appear that company directors are expected to be conversant in climate change issues and the impact of climate change on their business. A director of the company needs to be able to show that as an intelligent and honest man, he reasonably believed that the activities undertaken or not undertaken by the company were for the benefit of the company. As Hutley and Hartford-Davis said in their 2019 updated opinion, "company directors who consider climate change risks actively, disclose them properly and respond appropriately will reduce exposure to liability".

[91] As can be seen from the Volkswagen, Exxon and Shell litigation in the UK, US and Netherlands, directors are at risk from criminal prosecution and civil litigation for their companies' climate change violations, from the regulators, their shareholders, environmental interest groups, their customers and potentially the companies themselves, as demonstrated by the actions taken by Volkswagen, Audi and Porsche against members of their board for their involvement in *Dieselgate*, and in the case of Shell for their failure to reduce their global greenhouse gas emissions to meet the objectives of the Paris Agreement.

[92] In our view, the parameters used in assessing directors' responses to issues is set to evolve given the increasing global and local expectations on climate change. In Malaysia, the test of whether a director has acted in the best interest of the company and exercised the requisite "business judgment" under the CA 2016 will take into account the requirements of the MCCG 2021 and for financial institutions, the guiding principles in BNM's Taxonomy too. Directors will have to show their shareholders, stakeholders and regulators that the company has addressed climate change risks in an integrated and strategic manner to support its long term strategy and succeed.

[93] In conclusion, for companies and businesses, the social licence to operate has become more onerous. Directors can no longer afford to ignore the reality of climate change and the impact that it has on their businesses and the communities in which they operate.

The Right to Counsel under Article 5(3) of the Federal Constitution: The Continuing Saga Revisited

by

*Justice Wan Ahmad Farid bin Wan Salleh**

Introduction: How the saga began

[1] Ooi Chooi Toh ("Chooi Toh") was arrested by the police on December 26, 1974. However, due to intervening public holidays at the material time, he was brought before the magistrate on December 28, 1974 under section 117 of the Criminal Procedure Code [*Act 593*] ("CPC"). On January 7, 1975, Chooi Toh was charged in the Magistrates' Court, Alor Star, for abetment in an armed robbery alleged to have been committed on December 26, 1974, i.e. the day that he was arrested.

[2] Chooi Toh's father, Ooi Ah Phua, after having been made aware of his son's arrest and detention, attempted to see his son after the arrest. Unfortunately, he was prevented from doing so by the police. On December 30, 1974, the father instructed his solicitors and on the same day, the solicitors wrote to the OCCI Kedah/Perlis to ask if counsel could see Chooi Toh at 12.30 p.m. the same day.

[3] The OCCI replied that the time and date were not suitable. However, the OCCI assured the solicitors that any other date or time might be arranged with the OCPD Alor Star. On the day the letter was sent, counsel saw the OCCI and January 2, 1975 was fixed as a suitable date for the appointment for counsel to see Chooi Toh.

[4] The appointed date was a Thursday and, therefore, a half-day for government departments in Kedah at the material time. Counsel went to the police station at various times in the morning of that day together with the father, but neither Chooi Toh nor the OCCI was there. Being a half-day, counsel returned to his office at 1.30 p.m.

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* Judge of the High Court of Malaya.

[5] The solicitors then wrote a letter to the OCCI alleging breach of Article 5(3) of the Federal Constitution.

[6] This was how the saga began.

How the law developed

[7] At the Federal Court in *Ooi Ah Phua v Officer-in-Charge Criminal Investigation, Kedah/Perlis*[1] ("*Ooi Ah Phua*"), the issue was: when does the right of an arrested person to consult and be defended by a legal practitioner of his choice accrue? It was contended on behalf of the appellant that such right accrues at the moment of arrest.

[8] In delivering the judgment of the Federal Court and after having referred to a line of authorities and Article 5(3) of the Federal Constitution, Suffian LP (with whom Lee Hun Hoe CJ (Borneo) and Wan Suleiman FJ concurred) held as follows:

> With respect I agree that the right of an arrested person to consult his lawyer begins from the moment of arrest, but I am of the opinion that that right cannot be exercised immediately after arrest. A balance has to be struck between the right of the arrested person to consult his lawyer on the one hand and on the other the duty of the police to protect the public from wrongdoers by apprehending them and collecting whatever evidence exists against them. The interest of justice is as important as the interest of arrested persons and it is well-known that criminal elements are deterred most of all by the certainty of detection, arrest and punishment.

[9] The then Federal Court had another opportunity to address the same question in *Hashim bin Saud v Yahya bin Hashim & Anor*[2] ("*Hashim bin Saud*"). In reiterating the same proposition, Raja Azlan Shah FJ (as the former Lord President then was) held that such right of an arrested person "starts right from the day of his arrest but it cannot be exercised immediately after arrest if it impedes police investigation or the administration of justice".

[10] At this stage, it is helpful to reproduce Article 5(3) of the Federal Constitution, which provides:

1 [1975] 2 MLJ 198, FC.
2 [1977] 2 MLJ 116, FC.

> Where a person is arrested he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

[11] While the right to counsel as unequivocally pronounced in *Ooi Ah Phua* and *Hashim bin Saud* begins immediately after arrest, this right can only be exercised if, and only if, it does not impede the police investigation or the administration of justice.

[12] The Federal Court in *Ooi Ah Phua* had adopted the *dictum* of Syed Agil Barakbah J (later SCJ) in *Ramli bin Salleh v Inspector Yahya bin Hashim*[3] ("*Ramli bin Salleh*") who held, *inter alia*, that the right to counsel should be subject to certain legitimate restrictions. Such restrictions relate to the time and convenience of both the police and counsel and should not be subject to abuse by either party. In any event, according to the learned judge, the interviews should be held out of the hearing, though within sight of the police.

[13] It should be noted that *Ramli bin Salleh* is also an authority for the proposition that the right to counsel exists even though the police investigation has not yet been completed.

[14] The keywords used by Suffian LP in *Ooi Ah Phua* and Raja Azlan Shah FJ in *Hashim bin Saud* are that the right to consult a counsel "cannot be exercised immediately". Whether the delay is unreasonable or otherwise oppressive is a question of fact.

The onus to show the reasonableness

[15] But the question that arises is, who bears the onus of proving that the delay is unreasonable or otherwise oppressive? Syed Agil

3 [1973] 1 MLJ 54. The ruling of Syed Agil Barakbah J is to be treated as an *obiter*, though a very persuasive one. The reason is this: the learned judge in this case after making the ruling referred the matter for the opinion of the Federal Court under s 48 of the Courts of Judicature Act 1964 (Act 91). The Federal Court (Federal Court Special Case No. 1 of 1972, Ong CJ, Suffian, Gill, Ali and Ong Hock Sim FJJ) on October 2, 1972, unanimously refused to give an opinion, saying that the Federal Court under s 48 had no jurisdiction to determine abstract matters or matters of academic interest such as disclosed in the reference. Suffian FJ thought that the learned judge when making the ruling, was already *functus officio* and that he should not have made it. Ong Hock Sim FJ considered that as the prisoner was already released, the ruling was uncalled for as the matter had become purely an academic exercise. No written judgment of the Federal Court was delivered.

Barakbah J in *Ramli bin Salleh* was of the view that the police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds to deprive the accused of his fundamental right. What does this entail? It means that the onus is on the police to justify the delay in giving the arrested person access to legal consultation.

[16] What happened in *Ramli bin Salleh* was that the respondent informed the counsel that he could only see the prisoner after the completion of the remand period. Thus, from the day of arrest until the completion of the remand period, the prisoner would not be given the opportunity of consulting his counsel. To this, the learned judge forcefully remarked:

> I must say that the action of the respondent in restricting the learned counsel's application to interview his client on the expiry of the detention period is unreasonable. What the respondent meant was nothing more than "Well, you can see your client after I have completed my investigation during the remand period." It must therefore be understood that the police must not in any way delay or obstruct such interviews on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right.

[17] In short, the test is an objective one. It is for the detaining authority to justify the delay in giving access to legal representation. The reason must be a compelling one. Of course, the list of "compelling reasons" is not exhaustive and will depend on the circumstances of the case. One situation can be seen in the judgment of Dame Victoria Sharp P, in the English Court of Appeal case of *R v Abdurahman (Ismail)*:[4]

> In this respect, we agree with the Court of Appeal's observation in 2008 that "Abdurahman was providing information about Osman which could have been of critical importance in securing his arrest, which was the priority at that time". That conclusion could properly be drawn from the evidence before the court (including that of the police officers who had interviewed Mr Abdurahman), despite the lack of direct evidence from the senior police officer who had given the instruction. It is difficult to conceive of more compelling reasons than the need to obtain information about the whereabouts of an individual who had already detonated a bomb capable of killing and maiming large numbers of people and who it was believed, for good reason, may be planning imminently to detonate more.

4 [2020] 4 WLR 6, CA.

[18] However, the then Supreme Court in *Theresa Lim Chin Chin v Inspector General of Police*[5] ("*Theresa Lim*") had made a different approach on the onus of proving that the delay was unreasonable or otherwise oppressive. In that case, the police arrested the appellants pursuant to the police power of arrest under section 73 of the now repealed Internal Security Act 1960 [*Act 82*] ("ISA"). They were each kept in separate places and no counsel was allowed to see them. It was argued on behalf of the appellants that the arrest was illegal and therefore, *habeas corpus* should be issued by the court for their release.

[19] It was further argued, *inter alia*, that the appellants have the right to consult and be defended by a legal practitioner of their choice. If this right was denied, it was further argued at the Supreme Court that the arrest and detention would be held to be illegal. The Supreme Court, however, disagreed.

[20] In dismissing the appeal Salleh Abas LP held, *inter alia*, as follows:

> When should a detainee arrested under section 73 of the Internal Security Act be allowed to exercise his right under Article 5(3) of the Constitution to consult a counsel of his choice? We would reiterate what was held by the Federal Court in *Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198. In other words, the matter should best be left to the good judgment of the authority as and when such right might not interfere with police investigation. To show breach of Article 5(3), an applicant has to show that the police has deliberately and with bad faith obstructed a detainee from exercising his right under the Article.

[21] The question that arises is, can *Ramli bin Salleh* and *Theresa Lim* be reconciled? To begin with, although initially the ruling in *Ramli bin Salleh* is considered an *obiter*, the proposition stated by the learned trial judge was nevertheless approved by the Federal Court in *Ooi Ah Phua*. First, the Federal Court quoted *in extenso* the view of Syed Agil Barakbah J in *Ramli bin Salleh*.

[22] Secondly, the Federal Court also expressed its agreement with the judgment of Hashim Yeop Sani J (later CJ (Malaya)) who heard *Ooi Ah Phua*'s case at first instance. The learned trial judge in *Ooi Ah Phua*, whose decision was affirmed by the Federal Court, also quoted the

5 [1988] 1 MLJ 293, SC.

ruling of Syed Agil Barakbah J in *Ramli bin Salleh in extenso*, including the guidelines given therein. To this, Suffian LP said:

> With respect I agree with the view of the learned judge from whose decision this appeal has been lodged.

[23] To summarise, although the proposition in *Ramli bin Salleh* started with an *obiter*, the judicial recognition accorded to it by the Federal Court in *Ooi Ah Phua* means that it has crystallised into a *ratio*. In the circumstances, how can one reconcile it with the judgment of the Supreme Court in *Theresa Lim* on the issue of onus in proving the delay in the access to legal representation? With respect, the onus surely cannot be on the arrested person.

[24] First, Article 5(3) of the Federal Constitution has accorded the right to consult a legal practitioner of his choice to the arrested person. It was never designed to protect the detaining authority. It therefore defies logic that in order to acquire such right, which is constitutionally guaranteed, an arrested person is under a duty to prove that the detaining authority "has deliberately and with bad faith obstructed" from exercising his right under the said Article.

[25] It should be borne in mind that unlike Article 5(1) which provides that no person shall be deprived of his life or personal liberty *save in accordance with law*, Article 5(3) contains no such proviso. In the absence of such proviso, there should be an overall judicial reluctance to add any unless it is essential to do so.

[26] Secondly, there is a practical problem in shifting the onus to the arrested person to prove bad faith in the detaining authority. This practical problem can be seen, for example, in the case of *Abdul Ghani Haroon v Ketua Polis Negara & Anor Application*[6] ("*Abdul Ghani Haroon*"). In that case, Abdul Ghani Haroon, the applicant, was arrested under section 73(1) of the ISA. The detention of the applicant was extended twice subsequent to his arrest. The police denied family members, lawyers and members of the SUHAKAM (the Human Rights Commission of Malaysia) access to the applicant. Abdul Ghani's wife applied for the issue of a writ of *habeas corpus*.

[27] The High Court held that the applicant was unlawfully detained.

6 [2001] 2 MLJ 689.

[28] In *Abdul Ghani Haroon*, the lawyers acting for the applicant did not seek immediate access to their client. However, there was no affidavit deposed by the applicant simply because right until the last day of the hearing, a period of about 40 days, the lawyers and family members had been denied access to him. On behalf of the respondent, it was argued that "the denial of the right to counsel is permissible as long as the investigations are ongoing".

[29] The learned judge was of the view that the denial of access to lawyers was not only a gross violation of the fundamental rights as enshrined in the Federal Constitution but had also greatly prejudiced the applicant. For example, the arresting officers in their respective affidavits had averred that they had informed the applicant of the grounds of arrest "as soon as was possible after the arrest". In other words, the claim was made that they had complied with the first limb of Article 5(3) of the Federal Constitution. In the absence of the affidavit in reply from the applicant, the learned judge raised a very pertinent question: How could the court verify those claims? The learned judge further held the court could only make a fair judgment after having had the benefit of scrutinising the respondents' affidavits and the affidavit of the applicant as well.

[30] In registering a very powerful message in his judgment, Mohd Hishamudin J (later JCA) remarked as follows:

> With respect, whatever the allegations against them might be, it is clearly unlawful to deny them of the constitutional guarantee for such a long period. Those police officers responsible for the detention of the applicants must wake up to the fact that the supreme law of this country is the Constitution and not the ISA.

[31] Thirdly, the Supreme Court in *Theresa Lim* was only "reiterating" the proposition that was stated by the Federal Court in *Ooi Ah Phua*. With respect, there lies the problem. The judgment of Suffian LP in *Ooi Ah Phua* did not mention anything about putting the onus on the arrested person to show that the detaining authority was acting in bad faith in denying him access to legal representation.

[32] Having said that, it is submitted that the more accurate proposition is that the onus is on the detaining authority to justify the delay in giving the arrested person access to the legal counsel of his choice.

Conclusion so far

[33] The principles that can be distilled from *Ooi Ah Phua et al* can be summarised thus:

(a) The right of an arrested person to consult his lawyer under Article 5(3) of the Federal Constitution begins from the moment of arrest.[7]

(b) However, the right is not necessarily immediate and can be reasonably delayed by the detaining authority if it impedes police investigation or the administration of justice.[8]

(c) The legitimate restrictions to the legal consultation can relate to the time and convenience of both the detaining authority and counsel and should not be subject to abuse by either party.[9]

(d) The detaining authority must not in any way delay or obstruct the access of the arrested person to legal consultation on arbitrary or fanciful grounds with a view to deprive the accused of his fundamental right under the Federal Constitution.[10]

(e) The right to counsel under Article 5(3) exists even though the police investigation has not yet been completed.[11] Any interview conducted by the counsel should be within sight of the police.[12]

(f) Depending on the circumstances of the case, any delay on the part of the detaining authority to allow access to legal consultation after the expiry of the detention period can be construed as being unreasonable.[13]

(g) What is reasonable or otherwise is a question of fact. The reason given by the detaining authority must be a compelling one[14] and must not be arbitrary or fanciful.[15] One compelling reason is, for

7 *Ooi Ah Phua*, n 1 above; *Hashim bin Saud*, n 2 above.
8 *Hashim bin Saud*, n 2 above.
9 *Ramli bin Salleh*, n 3 above.
10 Ibid.
11 Ibid.
12 Ibid.
13 Ibid.
14 See for example in *R v Abdurahman*, n 4 above.
15 *Ramli bin Salleh*, n 3 above *per* Syed Agil Barakbah J.

example, if there is an immediate need to obtain information about the whereabouts of an individual who is still at large and who may, as it is reasonably believed and for good reason, be planning imminently to commit an act of terrorism.

(h) In *Abdul Ghani Haroon*, the fact that the arrested person was not even given access to his counsel in order to prepare the affidavit in relation to his *habeas corpus* application was held to be not only a gross violation of the fundamental rights as enshrined in the Federal Constitution, but had also greatly prejudiced him. In any event, a prolonged 40-day detention without any access to legal consultation was held to be unreasonable.

(i) In view of a line of authorities as discussed earlier, with the exception of *Theresa Lim*, a better statement of the law is that the onus is on the detaining authority to justify whether the delay in allowing legal consultation is reasonable.

(j) In any event, and this will be addressed later in this article, *Theresa Lim* can no longer be said to be good law in view of the new section 28A(10) of the CPC.

Section 28A of the Criminal Procedure Code: Boon or bane?

[34] In 2007, Parliament introduced a new section 28A to the CPC. The new section is said to have amplified the constitutional right of an arrested person under Article 5(3) on the right to consult a legal practitioner. The relevant subsections are as follows:

(2) A police officer shall before commencing any form of questioning or recording of any statement from the person arrested, inform the person that he may—

(a) communicate or attempt to communicate, with a relative or friend to inform of his whereabouts; and

(b) communicate or attempt to communicate and consult with a legal practitioner of his choice.

(3) Where the person arrested wishes to communicate or attempt to communicate with the persons referred to in paragraphs (2)(a) and (b), the police officer shall, as soon as may be, allow the arrested person to do so.

(4) Where the person arrested has requested for a legal practitioner to be consulted the police officer shall allow a reasonable time –

(a) for the legal practitioner to be present to meet the person arrested at his place of detention; and

(b) for the consultation to take place.

(5) The consultation under subsection (4) shall be within the sight of a police officer and in circumstances, in so far as practicable, where their communication will not be overheard;

(6) The police officer shall defer any questioning or recording of any statement from the person arrested for a reasonable time until the communication or attempted communication under paragraph 2(b) or the consultation under subsection (4), has been made;

(7) The police officer shall provide reasonable facilities for the communication and consultation under this section and all such facilities provided shall be free of charge.

[35] The choice of words employed in the aforesaid subsections such as "consult a legal practitioner", "reasonable time", "place of detention", "within the sight of a police officer", "defer any questioning" is a legislative attempt to embody and codify the legal propositions that were reflected in *Ooi Ah Phua et al*.

[36] The optimists would argue the codification of the legal principles as reflected in section 28A is a concerted attempt by Parliament to fortify the constitutional right of an arrested person to consult his counsel during detention. In any event, the new section is a very useful guideline to the presiding magistrate in granting or extending a remand under section 117 of the CPC or otherwise.

[37] However, the new section 28A is not without its criticism. The attack is on subsection (8), which reads as follows:

(8) The requirements under subsections (2), (3), (4), (5), (6) and (7) shall not apply where the police officer reasonably believes that –

(a) compliance with any of the requirements is likely to result in –

(i) an accomplice of the person arrested taking steps to avoid apprehension; or

(ii) the concealment, fabrication or destruction of evidence or the intimidation of a witness; or

(b) having regard to the safety of other persons the questioning or recording of any statement is so urgent that it should not be delayed.

[38] One of the criticisms against section 28A(8) is that, in a way, it casts aspersion on the lawyers appointed by the arrested person. The law, the argument goes, should not assume that lawyers, who are officers of the court, would be *particeps criminis*:

> While the reasoning behind the application of section 28A(8) for the purpose of having regard to safety of others is acceptable particularly in cases of kidnapping and abduction especially involving children (in such instances, even in the police station there will two or three officers who will be aware and will be involved in the investigations), but to deny the right of an arrested person to have access to his lawyer on the grounds that it would result in the accomplice of the arrested person being informed and taking steps to avoid arrest or it will likely result in the concealment, fabrication or destruction of evidence or the intimidation of a potential witness surely would tantamount to the lawyer being part of his accomplice and is totally unacceptable.[16]

[39] Writing as early as 1976, Edgar Joseph Jr (later FCJ)[17] had underscored the same point:

> If Lord Widgery had in mind the objection most invariably taken by the police, that a suspect's solicitor would simply impede police enquiries, then we would, with respect, suggest that His Lordship should initiate a conference between the police authorities and the Law Society to secure from the latter proper assurances for the former that any solicitor who abuses his position and impedes the police in the proper conduct of their duties would be appropriately dealt with. The interest of suspects cannot, however, be left forever on the long finger, while others fail to establish the *modus vivendi*.

16 Collin Arvind Andrew, *Pre-Trial Disposal: The Effectiveness of the National Legal Aid Foundation in Safeguarding the Rights of Arrested and Detained Person: An academic project submitted in partial fulfilment for the Degree of Master of Criminal Justice, University Malaya* (2013/2014).

17 [1976] 2 MLJ ii.

In short, it is argued that we have enough laws, rules and regulations to deal with the lawyers who abuse their position in impeding police investigation or administration of justice.

Are the criticisms justified?

[40] In order to appreciate subsection (8) of section 28A, we have to look into the remaining subsections (9), (10) and (11) which are as follows:

> (9) Subsection (8) shall only apply upon authorization by a police officer not below the rank of Deputy Superintendent of Police.
>
> (10) The police officer giving the authorization under subsection (9) shall record the grounds of belief of the police officer that the conditions specified under subsection (8) will arise and such record shall be made as soon as practicable.
>
> (11) The investigating officer shall comply with the requirements under subsections (2), (3), (4), (5), (6) and (7) as soon as possible after the conditions specified under subsection (8) have ceased to apply where the person arrested is still under detention under this section or under section 11.

[41] Can the aforesaid subsections be regarded as affording enough safeguards from a potential abuse on the part of the detaining authority in exercising their powers under subsection (8)? Reading together subsection (8) with the remaining subsections of section 28A, it seems that the delay in giving access to the legal consultation can be excused if:

(a) The police officer reasonably believes, *inter alia*, that the accomplice of the arrested person would take steps to avoid apprehension or the recording of the statement is so urgent that it should not be delayed.

(b) The power to delay can only be made on the authorisation by a police officer not below the rank of a Deputy Superintendent of Police ("DSP").

(c) The DSP shall record the grounds of belief of the police officer under subsection (8) and the record shall be made available.

(d) After the conditions stated in subsection (8) have ceased to apply, the right to consult a lawyer can no longer be delayed.

[42] Abdul Wahab JC (as he then was) in *PP v Phee Boon Poh & Ors*[18] ("*Phee Boon Poh*") had the opportunity to discuss the implication of section 28A of the CPC. In that case, the applicants were arrested by the Malaysian Anti-Corruption Commission ("MACC") on August 11, 2017 at about 4.00 p.m. The applicants appeared before the senior assistant registrar ("SAR") in the Penang lower court for the purpose of obtaining a remand order under section 117 of the CPC. The respondent had applied for a seven-day remand order for all applicants.

[43] At the remand hearing, the counsel for the first applicant had raised the initial objection in respect of the prohibition by the respondent for the applicants to have access to their legal counsel under section 28A of the CPC ("the initial objection").

[44] Upon hearing of the initial objection, the SAR proceeded to adjourn the matter for determination. Not long after the adjournment, the SAR decided to allow the respondent's application and granted a remand order for five days ("the decision").

[45] Aggrieved by the decision, the applicants moved the Penang High Court pursuant to section 323 of the CPC seeking for the court to exercise its revisionary powers on the decision.

[46] At the High Court, the decision by the SAR was set aside.

[47] The High Court held, *inter alia*, that when the detaining authority invokes section 28A(8) of the CPC, the arrested person is being deprived of his right to legal counsel as provided under Article 5(3) of the Federal Constitution and section 28A(2) to (7) of the CPC. As a matter of judicial practice, before a court exercises its judicial discretion, there are procedural safeguards and fairness that should be followed by the presiding SAR in respect of the application. Therefore, the reasons justifying the deprivation of the applicants' liberty ought to be clearly stated. Failure of the SAR to determine on the said initial objection had deprived the applicants of their fundamental right to a legal counsel which thereupon caused adverse consequences to the applicants.

[48] The learned judicial commissioner, in interpreting section 28A(8), made it clear that "the reasons justifying the deprivation of the

18 [2018] 9 MLJ 376.

applicants' liberty must be clearly stated". The said proposition, in one stroke, has dispelled the anxiety of the pessimists. To begin with, the "reasonable belief" on the part of the police officer must be justified to the satisfaction of the presiding officer. Is it because an accomplice of the person arrested is taking steps to avoid apprehension? Is it because there is a high risk of any concealment, fabrication or destruction of evidence or the intimidation of a witness? Is it because, having regard to the safety of other persons, the questioning or recording of any statement is so urgent that it should not be delayed?

[49] It is quite apparent that the explanation in invoking section 28A(8) of the CPC must be done in writing. This view is fortified by making reference to section 28A(10) of the CPC, where the DSP will have to "record the grounds of belief of the police officer that the conditions specified under subsection (8) will arise". However, in the final analysis, since the test is an objective one, it is for the presiding officer to make a ruling on the reasonableness of the grounds.

[50] If the presiding officer is not aware of the grounds, how could he decide whether they are reasonable or otherwise?

[51] This issue was discussed by Vernon Ong FCJ in his judgment in support of the majority in the Federal Court case of *Zaidi bin Kanapiah v ASP Khairul Fairoz bin Rodzuan and other cases*[19] ("*Zaidi bin Kanapiah*"). His Lordship was of the view that the production of the person before a magistrate for remand under section 4(1) of the Prevention of Crime Act 1959 ("POCA") is preceded by the arrest of the person under section 3(1) of the same Act. The police officer's decision to arrest a person without warrant under section 3(1), namely, that he has "reason to believe that grounds exist which would justify the holding of an inquiry into the case of that person" under the POCA is "objectively justiciable". The police has the burden of satisfying the magistrate that the preconditions constituting section 3(1), section 28A of the CPC and Article 5(3) of the Federal Constitution, which set out the jurisdictional threshold requisite to the exercise of the power of arrest, have been complied with.

[52] The Federal Court in *Zaidi bin Kanapiah* has finally put the issue of burden to rest. It is on the detaining authority.

19 [2021] MLJU 669, FC.

[53] Vernon Ong FCJ, in his speech, remarked as follows:

> The Magistrate must be satisfied that the arrest was carried out in accordance with law – see art 5(3) FC and s 28A of the CPC. This is done by questioning the person arrested and perusing the police diary.

His Lordship further held that if the magistrate is not satisfied that the arrest was carried out in accordance with the law, the magistrate should reject the application for remand and direct the person's immediate release.

[54] This goes to show that the safeguards are already built into section 28A of the CPC. If at the application for remand, the detaining authority wishes to invoke section 28A(8) of the CPC, it has to satisfy the magistrate that the delay in allowing legal representation comes within the ambit of the subsection and nothing more.

[55] In view of the built-in safeguards, it cannot be said that the scheme of section 28A(8)(a) of the CPC is an attempt, albeit indirectly, to cast aspersions on the legal practitioners in that they are potential *particeps criminis*. The line of authorities post section 28A of the CPC seems to suggest the following procedure:

(a) An arrested person has to be brought before the magistrate within 24 hours of his arrest.[20]

(b) The magistrate must be satisfied that the arrest was carried out in accordance with law by referring to Article 5(3) of the Federal Constitution and section 28A of the CPC.[21]

(c) The magistrate will have to ask the arrested person on the issue of access to legal consultation. If the answer is in the affirmative, the magistrate will then proceed to consider and determine the merits of the remand application.

(d) If, however, the answer is in the negative, the magistrate will have to ask if the detaining authority invokes section 28A(8) of the CPC. This is a matter of judicial practice. Before the magistrate exercises his judicial discretion, the reasons justifying the

20 Federal Constitution, Art 5(4); CPC, s 28(3).
21 *Zaidi bin Kanapiah*, n 19 above.

deprivation of the arrested person's liberty ought to be clearly stated to the satisfaction of the magistrate.[22]

(e) The detaining authority must make it clear which particular limb of section 28A(8) of the CPC that it relies on. The magistrate must then allow the arrested person the opportunity to reply to the assertion made on behalf of the detaining authority. The rule of natural justice must be observed.[23]

(f) The question of the police officer reasonably believing the assertion that he makes to invoke section 28A(8) is "objectively justiciable".[24]

(g) Having given both parties the opportunities to be heard and having directed his mind on the reasonable belief of the police officer objectively, the magistrate will have to determine whether the denial of access to the legal consultation as requested by the detaining authority is justified or otherwise.

(h) If, in making such determination, the magistrate is of the view that the assertions made by the detaining authority are not reasonable, then he shall direct the detaining authority to give the arrested person immediate access to the counsel. Section 28A(8) has to be strictly interpreted in that the detaining authority cannot plead any other reasons to suspend the constitutional right of the arrested person other than that stated in subsection (8).

(i) If, on the other hand, the magistrate accepts the assertions made by the detaining authority to be reasonable, the suspension of the arrested person's right under Article 5(3) of the Federal Constitution shall be allowed.

(j) But in view of subsection (11) of section 28A, the suspension, by definition, cannot be permanent. The arrested person cannot be left forever on the long finger as in *Abdul Ghani Haroon*. The moment the conditions specified under subsection (8) have ceased to apply, the magistrate must give a clear direction on subsection (11) of section 28A and provide a timeline for the

22 *Phee Boon Poh*, n 18 above.
23 Ibid.
24 *Zaidi bin Kanapiah*, n 19 above.

> detaining authority to reinstate the constitutional right of the arrested person under Article 5(3).

On reasonable belief

[56] As stated earlier, the test to be applied on the reasonable belief of the police officer is an objective one.

[57] What then is "reasonable"? Section 26 of the Penal Code [*Act 574*] defines "reason to believe" as:

> A person is said to have "reason to believe" a thing, if he has sufficient cause to believe that thing, but not otherwise.

To this Arulanandom J in *Ahmad bin Ishak v PP*[25] had this to say:

> Now, "reason to believe", knowledge, intention, are things in a man's mind and you cannot see it, you cannot hear it. Nobody who receives stolen goods carries a big banner saying that these are stolen goods. Nor does he shout from the roof tops. You must look into the circumstances and consider if the circumstances are such that any reasonable man could see sufficient cause to believe that it was stolen.

It has been said that the belief must be held in good faith and it is open to the court to examine the question of whether the reasons for the belief have a rational connection or is relevant to the formation of the belief.[26] In *S Narayanappa*, the Supreme Court of India held that:

> The belief must be held in good faith: it cannot be merely a pretence. To put it differently it is open to the Court to examine the question whether the reasons for the belief have a rational connection or a relevant bearing to the formation of the belief and are not extraneous or irrelevant to the purpose of the section.

[58] Applying the said propositions to section 28A(8) of the CPC, the reasonable belief of the police officer is subject to scrutiny from the court. If the court finds it to be unreasonable, then the attempt by the detaining authority to suspend the constitutional right of the arrested person under Article 5(3) will be of no avail.

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25 [1974] 2 MLJ 21.

26 *S Narayanappa v IT Commissioner Bangalore* AIR (1967) SC 523 ("*S Narayanappa*").

[59] In this context, the Federal Court in *Merdeka University Berhad v Government of Malaysia*[27] remarked that the "test of unreasonableness is not whether a particular person considers a particular course unreasonable, but whether it could be said that no reasonable person could consider that course reasonable".

[60] To conclude thus far, the safeguards embedded in subsections (9), (10) and (11) of section 28A of the CPC mean that any attempt by the detaining authority to invoke section 28A(8) of the CPC will be subject to objective examination by the court.

The position in Singapore

[61] Article 9(3) of the Constitution of the Republic of Singapore is identical to that of Article 5(3) of the Federal Constitution.

[62] It should be recalled that Suffian LP in *Ooi Ah Phua* referred to the judgment of the Singapore High Court in *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor*[28] ("*Lee Mau Seng*"). Having referred to *Lee Mau Seng* and other related authorities, Suffian LP concluded that the constitutional right granted to an arrested person on the access to legal consultation must be granted within a reasonable time after his arrest.

[63] Post *Lee Mau Seng* cases do not seem to depart from the proposition stated therein. For example, in *Jasbir Singh v PP*[29] ("*Jasbir Singh*"), the first appellant was allowed access to his lawyer two weeks after his arrest. Counsel argued that the right of access of the first appellant to counsel was an *immediate* one and the first appellant, as a result, had suffered injustice. In reiterating the proposition in *Lee Mau Seng*, the Court of Criminal Appeal held that there is a world of difference between "within a reasonable time" and "immediately".[30] The court further held that two weeks was a reasonable period of time given the circumstances of the case.

[64] The same situation can be seen in *PP v Leong Siew Chor*[31] where the period of non-access to counsel was 19 days after the arrest, five

27 [1982] 2 MLJ 243, FC *per* Suffian LP.
28 [1971] 2 MLJ 137.
29 [1994] 1 SLR(R) 782, CCA.
30 *Per* Yong Pung How CJ.
31 [2006] 3 SLR(R) 290.

days longer than the first appellant in *Jasbir Singh*. The High Court held that the delay was justifiable in the circumstances, bearing in mind the duty of the police to follow up on new leads quickly and to gather swiftly whatever evidence was available "lest it disappears or is destroyed".

[65] For the avoidance of any doubt, the court made it clear that the said finding was not an indictment against the integrity of counsel, generally or specifically. It is a question of balancing an accused person's rights against the public interest that crime is effectively investigated.

[66] On the issue of "reasonable time" the Court of Appeal in *James Raj v PP*[32] held that it is a factual issue that has to be determined by the trial judge. In delivering the judgment of the court, Sundaresh Menon CJ observed as follows:

> As for the second question that was framed by the Applicant, what is a "reasonable time" within which the right to counsel can be exercised is inherently a question of fact in the sense that it calls for a factual inquiry of all the relevant considerations. It is evident that this is not a question of law that can be answered in the abstract.

The position in India

[67] Suffian LP in *Ooi Ah Phua* referred to Article 22(1) of the Constitution of India which reads:

> No person who is arrested shall be detained in custody without being informed, as soon as may be, of the ground for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

In *Ooi Ah Phua*, reference was made to the judgment of Modi J in *Moti Bai v the State*[33] who held, *inter alia*, that a legal practitioner must be allowed to consult the accused without the hearing of the police in their presence.

[68] The Supreme Court of India in *Mohammed Ajmal & Anor v State of Maharashtra & Anor*[34] ("*Mohammed Ajmal*") had the opportunity to revisit almost all of the relevant authorities in respect of the constitutional

32 [2014] SGHC 10, CA.
33 AIR 1954 Rajasthan 241.
34 [2012] 4 MLJ (CRL) 15, SC.

right to counsel of an arrested person. On behalf of the appellant, it was argued, *inter alia*, that a mere offer of legal aid is not the same as being made aware that one has the constitutional right to consult, and to be defended by, a legal practitioner, and that simply the offer of legal aid does not satisfy the constitutional requirement.

[69] It was further argued on behalf of the appellant that telling the appellant that he was not bound to make the confession and that it could be used against him did not amount to constitutional compliance. The magistrate was required to inform him of his rights under Articles 22(1) and 20(3) of the Constitution. Article 20(3) of the Constitution of India provides immunity to an accused against self-incrimination. It is only if an accused is so informed, counsel argued, that he can be said to have made a constitutionally acceptable choice either to have or not to have a lawyer or to make or not to make a confession.

[70] In support of the aforesaid contention, counsel for the appellant referred to *Nandini Satpathy v PL Dani*[35] and the celebrated decision of the US Supreme Court in *Miranda v Arizona*.[36] In *Miranda v Arizona*, the US Supreme Court held, *inter alia*, that the right to have counsel present at the interrogation was indispensable in view of the Fifth Amendment privilege against self-incrimination. This, according to the US Supreme Court, is to ensure that the right to choose between silence and speech remains unfettered throughout the interrogation process.

[71] On the duty of the magistrate as contended by counsel for the appellant, the Supreme Court reiterated the proposition that it is the duty and obligation of the magistrate before whom a person accused of committing a cognisable offence is first produced to make him fully aware that it is his right to consult and be defended by a legal practitioner and, in case he has no means to engage a lawyer of his choice, that one would be provided to him from legal aid at the expense of the state. The right flows from Articles 21 and 22(1) of the Constitution and needs to be strictly enforced.

[72] In *Mohammed Ajmal*, the appellant was detained under the Indian Prevention of Terrorism Act, 2002 ("POTA"). The Supreme Court took

35 (1978) 2 SCC 424, SC.
36 384 US 436 (1966).

cognisance that the law of the POTA is a major departure from the common criminal law process in India and further held that:

> To say that the safeguards built into Section 32 of the POTA have their source in Articles 20(3), 21 and 22(1) is one thing, but to say that the right to be represented by a lawyer and the right against self-incrimination would remain incomplete and unsatisfied unless those rights are read out to the accused and further to contend that the omission to read out those rights to the accused would result in vitiating the trial and the conviction of the accused in that trial is something entirely different. As we shall see presently, the obligation to provide legal aid to the accused as soon as he is brought before the magistrate is very much part of our criminal law procedure, but for reasons very different from the *Miranda v. Arizona (supra)* rule, aimed at protecting the accused against self-incrimination. And to say that any failure to provide legal aid to the accused at the beginning, or before his confession is recorded under Section 164 CrPC, would inevitably render the trial illegal is stretching the point to unacceptable extremes.

[73] In a clear departure from *Miranda v Arizona*, the Indian Supreme Court clarified that the right to consult and be defended by a legal practitioner is not to be construed as sanctioning or permitting the presence of a lawyer during police interrogation. It further held that the right to access a lawyer in India is not based on the *Miranda v Arizona* principles. This is so because there are more than adequate safeguards in Indian law in respect of protection against self-incrimination. The right to access a lawyer, for very Indian reasons, flows from the provisions of the Constitution and the statutes.

Conclusion: The saga revisited

[74] Almost immediately after the judgment of the Federal Court in *Ooi Ah Phua* was published, a prominent member of the academia at the University of Malaya, Azmi Abdul Khalid, wrote an article[37] which was entitled "The Continuing Saga on the Right to Counsel Under Article 5(3) of the Malaysian Constitution".

37 (1975) 1(1) JMCL 176.

[75] The late Azmi began his article with:

> The Malaysian judiciary has finally made its first few authoritative pronouncements on the nature and scope of the right to counsel of an arrested person as guaranteed by the second limb of Article 5(3) of the Malaysian Constitution.

He then concluded, *inter alia*, with:

> The legal position to date on the right to counsel seems far from sufficient to most champions of human rights, regardless of the courts' constant reminders that almost all of our fundamental liberties as guaranteed by the constitution are necessarily qualified.

[76] Although the learned author did not make any specific reference to *Miranda v Arizona*, he cautioned that admirable as they may be, current American interpretation and application of civil liberties place heavy reliance on doctrines and principles which are not easily acceptable in Malaysia and indeed have not gained much local juristic recognition. Consequently, the learned author continued, constant resort to American legal trends might not prove useful and could even further complicate hitherto undeveloped areas of Malaysian law on the subject.[38]

[77] There are merits in the aforesaid observation. In any event, as had been pointed out in the course of arguments in *Mohammed Ajmal*, even in the United States, the principle in *Miranda v Arizona* was said to have been eroded by later case law. An example of this can be seen in the judgment of the US Supreme Court in *Davis v United States*,[39] where it was held that the suspect must unambiguously request for counsel and that the police were not prohibited from continuing with the interrogation if the request for counsel by the suspect did not meet the requisite level of clarity. It was observed by the US Supreme Court that "a suspect who knowingly and voluntarily waives his right to counsel after having that right explained to him has indicated his willingness to deal with the police unassisted".

[78] However, it does not mean that there should not be any further reform à la section 28A of the CPC in the immediate future. Of course, there is room for improvement. One possible reform is to put lawyers

38 Ibid, at p 181.
39 512 US 452 (1993).

under the auspices of the National Legal Aid Foundation ("YBGK") to be on standby so that they can be available 24/7 to assist the arrested person if the need arises, as is practised in England.

[79] The practice in England is that an arrested person must be told about his right to free legal advice after he is arrested and before the arrested person is questioned at a police station, he can:

(a) ask for the police station's "duty solicitor" – they are available 24 hours a day and independent of the police; and

(b) tell the police he would like legal advice – the police will contact the Defence Solicitor Call Centre ("DSCC").[40]

[80] The other suggestion is if the detaining authority wishes to invoke section 28A(8), the relevant police officer must record his reasons thereto in writing and make the same available to the arrested person. This is to avoid the police officer having an afterthought in justifying the reasons for the invocation of section 28A(8). The danger is real. In *Fadiah Nadwa Fikri & Ors v Konstable Fauziah Mustafa & Ors and Another Case*,[41] the learned trial judge had made an adverse remark on the manner in which the police officer justified the invocation of section 28A(8) of the CPC:

> Moreover SD6 kept on changing his testimony in regard to the reasons for invoking s. 28A(8) and this court therefore has grounds to doubt the authenticity and veracity of the reasons put forward by SD6 for his belief under s. 28A(8), and this court therefore has serious issues in regard to the credibility of SD6 as a witness.

A possible amendment to subsection (8) is that the reasonable belief of the police officer is to be recorded in writing and to be co-signed by the arrested person.

[81] A lot of water has passed under the proverbial bridge since *Ooi Ah Phua* 46 years ago. But there is one issue that should not escape our attention. It is this. In *Ooi Ah Phua*, the applicant was the father of the arrested person. In *Ramli bin Salleh* the applicant was the father-in-law of the prisoner. These seem to suggest in an urgent situation, as usually the case when the constitutional right of a person is in jeopardy, the

40 https://www.gov.uk/arrested-your-rights/legal-advice-at-the-police-station.
41 [2015] 10 CLJ 259.

Malaysian courts have recognised that the application can be made by a third party who is closely related to the detained person.

[82] Whatever criticisms levelled against *Ooi Ah Phua*, it surely does not include a judicially recognised right of a third party to file an application to enforce the constitutional right of another person when he is still under detention.

[83] Surely that is something that Malaysian lawyers should celebrate!

Indemnity and Insurance for Directors and Officers

by

*Justice Quay Chew Soon**

Introduction

[1] This article discusses the position with respect to indemnity and insurance for directors and officers under the Companies Act 2016 [*Act 777*] ("Act"). The present position will be contrasted with the previous position under the former Companies Act 1965 [*Act 125*] ("previous CA"). The Act came into force on January 31, 2017. It repealed and replaced the previous CA.

[2] The salient provisions pertaining to indemnity and insurance for directors and officers are set out in sections 288 and 289 of the Act. Their predecessor provision was contained in section 140 of the previous CA.

[3] This article is divided into two parts. The first part (Part I) will discuss *insurance* for directors and officers. The second part (Part II) will discuss *indemnity* for directors and officers.

Part I: Insurance for directors and officers

A. Directors and officers liability insurance

[4] In practice, companies would normally purchase some form of directors and officers liability insurance for their directors and officers ("D&O insurance"). D&O insurance is designed to protect directors and officers of companies against personal liability that they might incur or in respect of claims made against them arising out of the performance of their duties.

[5] There was a view that the provision of D&O insurance by companies for the benefit of their directors and officers runs afoul of section 140 of the previous CA. This is because section 140 of the previous CA voided any contract with a company which indemnifies

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an officer of the company against any liability which he may be guilty of in relation to the company.

[6] An insurance policy or a contract of insurance (except life insurance) is, after all, a contract of indemnity. D&O insurance is a form of indemnification. It is a type of insurance which indemnifies directors and officers against liability.

[7] From my stint as a legal practitioner, I was made to understand that there existed an industry practice whereby the company would pay the bulk (typically 95%) of the insurance premium. And the officer in question would pay a lesser portion (typically 5%) of the insurance premium. The thinking was that in order to avoid the insurance policy being void, the company is seen to be paying the insurance premium to cover the event where the officer concerned successfully defends himself. In turn, the payment by the said officer is meant to cover the event where he fails in his defence and is found liable.

[8] First, the basis for apportioning the insurance premium seems rather arbitrary. Second, my reading is that the company's ability to indemnify an officer comes into play if and only when the said officer actually and finally succeeds in his defence. In other words, judgment, acquittal or relief (as the case may be) must have been granted in favour of the officer. And not earlier by putting in place a D&O insurance. This interesting solution adopted by the industry to overcome the dilemma created by section 140(1) of the previous CA notwithstanding, I have doubts regarding the efficacy of such arrangement.

B. Section 140 of the previous CA

[9] Section 140(1) of the previous CA reads:

> 140. *Provisions indemnifying directors or officers*
>
> (1) Any provision, whether contained in the articles or in any *contract* with a company or otherwise, for exempting any officer or auditor of the company from, or *indemnifying* him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

[10] Under section 140(1) of the previous CA, provisions contained in a contract with a company which indemnifies an officer of the company against liability which he may be guilty of in relation to the company, is void. Arguably, this could extend to D&O insurance purchased and maintained by companies for their directors and officers.

[11] There was a saving provision in section 140(2) of the previous CA. This saving provision allowed a company to indemnify its officers against liability under certain stated circumstances. Section 140(2) of the previous CA reads:

> (2) Notwithstanding anything contained in this section a company may pursuant to its *articles* or otherwise *indemnify* any officer or auditor against any *liability incurred by him in defending any proceedings*, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application in relation thereto in which relief is under this Act granted to him by the Court.

[12] It is evident that this saving provision is rather restrictive. Firstly, the indemnification permitted thereby is confined to liability incurred by an officer in defending proceedings. Secondly, the defence must be successful. That is to say, the officer concerned must obtain judgment in his favour, be acquitted or is granted relief by the court.

C. Articles of association

[13] Under section 140(2) of the previous CA, the permitted indemnification may be provided by a company pursuant to its articles. Typically, the articles of association of a company would contain an indemnity provision in favour of its officers. An example can be found in article 113 of the Table A "Regulations for management of a company limited by shares" in the Fourth Schedule to the previous CA. It reads:

> 113. *Indemnity*
>
> Every director, managing director, agent, auditor, secretary, and other officer for the time being of the company shall be *indemnified* out of the assets of the company against any liability incurred by him in defending any proceedings, whether civil or criminal, in which judgment is given in his favour or in which he is acquitted or in connection with any application under the Act in which

relief is granted to him by the Court in respect of any negligence, default, breach of duty or breach of trust.

[14] Such indemnity provision largely mirrors section 140(2) of the previous CA. It is equally restrictive in nature insofar as the permitted indemnification is concerned.

[15] It should be pointed out that the concept of a memorandum and articles of association, which existed under the previous CA, no longer exists under the Act. That has been replaced with the concept of a constitution. Under the Act, a company (other than a company limited by guarantee) may adopt a constitution or choose not to have a constitution.

[16] If a company has a constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations set out in the Act, except to the extent that such rights, powers, duties and obligations are permitted to be modified in accordance with the Act, and are so modified by the constitution of the company. On the other hand, if a company has no constitution, the company, each director and each member of the company shall have the rights, powers, duties and obligations as set out in the Act. The constitution of a company has no effect to the extent that it contravenes or is inconsistent with the provisions of the Act.

[17] By virtue of the transitional provisions of the Act, the articles of association of a company, which existed at the time the Act came into force, would be deemed to be the constitution of the company, unless the company resolves otherwise. This is provided in section 619(3) of the Act which reads:

619. *General transitional provisions*

(3) The memorandum of association and articles of association of an existing company in force and operative at the commencement of this Act, and the provisions of Table A under the Fourth Schedule of the Companies Act 1965 if adopted as all or part of the articles of association of a company at the commencement of this Act, shall have effect as if made or adopted under this Act, unless otherwise resolved by the company.

D. Section 289 of the Act

[18] The coverage provided under D&O insurance is usually much wider than that permitted by section 140(2) of the previous CA or by the company's articles of association. For instance, D&O insurance usually covers a director or officer against liability for any act or omission (wrongful or otherwise) in his capacity as a director or officer, as well as costs incurred in defending any claim or proceeding relating to such liability. Thus, the coverage is not confined to liability incurred in defending proceedings, and much less that the defence must succeed.

[19] This really is to be expected. After all, the *raison d'être* of D&O insurance is to protect a director or officer against personal liability that he might suffer in the course of performing his duty. This includes not just the costs of defending proceedings but crucially, any substantive liability, regardless of whether he is guilty of negligence, default or breach in relation to the company. D&O insurance would be of little value to directors and officers if it covers them only if they win a judgment or are acquitted.

[20] However, to the extent that the coverage of a D&O insurance goes beyond the scope permitted by section 140(2) of the previous CA, the D&O insurance will be invalidated by section 140(1) of the previous CA. From this perspective, section 289 of the Act is to be welcomed. It expressly allows a company to effect insurance for its directors and officers in respect of liability for any act or omission in their capacity as directors or officers.

[21] Section 289 of the Act is for the most part a new provision. It allows a company to provide indemnity and insurance for its directors and officers under the stated circumstances. In this regard, it represents a departure from the previous position under section 140(2) of the previous CA.

[22] That said, companies are not given *carte blanche* to provide indemnity and insurance for their directors and officers. Certain limitations still exist, as discussed below.

E. Section 288 of the Act

[23] As a starting point, provisions indemnifying directors and officers are still nullified by *section 288* of the Act. It reads:

288. *Provisions indemnifying directors or officers*

Any provision, whether contained in the *constitution* or in any *contract* with a company or otherwise, for exempting any officer or auditor of the company from, or *indemnifying* him against, any liability which by law would otherwise attach to him in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, shall be void.

[24] Under section 288 of the Act, provisions indemnifying directors and officers against liability which they may be guilty of in relation to the company, are void. This provision is similar to section 140(1) of the previous CA.

[25] The prohibition against indemnification for directors and officers is reiterated in *section 289(1) and (2)* of the Act. It reads:

289. *Indemnity and insurance for officers and auditors*

(1) Unless provided otherwise in this section, a company shall not *indemnify* or directly or indirectly *effect insurance* for an officer or auditor of the company in respect of –

(a) the *liability* for any *act* or *omission* in his capacity as an officer or auditor; or

(b) the *costs* incurred by that officer or auditor in defending or settling any claim or proceedings relating to any such liability.

(2) An *indemnity* given in breach of this section shall be void.

[26] The fact that section 289(1) of the Act makes specific reference to "effecting insurance" is noteworthy. This reinforces the view that provision of insurance is a form of indemnity, hence caught by the prohibition against indemnification for directors and officers.

F. Permitted insurance for directors and officers

[27] The permitted D&O insurance is spelt out in *section 289(5)* of the Act. It reads:

(5) A company may, with the prior approval of the Board, *effect insurance* for an officer or auditor of the company in respect of –

(a) *civil liability*, for any *act* or *omission* in his capacity as a director or officer or auditor; *and*

(b) *costs* incurred by that officer or auditor in defending or settling any claim or proceeding relating to any such liability; *or*

(c) *costs* incurred by that officer or auditor in *defending any proceedings* that have been brought against that person in relation to any act or omission in that person's capacity as an officer or auditor –

(i) in which that person is acquitted;

(ii) in which that person is granted relief under this Act; or

(iii) where proceedings are discontinued or not pursued.

[28] To paraphrase, D&O insurance for a director or officer is permitted in the following circumstances:

(i) civil (*not criminal*) liability for any act or omission in his capacity as a director or officer (section 289(5)(a)); *and*

(ii) costs incurred in defending or settling any claim or proceeding relating to any such *civil liability* (section 289(5)(b)); *or*

(iii) costs incurred by him in defending any proceedings (*civil or criminal*) brought against him in relation to any act or omission in his capacity as a director or officer in which he is acquitted, granted relief under the Act or where proceedings are discontinued or not pursued (section 289(5)(c)).

[29] In respect of the circumstances envisaged in subparagraphs (i) and (ii) above, it does not appear to be mandatory that the outcome of the *civil* claim or proceeding must go in favour of the director or officer. However in respect of the circumstances envisaged in subparagraph (iii) above, it appears that the director or officer must be successful in his defence of the *civil or criminal* proceeding, or *any proceeding* for that matter.

G. Scope of section 289(5) of the Act

[30] A question which arises is whether the circumstances set out in section 289(5) of the Act are exhaustive. That is to say, whether a company may take out D&O insurance beyond such specified circumstances. It is unclear whether section 289(5) is prescriptive (as opposed to permissive).

[31] As mentioned, the starting point of section 289(1) of the Act is that a company cannot effect D&O insurance, unless otherwise permitted in the said section. This provision is capable of being interpreted to mean that a company can effect D&O insurance only to the extent permitted by the said section.

[32] In this regard, the Explanatory Statement which accompanied the Companies Bill 2015 is instructive. The Companies Bill 2015 was passed on April 5, 2016, received Royal Assent on August 31, 2016 and was gazetted on September 15, 2016 as the Companies Act 2016. The relevant extract states:

> Clause 289 deals with the provision relating to indemnifying or effecting any insurance for an officer or auditor for the liability for any act or omission occurred in their capacity as an officer or auditors, as the case may be.

[33] It then goes on to say that:

> Any indemnification or *provision of insurance must be in accordance with the proposed clause*.

[34] One could take the view that D&O insurance effected by a company must observe the limits stated in section 289(5) of the Act. As such, a D&O insurance would not be in compliance with section 289(5) of the Act insofar as its coverage goes beyond the limits prescribed therein.

[35] Going by this view, a company would not be permitted to pay the costs of D&O insurance to the extent that its coverage goes beyond the limits prescribed in section 289(5) of the Act. This is because "effecting insurance" is defined to include paying the costs of the insurance. Under *section 289(9)* of the Act, "effect insurance" is defined as follows:

> "effect insurance" includes *pay*, whether directly or indirectly, the *costs of the insurance*;

[36] So when a company pays the premium of a D&O insurance taken out for its directors and officers, it is actually effecting insurance for its directors and officers.

[37] On this premise, a company can pay the costs of a D&O insurance only to the extent of the coverage that is permitted by section 289(5)

of the Act. In respect of coverage that is beyond such permitted limit, it is questionable whether the company is permitted to pay the costs of the D&O insurance attributable thereto. Arguably, any such portion ought to be borne by the director or officer concerned.

H. Requirements of section 289(5) of the Act

[38] As stated in section 289(5) of the Act itself, the prior approval of the Board must be obtained for D&O insurance. In addition, section 289(7) of the Act requires that the particulars of the D&O insurance must be recorded in the minutes of the board of directors and be disclosed in the directors' report.

[39] *Section 289(7)* of the Act reads:

> (7) The directors shall –
>
> (a) record or cause to be recorded in the *minutes* of the board of directors; and
>
> (b) disclose or cause to be disclosed in the *directors' report* referred to in section 253, the particulars of any indemnity given to, or *insurance* effected for, any officer or auditor of the company.

[40] Where the officer concerned is a director, there are further limits imposed under *section 289(6)* of the Act which states:

> (6) In the case of a *director*, subsection (4) and *paragraphs (5)(a) and (b) shall not apply* to any civil or criminal liability in respect of a breach of the duty as specified in section 213.

[41] If a director is in breach of his duty under section 213 of the Act, D&O insurance for that director in respect of civil liability and costs incurred in connection therewith (which would otherwise have been permitted by section 289(5)(a) and (b) of the Act), shall not apply.

[42] Section 213 of the Act imposes a duty on a director to (i) act for a proper purpose and in good faith in the best interest of the company, and (ii) exercise reasonable care, skill and diligence. It reads:

> 213. *Duties and responsibilities of directors*
>
> (1) A director of a company shall at all times exercise his powers in accordance with this Act, for a proper purpose and in good faith in the best interest of the company.

(2) A director of a company shall exercise reasonable care, skill and diligence with –

(a) the knowledge, skill and experience which may reasonably be expected of a director having the same responsibilities; and

(b) any additional knowledge, skill and experience which the director in fact has.

[43] If section 289(6) or (7) of the Act is not observed, the director or officer concerned will be personally liable to the company for the costs of effecting the D&O insurance, unless he can persuade the court that he is not liable. This is stipulated in *section 289(8)* of the Act which reads:

(8) Where insurance is effected for an officer or auditor of a company and *subsection (6) or (7) has not been complied with*, the officer or auditor shall be *personally liable* to the company for the *cost of effecting the insurance* unless the officer or auditor satisfies the Court that he is not liable.

I. Definition of directors and officers

[44] As mentioned, the permitted D&O insurance is circumscribed where (i) the officer in question is a director, and (ii) that director is in breach of his duty under section 213 of the Act. It would be opportune at this juncture to examine the meaning of "directors" and "officers".

[45] To start with, section 2 of the Act (Interpretation) defines a "director" to include the following:

"director" *includes* any person occupying the position of director of a corporation by whatever name called and includes a person in accordance with whose directions or instructions the majority of directors of a corporation are accustomed to act and an alternate or substitute director;

[46] However by virtue of section 210 of the Act, for the purposes of section 213, "director" in section 213 includes (in addition to the definition of "director" under section 2) chief executive officer, chief financial officer, chief operating officer, or any other person primarily responsible for the management of the company. Section 210 of the Act reads:

210. *Interpretation*

For the purpose of this Subdivision, in sections *213*, 214, 215, 216, 217, 218, 223 and 228, *in addition* to the definition of "director" in section 2, "director" *includes* chief executive officer, chief financial officer, chief operating officer or any other person primarily responsible for the management of the company.

[47] Does this mean that a "director", for the purposes of section 289(6) of the Act, includes the people falling within the expanded meaning of "directors" (as per section 210 of the Act)? At first blush, that would seem to be the case. If so, is that truly the legislative intent? Arguably not, since section 289 of the Act applies not just to "directors", but also to "officers", and those people falling within the expanded meaning of "directors" (as per section 210 of the Act) would likely come within the ambit of "officers", namely, the C-suite executives (chief executive officer, chief financial officer, chief operating officer) or persons in managerial positions in the company.

[48] Dealing next with "officers", section 2 of the Act defines an "officer" to include the following:

"*officer*", in relation to a corporation, *includes* –

(a) any *director*, secretary or *employee* of the corporation;

(b) a receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and

(c) any liquidator of a company appointed in a voluntary winding up,

but does not include –

(i) any receiver who is not also a manager;

(ii) any receiver and manager appointed by the Court; or

(iii) any liquidator appointed by the Court or by the creditors;

[49] Under *section 289(9)* of the Act, the meaning of an "officer" is expanded as follows:

(9) In this section –

"officer", in relation to a corporation, *includes* –

(a) any director, *manager*, secretary or employee of the corporation;

(b) a *former officer*;

(c) a receiver or receiver and manager of any part of the undertaking of the corporation appointed under a power contained in any instrument; and

(d) any liquidator of a company appointed in a voluntary winding up, but does not include –

(A) any receiver who is not also a manager;

(B) any receiver and manager appointed by the Court; or

(C) any liquidator appointed by the Court or by the creditors;

[50] At least two differences are noticed between (i) the general definition of "officer" (under section 2 of the Act) and (ii) the expanded meaning of "officer" (under section 289(9) of the Act).

[51] First, although "employees" are listed in both instances, the latter specifically identifies "manager". Recall the earlier discussion that persons occupying managerial positions in the company are included in the expanded meaning of "directors" pursuant to section 210 of the Act. However, such managers would likely be employees of the company anyway, and hence are "officers".

[52] Second, for purposes of section 289, "officer" includes a "former officer". That is interpreted to mean a former director, a former manager, a former secretary or a former employee of the company.

J. Effect of section 289(5) of the Act

[53] A further question is whether a company may, in the first place, take out a D&O insurance that goes beyond the circumstances specified in section 289(5) of the Act. This is in light of the definition of "effecting insurance" which includes, and therefore is not limited to, paying the costs of the insurance. In light of this definition, it could be said that taking out a D&O insurance amounts to effecting such insurance, regardless of who pays the premium.

[54] As section 289 of the Act is a relatively new provision, there is a dearth of local case law offering guidance on how this provision should be interpreted. For purposes of comparison, the equivalent provisions in the companies legislation of Commonwealth and other jurisdictions will be looked at.

[55] *United Kingdom, Singapore, Hong Kong*. The equivalent provisions in the respective companies legislation of the United Kingdom,[1] Singapore[2] and Hong Kong[3] provide that the section which voids provisions indemnifying officers (i.e. their equivalent of our section 288 of the Act) does not prevent a company from taking out D&O insurance for a director or officer of the company. It does not specify the circumstances which may be covered by such insurance (unlike section 289(5) of the Act).

[56] *Australia*. In contrast, the equivalent provision in the Australian[4] companies legislation states that a company must not pay a premium for a contract insuring an officer against certain specified liabilities. Anything that purports to insure a person against such a liability is

1 Section 233 of the UK Companies Act 2006 states:
Section 232(2) (voidness of provisions for indemnifying directors) does not prevent a company from *purchasing and maintaining* for a director of the company, or of an *associated company, insurance* against any such liability as is mentioned in that subsection.

2 Section 172A of the Singapore Companies Act (Chapter 50) states:
Section 172(2) shall not prevent a company from *purchasing and maintaining* for an officer of the company *insurance* against any such liability referred to in that subsection.

3 Section 468(4) of the Hong Kong Companies Ordinance states:
Subsection (3) does not prevent a company from *taking out and keeping in force insurance* for a director of the company, or a director of an *associated company* of the company, against –
(a) any liability to any person attaching to the director in connection with any negligence, default, breach of duty or breach of trust (except for fraud) in relation to the company or associated company (as the case may be); or
(b) any liability incurred by the director in defending any proceedings (whether civil or criminal) taken against the director for any negligence, default, breach of duty or breach of trust (including fraud) in relation to the company or associated company (as the case may be).

4 Section 199B of the Australian Corporations Act 2001 states:
(1) A company or a *related body corporate* must *not pay*, or agree to pay, a *premium for a contract insuring* a person who is or has been an officer or auditor of the company against a liability (other than one for legal costs) arising out of:
(a) conduct involving a wilful breach of duty in relation to the company; or
(b) a contravention of section 182 or 183.
This section applies to a premium whether it is paid directly or through an interposed entity.

void to the extent of such contravention.[5] It appears that in Australia, a D&O insurance which insures against a liability that is not permitted by the Australian companies legislation would be void.

[57] *New Zealand*. The equivalent provision in the New Zealand[6] companies legislation is quite similar to our section 289(5) of the Act. It likewise specifies certain circumstances in respect of which a company may effect D&O insurance. Where that is not complied with however, their equivalent provision (of our section 289(8) of the Act) expressly includes such non-compliance as an event which will result in the officer being personally liable to the company for the cost of effecting the D&O insurance, except to the extent he proves that such cost was fair to the company at the time the insurance was effected.[7] An inference can be drawn from this that a New Zealand company may take out a D&O insurance that goes beyond the permitted scope, save that the officer is personally liable to the company for the cost

5 Section 199C of the Australian Corporations Act 2001 states:

(2) Anything that purports to indemnify or insure a person against a liability, or exempt them from a liability, is *void to the extent that it contravenes* section 199A or 199B.

6 Section 162(5) of the New Zealand Companies Act 1993 states:

A company may, if expressly authorised by its constitution and with the prior approval of the board, *effect insurance* for a director or employee of the company or a *related company* in respect of –

(a) liability, not being criminal liability, for any act or omission in his or her capacity as a director or employee; or

(b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability; or

(c) costs incurred by that director or employee in defending any criminal proceedings –

(i) that have been brought against the director or employee in relation to any act or omission in his or her capacity as a director or employee; and

(ii) in which he or she is acquitted.

7 Section 162(8) of the New Zealand Companies Act 1993 states:

Where insurance is effected for a director or employee of a company or a related company and –

(a) the provisions of either subsection (5) or subsection (6) have not been complied with; or

(b) reasonable grounds did not exist for the opinion set out in the certificate given under subsection (6), – the director or employee is *personally liable to the company for the cost of effecting the insurance* except to the extent that he or she proves that it was fair to the company at the time the insurance was effected.

of effecting the D&O insurance, except to the extent he proves that it was fair.

[58] *Malaysia*. Unlike the New Zealand companies legislation, our section 289(8) of the Act does not include non-compliance with section 289(5) of the Act as an event which will result in the director or officer being personally liable to the company for the cost of effecting the D&O insurance, unless it can be argued that section 289(5) of the Act is indirectly included by virtue of (i) section 289(6) of the Act being included in section 289(8) of the Act, and (ii) the said section 289(6) containing a reference to section 289(5)(a) and (b) of the Act. That is to say, incorporated by way of cross-reference. Such an argument, however, seems rather tenuous.

[59] Section 289(2) of the Act states that "an indemnity given in breach of this section shall be void". It does not say however that an insurance effected in breach of this section is void.

[60] Is section 289(5) of the Act intended to prohibit a company from taking out a D&O insurance that goes beyond the circumstances specified therein? The jury is still out on this question.

[61] If it is indeed the case that a company is prohibited from taking out D&O insurance that goes beyond the stated circumstances, a breach thereof could attract the general penalty prescribed in section 588 of the Act. Under section 588(1), a person commits an offence under the Act if he does that which by or under this Act he is prohibited to do or otherwise contravenes or fails to comply with any provision of the Act. Under section 588(2) of the Act, where a penalty or punishment is not mentioned, that person shall on conviction be liable:

(a) in the case of a person who is an individual, to a fine not exceeding RM50,000 or to imprisonment for a term not exceeding 3 years or to both; or

(b) in the case of a person other than an individual, to a fine not exceeding RM50,000.

K. Group policy

[62] On the premise that a company may effect D&O insurance only to the extent permitted by section 289(5) of the Act, another question is whether a company may take out D&O insurance for the directors and officers of its related companies. Section 289(5) of the Act states

that a company may effect insurance for an officer of the company, i.e. its own officer. It does not extend to an officer of a related company.

[63] "Related company" is defined in section 7 of the Act as follows:

> 7. *When corporations deemed to be related to each other*
>
> A corporation is deemed to be related to each other if –
>
> (a) it is the holding company of another corporation;
>
> (b) it is a subsidiary of another corporation; or
>
> (c) it is a subsidiary of the holding company of another corporation.

[64] "Subsidiary" and "holding company" in turn are defined in section 4 of the Act as follows:

> 4. *Definition of "subsidiary and holding company"*
>
> (1) Subject to subsection (3), a corporation shall be deemed to be a *subsidiary* of another corporation, but only if –
>
> (a) the other corporation –
>
> (i) *controls* the composition of the *board of directors* of the corporation;
>
> (ii) *controls* more than half of the *voting power* of the corporation; or
>
> (iii) *holds more than half of the total number of issued shares* of the corporation, excluding any part of the share capital which consists of preference shares; or
>
> (b) the corporation is a subsidiary of any corporation which is that other corporation's subsidiary.
>
> …
>
> (4) A reference in this Act to the *holding company* of a company or other corporation shall be read as a reference to a corporation of which that company or corporation is a subsidiary.

[65] *United Kingdom, Hong Kong, New Zealand*. In comparison, the equivalent provisions in the respective companies legislation of the United Kingdom,[8] Hong Kong[9] and New Zealand[10] allows a company

8 See n 1 above.
9 See n 3 above.
10 See n 6 above.

to take out insurance for a director or officer of a related or associated company. It appears that companies in those jurisdictions may take out D&O insurance covering their related and associated companies. It is noted though that their provisions voiding indemnity for directors and officers (i.e. their equivalent of our section 288 of the Act)[11] extends to a director or officer of a related or associated company.

[66] *Australia*. The equivalent provision in the Australian[12] companies legislation is interesting. It states that a company or a related body corporate must not pay a premium for a contract insuring a person who is or has been an officer of the company against certain specified liabilities. In that connection, it expressly states that the said provision "applies to a premium whether it is paid directly or through an interposed entity". This appears to suggest that the said prohibition cannot be circumvented by having the premium paid by another entity.

[67] *Malaysia*. The relevant wording in section 289(1) of the Act is that "a company shall not … directly or indirectly effect insurance for an officer … of the company". Arguably, this bites a situation where the D&O insurance is effected by or through a related or associated

11 Section 232(2) of the UK Companies Act 2006 states:

> Any provision by which a company directly or indirectly provides an indemnity (to any extent) for a director of the company, or of an associated company, against any liability attaching to him in connection with any negligence, default, breach of duty or breach of trust in relation to the company of which he is a director is void, except as permitted by –
>
> (a) section 233 (provision of insurance),
>
> (b) section 234 (qualifying third party indemnity provision), or
>
> (c) section 235 (qualifying pension scheme indemnity provision).

Section 468(3) of the Hong Kong Companies Ordinance states:

> If, by a provision, the company directly or indirectly provides an indemnity for a director of the company, or a director of an *associated company* of the company, against any liability attaching to the director in connection with any negligence, default, breach of duty or breach of trust in relation to the company or associated company (as the case may be), the provision is void.

Section 162(1) of the New Zealand Companies Act 1993 states:

> Except as provided in this section, a company must not indemnify, or directly or indirectly effect insurance for, a director or employee of the company or a *related company* in respect of –
>
> (a) liability for any act or omission in his or her capacity as a director or employee; or
>
> (b) costs incurred by that director or employee in defending or settling any claim or proceeding relating to any such liability.

12 See n 4 above.

company. On that footing, the fact that section 289(5) of the Act does not expressly allow D&O insurance to be taken out for a related or associated company could be interpreted to mean that this is outside the scope of permitted D&O insurance.

L. Liability to the company

[68] Another question is whether D&O insurance may be effected for a director or officer in relation to liability owed by him towards the company.

[69] As background, it is useful to refer to the Review of the Companies Act 1965 – Final Report ("Report") by the Corporate Law Reform Committee ("CLRC"). The CLRC was established by the Companies Commission of Malaysia on December 17, 2003 to undertake a review of the legislative policies on corporate law in order to propose amendments that are necessary for corporate and business activities to function in a cost effective, consistent, transparent and competitive business environment in line with international standards of good corporate governance.

[70] In the Report, the relevant recommendations of the CLRC pertaining to indemnity and insurance for directors and officers are as follows:[13]

> Recommendation 2.33
>
> The CLRC recommends the retention of section 140(1) of the Companies Act 1965.
>
> Recommendation 2.34
>
> The CLRC recommends that a company be allowed to provide indemnity for any costs incurred by a director, officer or auditor in defending legal proceedings, whether civil or criminal, only when the director, officer or auditor is successful (whether by a judgment in his favour, an acquittal or by a discontinuance).
>
> Recommendation 2.35
>
> The CLRC recommends that a company should *not be allowed* to purchase or maintain *insurance* for directors, officers or auditors in relation to *liability owed towards the company*.

13 Page 22 of the Report.

Recommendation 2.36

The CLRC recommends that section 140 of the Companies Act 1965 should be clarified to allow a company to purchase or maintain insurance or to indemnify its officer or director or auditor for cost, expenses and liability incurred by that officer or director or auditor in *defending an action commenced by a third party* (the third party being a person *other than the company*).

Recommendation 2.37

The CLRC recommends that any insurance or indemnification that is allowed to be taken by the company for is directors or officers or auditors (as stated in recommendation 2.36) will have to be disclosed to shareholders.

[71] It is noteworthy that the CLRC recommended that a company should not be allowed to purchase or maintain insurance for directors and officers in relation to liability owed towards the company. Further, that section 140 of the previous CA should be clarified to allow a company to purchase or maintain insurance for cost, expenses and liability incurred by directors and officers in defending an action commenced by a third party (the third party being a person other than the company).

[72] The thinking was that only third-party claims may be insured by a company. This is reflected in the Report as follows:[14]

> 11.04 In CD 5 [Consultative Document 5] another issue that was raised was *whether an insurance contract taken by the company is void under section 140*. In deciding whether or not to recommend allowing the insurance coverage to cover the liability of directors or officers or auditors, the CLRC was mindful of the personal liability issue as imposed by other statutes, the lengthy process, and the cost of legal proceedings in Malaysia. Nonetheless, an *insurance* purchased and maintained by a company for its directors or officers or auditors *in relation to any potential breach of duty owed towards the company has the effect of exonerating the directors or officers* or auditors *for any liability towards the company and undermines the principle that directors or officers* or auditors *are accountable to the company*.

14 Page 110 of the Report.

> However, as stated in the preceding paragraph, *third party claims may be insurable by the company*.

[73] Clearly, the CLRC's recommendation is that D&O insurance should not be permitted in relation to liability owed by directors and officers towards the company. This recommendation, however, was not incorporated into the Act. Section 289(5) of the Act does not contain the recommended clarification. Instead, it allows a company to effect D&O insurance for a director or officer in respect of:

(a) civil liability for any act or omission in his capacity as a director or officer and costs incurred in defending any claim or proceeding relating to such civil liability (without any caveat that this should only apply to liability owed to, or claims by, a third party); or

(b) costs incurred by him in defending any proceeding against him in relation to any act or omission in his capacity as a director or officer in which he is acquitted, granted relief under the Act or where proceedings are discontinued or not pursued (again without any qualification that this should only apply to proceedings by a third party).

[74] In contrast, section 289(4) of the Act (which deals with indemnity for directors and officers) contains a qualification that it does not cover liability to the company nor proceedings brought by the company.

(a) Section 289(4)(a) of the Act states that a company may indemnify an officer in respect of:

> any liability to any person, *other than the company*, for any act or omission in his capacity as an officer.

(b) Section 289(4)(ii)(B) of the Act excludes:

> any liability incurred by the director … in defending civil proceedings *brought by the company*, or an associated company, in which judgment is given against him.

[75] In the absence of a similar caveat in section 289(5) of the Act, it would appear that a company may effect D&O insurance, not only in respect of third-party claims, but also in respect of claims brought by the company itself.

Part II: Indemnity for directors and officers

A. Indemnity

[76] *Section 289(9)* of the Act defines "indemnity" as follows:

> "indemnify" includes relief or excuse from liability, whether before or after the liability arises, and "indemnity" has a corresponding meaning.

[77] As mentioned, the starting premise of section 289(1) of the Act is that a company must not indemnify its directors and officers, unless otherwise provided in the said section. Section 289(2) of the Act goes on to say that "an indemnity given in breach of this section shall be void". Underlying that is section 288 of the Act which states that any provision (whether contained in the constitution or in any contract with a company or otherwise) indemnifying any officer against any liability in respect of any negligence, default, breach of duty or breach of trust, of which he may be guilty in relation to the company, is void.

[78] It is clear that any indemnity in favour of directors and officers must observe the limits prescribed in section 289 of the Act. Failing which, such an indemnity will be void. The limits on indemnity for directors and officers are set out in section 289(3) and (4) of the Act.

B. Indemnity for costs (section 289(3) of the Act)

[79] *Section 289(3)* of the Act allows a company to indemnify a director or officer in respect of *costs* incurred by him in defending proceedings. It reads:

> (3) A company may *indemnify* an officer or auditor of the company for any *costs* incurred by him or the company in respect of any proceedings –
>
> (a) that relates to the *liability* for any *act* or *omission* in his capacity as an officer or auditor; *and*
>
> (b) in which judgment is given in favour of the officer or auditor or in which the officer or auditor is acquitted or in which the officer or auditor is granted relief under this Act, or where proceedings are discontinued or not pursued.

[80] An indemnity in favour of a director or officer in respect of costs of proceedings can cover defence of any proceeding against him in

relation to any liability (*civil* or *criminal*) for any act or omission in his capacity as a director or officer. Provided that he is successful in his defence. That is to say, (i) judgment is given in his favour, (ii) he is acquitted, (iii) he is granted relief under the Act, or (iv) the proceedings against him are discontinued or not pursued.

C. Indemnity for liability and costs (section 289(4) of the Act)

[81] Section 289(4) of the Act allows a company to indemnify a director or officer in respect of:

(a) any *liability* to any person, other than a liability to the company, for any act or omission in his capacity as a director or officer; and

(b) *costs* incurred by him in defending or settling any claim or proceedings relating to any such liability, subject to certain exceptions.

[82] *Section 289(4)* of the Act reads:

> (4) A company may *indemnify* an officer or auditor of the company in respect of –
>
> (a) any *liability to any person, other than the company*, for any act or omission in his capacity as an officer or auditor; and
>
> (b) *costs* incurred by that director or officer or auditor in defending or settling any claim or proceedings relating to any such liability *except* –
>
> (i) any liability of the *director* to pay –
>
> (A) a *fine* imposed in *criminal proceedings*; or
>
> (B) a sum payable to a *regulatory authority* by way of a *penalty* in respect of non-compliance with any requirement of a regulatory nature, however arising; or
>
> (ii) any liability incurred by the *director* –
>
> (A) in defending *criminal proceedings* in which he is *convicted*; or
>
> (B) in defending *civil proceedings* brought by the *company*, or an *associated company*, in which judgment is given against him; or
>
> (c) in connection with an application for relief under this Act.

[83] The way in which this section is drafted raises some questions. Moreover, there appears to be some duplication between section 289(4) and (3) of the Act. Section 289(4) of the Act covers both liability and costs. However, costs is also covered by section 289(3) of the Act.

D. The exceptions in subsection (b) of section 289(4) of the Act

[84] Subsection (b) of section 289(4) of the Act ("subsection (b)") sets out four categories of exceptions ("specified exceptions"), namely:

(a) any liability of a director to pay a fine imposed in criminal proceedings (paragraph (i)(A));

(b) any liability of a director to pay a penalty to a regulatory authority in respect of non-compliance with any regulatory requirement (paragraph (i)(B));

(c) any liability incurred by a director in defending criminal proceedings in which he is convicted (paragraph (ii)(A)); or

(d) any liability incurred by a director in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him (paragraph (ii)(B)).

[85] A question arises concerning the ambit of the application of the specified exceptions. Pursuant to subsection (b), a company may indemnify a director or officer in respect of costs incurred by him in defending or settling any claim or proceedings relating to any liability for any act or omission in his capacity as a director or officer. Such indemnity however does not apply in the case of the specified exceptions.

[86] At first glance, the specified exceptions appear to only qualify subsection (b). However, that does not seem to sit comfortably with the tenor of the provision. For instance, the payment of a fine imposed in criminal proceedings (as per paragraph (i)(A)) cannot really be considered to be costs incurred in defending proceedings. The same goes for the payment of a penalty to a regulatory authority in respect of non-compliance with a regulatory requirement. Those are more in the nature of a liability to a person, other than the company, for an act or omission (as provided under subsection (a) of section 289(4) of the Act ("subsection (a)")). It would seem that the specified exceptions ought to apply to subsection (a) as well. In fact, that is how the

equivalent provisions in the respective companies legislation of the United Kingdom,[15] Singapore[16] and Hong Kong[17] are drafted.

15 Section 234(3) of the UK Companies Act 2006 states:

The provision must not provide any indemnity against –

(a) any *liability* of the director to pay –

(i) a *fine* imposed in criminal proceedings, or

(ii) a sum payable to a regulatory authority by way of a *penalty* in respect of non-compliance with any requirement of a regulatory nature (however arising); or

(b) any *liability* incurred by the director –

(i) in *defending criminal proceedings* in which he is convicted, or

(ii) in *defending civil proceedings* brought by the company, or an associated company, in which judgment is given against him, or

(iii) in connection with an *application for relief* (see subsection (6)) in which the *court refuses to grant him relief*.

16 Section 172B(1) of the Singapore Companies Act (Chapter 50) states:

Section 172(2) shall not apply where the provision for indemnity is against liability incurred by the officer to a person other than the company, except when the indemnity is against –

(a) any *liability* of the officer to pay –

(i) a *fine* in criminal proceedings; or

(ii) a sum payable to a regulatory authority by way of a *penalty* in respect of non-compliance with any requirement of a regulatory nature (however arising); or

(b) any *liability* incurred by the officer –

(i) in *defending criminal proceedings* in which he is convicted;

(ii) in *defending civil proceedings* brought by the company or a related company in which judgment is given against him; or

(iii) in connection with an *application for relief* referred to in subsection (4) in which the *court refuses to grant him relief*.

17 Section 469(2) of the Hong Kong Companies Ordinance states:

The provision must not provide any indemnity against –

(a) any *liability* of the director to pay –

(i) a *fine* imposed in criminal proceedings; or

(ii) a sum payable by way of a *penalty* in respect of non-compliance with any requirement of a regulatory nature; or

(b) any *liability* incurred by the director –

(i) in *defending criminal proceedings* in which the director is convicted;

(ii) in *defending civil proceedings* brought by the company, or an associated company of the company, in which judgment is given against the director;

(iii) in *defending civil proceedings* brought on behalf of the company by a member of the company or of an associated company of the company, in which judgment is given against the director;

(iv) in *defending civil proceedings* brought on behalf of an associated company of the company by a member of the associated company or by a member of an associated company of the associated company, in which judgment is given against the director; or

(v) in connection with an *application for relief* under section 358 of the predecessor Ordinance or section 903 or 904 in which the *Court refuses to grant the director relief*.

[87] Another question arises as the specified exceptions specifically refer to "director". Does this mean that the specified exceptions apply only where a director is involved, but not where other categories of officers are involved, e.g. manager, secretary or employee?

[88] If so, this would mean that a *director* may not be indemnified in respect of a liability:

(a) to pay a fine imposed in criminal proceedings;

(b) to pay a penalty to a regulatory authority in respect of non-compliance with a regulatory requirement;

(c) incurred in defending criminal proceedings in which he is convicted; or

(d) incurred in defending civil proceedings brought by the company, or an associated company, in which judgment is given against him.

[89] But other categories of officers (i.e. other than a director) may be indemnified in respect of such a liability.

E. Subsection (c) of section 289(4) of the Act

[90] A further question concerns subsection (c) of section 289(4) of the Act ("subsection (c)"). Subsection (c) refers to "an application" for relief under the Act. It does not stipulate that the director or officer concerned must have been "granted relief" under the Act. That, for instance, is stipulated in section 289(5)(c)(ii) of the Act. The context there is that a company may effect insurance for a director or officer in respect of costs incurred by him in defending any proceedings in which he is "granted relief" under the Act. Moreover, subsection (c) appears to be a separate limb standing on its own.

[91] Does this mean that a company may indemnify a director or officer in connection with "an application" for relief under the Act, regardless of the outcome of the application? An alternative reading is that such an indemnity is permitted only where the director or officer is granted relief by the court. Again, that is how the equivalent provisions in the respective companies act of the United Kingdom,[18] Singapore[19] and Hong Kong[20] are drafted.

18 See n 15 above.
19 See n 16 above.
20 See n 17 above.

[92] On this note, it would be useful to refer to section 581 of the Act which empowers the court to grant relief. It reads:

> 581. *Power to grant relief*
>
> (1) In any proceeding for *negligence, default, breach of duty or breach of trust* against any person to whom this section applies, if it appears to the Court before which the proceedings are taken that a person is or may be liable, but that he has acted honestly and reasonably and that, having regard to all the circumstances of the case, he ought fairly to be excused for the negligence, default or breach, the Court may relieve him either wholly or partly from his liability on such terms as the Court thinks fit.
>
> …
>
> (3) This section applies to –
>
> (a) an *officer* of a corporation; …

[93] It is noteworthy that section 581 of the Act is expressed to apply to "officers", and not just to directors. Pursuant thereto, the court may grant relief to an officer in any proceeding against him for (i) negligence, (ii) default, (iii) breach of duty, or (iv) breach of trust.

[94] It is also noteworthy that the four categories of liability described in section 581 of the Act aforesaid correspond to the description in section 288 of the Act. Recall that section 288 of the Act invalidates provisions indemnifying a director or officer against any liability which by law would otherwise attach to him in respect of any (i) negligence, (ii) default, (iii) breach of duty, or (iv) breach of trust, which he may be guilty of in relation to the company. By virtue of section 581 of the Act, the court may grant relief if it is satisfied that the officer concerned had acted honestly and reasonably and ought fairly to be excused for the negligence, default or breach.

F. Associated company

[95] Under section 289(4)(a) of the Act, an indemnity in respect of a liability owed to the company is not permitted. Instead, only an indemnity in respect of a liability to any person, other than the company (i.e. a third party) is permitted.

[96] In the same vein, an indemnity against "(ii) any liability incurred by the director – … (B) in defending civil proceedings brought by the company, or an *associated company*, in which judgment is given against him" is not permitted (section 289(4)(b)(ii)(B) of the Act).

[97] The term "associated company" is used in section 289(4)(b)(ii)(B) of the Act. However, this term is not defined in the Act. "Associated company" is generally understood to mean a company in which one holds at least 20% but not more than 50% of its shares.

[98] For instance, paragraph 1.01 (Definitions and Interpretation) of the Listing Requirements of Bursa Malaysia Securities Bhd contains the following definition:

> associated company has the meaning given to "*associate*" under the accounting standards issued or adopted by the Malaysian Accounting Standards Board.

[99] The applicable accounting standard issued by the Malaysian Accounting Standards Board sets out the following definition:

> MFRS (Malaysian Financial Reporting Standard) 128
>
> Investments in Associates and Joint Ventures
>
> An *associate* is an entity over which the investor has *significant influence*.
>
> Significant influence is the power to participate in the financial and operating policy decisions of the investee but is *not control* or joint control of those policies.
>
> Significant Influence
> If an entity holds, directly or indirectly (eg through subsidiaries), *20 per cent or more* of the voting power of the investee, it is presumed that the entity has significant influence, unless it can be clearly demonstrated that this is not the case. Conversely, if the entity holds, directly or indirectly (eg through subsidiaries), less than 20 per cent of the voting power of the investee, it is presumed that the entity does not have significant influence, unless such influence can be clearly demonstrated. A substantial or majority ownership by another investor does not necessarily preclude an entity from having significant influence.

[100] The reference to "associated company" in section 289(4)(b)(ii)(B) of the Act is curious. Firstly, it is not a defined term under the Act. Secondly, there seems to be no plausible explanation why an "associated company" is included here, but not a "related company" or a "subsidiary company".

[101] Generally, a "subsidiary" is a company in which one holds more than 50% of its voting shares. One has control over a "subsidiary". In contrast, one only has significant influence over an "associated company", but not control.

[102] It therefore seems odd that "associated company" is referred to in section 289(4)(b)(ii)(B) of the Act. It might have been more appropriate here to refer to a "related company" or a "subsidiary company".

G. Requirements of section 289(4) of the Act

[103] The requirements imposed in the case of a director under section 289(6) of the Act, as discussed in Part I of this article (Insurance for Directors and Officers), is also relevant here. Section 289(6) of the Act reads:

> (6) In the case of a *director, subsection (4)* and paragraphs (5)(a) and (b) *shall not apply* to any civil or criminal liability in respect of a breach of the duty as specified in section 213.

[104] An indemnity for a director (which would otherwise have been allowed by section 289(4) of the Act) is not permitted where the director is in breach of his duty under section 213 of the Act. Recall that the said section 213 of the Act imposes a duty on a director to (i) act for a proper purpose and in good faith in the best interest of the company, and (ii) exercise reasonable care, skill and diligence.

[105] Also pursuant to section 289(7) of the Act, the particulars of any indemnity given to directors and officers must be recorded in the minutes of the board of directors and be disclosed in the directors' report. Section 289(7) of the Act reads:

> (7) The directors shall –
>
> (a) record or cause to be recorded in the *minutes* of the board of directors; and
>
> (b) disclose or cause to be disclosed in the *directors' report* referred to in section 253, the *particulars of any indemnity*

> *given* to, or insurance effected for, any officer or auditor of the company.

H. Case law

[106] One of the few case law dealing with section 289 of the Act is the High Court case of *Tengku Dato' Ibrahim Petra Tengku Indra Petra & Ors v Perdana Petroleum Bhd*.[21] The facts briefly are these. The plaintiffs were former directors of the defendant company ("company"). The company sued the plaintiffs for, *inter alia*, breaches of directors' duties, obligations of trust as directors, and conspiracy to injure the company. The plaintiffs were exonerated of all wrongdoings by the Federal Court.

[107] Consequently, the plaintiffs filed an action pursuant to section 289(3) and (4) of the Act, as well as article 170 of the articles of association of the company ("article 170"), to indemnify themselves for the legal costs which were incurred in successfully defending the suits by the company. Article 170 is in similar terms with article 113 of Table A, Fourth Schedule to the previous CA.

[108] The court held that article 170 was incorporated into the plaintiffs' contractual relationship with the company. The plaintiffs may therefore rely on article 170 to claim indemnity for costs incurred by them in defending the earlier proceedings.

[109] The court further held that article 170 was not confined to a claim for indemnity by a director for successfully defending himself against a suit brought by a third party. The language of article 170 was sufficiently wide enough to encompass within its scope, a claim for indemnity for proceedings by the company against the director. The court made the following observation:

> [95] … *directors who are sued for any breach of their duties towards the company may later look to the company for indemnity* and reimbursement of all legal expenses incurred in successfully defending themselves and being vindicated of all the nefarious allegations that were levelled against them.

[110] The court allowed the plaintiffs' claim. First, on the basis of article 170. And secondly, on the basis of section 289 of the Act. The court said that section 289 of the Act gave the plaintiffs:

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21 [2021] 7 MLJ 439.

> [99] … a *statutory right to obtain an indemnity* in respect of their legal costs incurred throughout the litigation proceedings.

[111] It was the company's contention that section 289(3) and (4) of the Act were merely enabling provisions and did not vest any freestanding power or obligation to indemnify, that they simply authorised indemnification. The company argued that the authority and power to indemnify must be pursuant to the constitution or contract or otherwise.

[112] To this, the court observed that section 289(3) and (4) of the Act were expressed without reference to the constitution or contract or otherwise. The court said:

> [49] However, *ex facie*, s. 289(3) and (4) CA 2016 appear to authorise a company to indemnify its officers in the stated circumstances. *This is expressed without reference to the constitution or contract or otherwise.* The authorised indemnification also covers a broader range of matters (the first interpretation).

[113] The court also held that a claim for indemnity can be brought in a subsequent and separate proceeding. The company argued that the plaintiffs had failed to apply for or state that they were entitled to receive costs on an indemnity basis as and when they were awarded costs in the earlier proceedings. Thus, it was contended that the plaintiffs are estopped from claiming costs on an indemnity basis.

[114] In dismissing this argument, the court said:

> [81] The next issue is whether the fact that during the course of all the proceedings in the High Court, Court of Appeal and Federal Court, party and party costs were ordered and the present plaintiffs did not at that time seek costs on an indemnity basis, is fatal. In my view, the failure on the part of the present plaintiffs to previously seek an order for costs on an indemnity basis from the respective courts is not fatal. The *claim for costs indemnification can and should, for all practical reasons, be made subsequently in separate proceedings* for this purpose so that there can be proper argument and mature consideration on the multifarious issues that could arise (as it did in OS391).
>
> [82] Hence, this (OS391) is the proper forum for the present plaintiffs to make the claim for indemnity under article 170.

[115] In this case, there was no dispute as to the quantum of the legal fees claimed by the plaintiffs. The company did not allege that the legal fees were unreasonable or excessive. As such, the plaintiffs were awarded costs on an indemnity basis (less party and party costs that were awarded and had been paid).

Conclusion

[116] Apart from directors and officers, section 289 of the Act also speaks of auditors of the company. A company is permitted to provide indemnity and insurance to its auditors. A discussion concerning auditors, however, is outside the scope of this article.

[117] With the introduction of section 289 of the Act, companies can safely provide indemnity and D&O insurance for their directors and officers. There is no longer a concern that such an indemnity and D&O insurance might be in contravention of the Act. However, companies need to be mindful that there are certain limits and requirements in relation to the permitted indemnity and D&O insurance.

Committal Proceedings: Civil Contempt

by

*Justice Wong Hok Chong**

Introduction

[1] Committal proceedings for civil contempt have of late been all too common. At first blush, the law appears confusing, even contradictory, as opposing counsel brandish seemingly irreconcilable authorities. This article is intended as a snapshot to bring some key issues into focus and clarity to blurred lines.

Definition

[2] There is no finite definition of what contempt of court is, but it is broadly accepted as "any conduct that tends to bring the authority and administration of the law into disrespect or disregard, or to interfere with or prejudice parties, litigants or their witnesses during the litigation".[1] Such contumelious conduct is a wrongdoing punishable by the court. The court is vested with the power inherent to the very concept of a court of law to defend itself as an institution against any undermining of her authority or undue interference with the administration of justice in the public interest. In Malaysia, that inherent power is further affirmed in Article 126 of the Federal Constitution and section 23 of the Courts of Judicature Act 1964 [*Act 91*].

Categories of contempt never closed

[3] Contempt of court is as varied as its broad definition and the categories of contempt are never closed. Low Hop Bing J (as he then was) in *Chandra Sri Ram v Murray Hiebert*[2] ("*Chandra Sri Ram*") made the observation that:

> The circumstances and categories of facts which may give rise and which may constitute contempt of court, in a particular case, are

* Judicial Commissioner of the High Court of Malaya.

1 *Oswald's Contempt of Court*, 3rd edn (London: Butterworths).

2 [1997] 3 CLJ Supp 518.

never closed. This is the same position as in the case of negligence in which the scope for development is limitless. Contempt of Court may arise from any act or form whatsoever, ranging from libel or slander emanating from any contemptuous utterance, news item, report or article, to an act of disobedience to a Court order or a failure to comply with a procedural requirement established by law. Any of these acts, in varying degrees, affects the administration of justice or may impede the fair trial of *sub judice* matters, civil or criminal, for the time being pending in any Court. The particular matrix of the individual case is of paramount importance in determining whether a particular circumstance attracts the application of the law of contempt. Hence, a positive perception of the facts is a prerequisite in deciding whether or not there is any contravention necessitating the invocation of the law of contempt.

Classifications

[4] Categories aside, the literature on this subject have classified contempt based on broad characteristics for ease of reference. They include characteristics along the lines of (a) whether the contempt arose in the course of litigation or otherwise; (b) the person who initiated contempt proceedings; and (c) the manner in which the contempt was manifested.

Classification – Traditional

[5] The traditional classification was premised on whether the contempt arose in the course of litigation or otherwise; the original one being that a breach of a court order prejudicial to a party was classified as *civil contempt* and all else as *criminal contempt*. I say *original* because it has since evolved.

[6] There is logic to the traditional classification – one pertains to the breach of court orders and the other, all else – but less so the rationale for the labels assigned them. This is because all contempt is criminal in nature but prosecuted under the civil rules of court. Salmon LJ in *Jennison v Baker*[3] remarked that it was "unhelpful and almost meaningless classification" and Sir Donaldson MR in *AG v Newspaper Publishing Plc*[4] ("*Newspaper Publishing*") likewise found that it "tends to mislead rather than assist".

3 [1972] 1 All ER 997.
4 [1987] 3 All ER 276 at 294.

[7] In the same case, *Newspaper Publishing*, Sir Donaldson MR expanded on the delineation of civil contempt to include non-parties aiding and abetting a breach of a court order. This was a sensible evolution as the newly included segment bore a close nexus to the breach of a court order. But a descriptive definition was always going to have its limitations. Seeing this, the Court of Appeal promulgated a purposive definition in *Uthayakumar Ponnusamy v Abdul Wahab Abdul Kassim (Pengarah Penjara Kajang)*[5] ("*Uthayakumar*"):

> [21] In *Miller v. Miller*, 652 SE 2d 754 – SC: Court of Appeals 2007, the Court of Appeals of South Carolina had in very clear terms explained the difference in classification between civil and criminal contempt, and it would be apposite to quote the relevant passage from that decision, as it is highly persuasive and relevant to the issue at hand:
>
> > "The determination of whether contempt is civil or criminal depends on the underlying purpose of the contempt ruling. In *Floyd v. Floyd*, we provided a comprehensive review of the differences between civil and criminal contempt:
> >
> > The major factor in determining whether a contempt is civil or criminal is the purpose for which the power is exercised, including the nature of the relief and the purpose for which the sentence is imposed. The purpose of civil contempt is to coerce the defendant to do the thing required by the order for the benefit of the complainant.
> >
> > The primary purposes of criminal contempt are to preserve the court's authority and to punish for disobedience of its orders. If it is for civil contempt the punishment is remedial, and for the benefit of the complainant. But if it is for criminal contempt the sentence is punitive, to vindicate the authority of the court."
>
> Hence, the Court of Appeals of South Carolina had differentiated the two categories of contempt by determining the underlying purpose of the contempt ruling. *If the purpose of the contempt ruling is remedial, ie, for the benefit of the complainant, then it is civil*. And *if it is to preserve the court's authority and keep pure the administration of justice, then it is criminal*. The basis of this dichotomy is discussed in some depth in an earlier academic article – *Distinction Between Civil and Criminal*

5 [2020] 1 CLJ 82 at 90–91.

Contempt – Donner et al. v. Calvert Distillers Corp, 12 Md L Rev 241 (1951) …

(Emphasis added.)

[8] In short, if the purpose of the contempt proceedings is for the benefit of the litigant then it is a civil contempt; all else to preserve the court's authority and keep pure the administration of justice is a criminal contempt.

Classification – Initiator of proceedings

[9] Contempt has also been classified along the lines of the person who initiated the contempt proceedings (*Uthayakumar* at pages 92–94). There are three possible persons who may initiate contempt proceedings: (a) a party to the proceedings, (b) the Attorney General, and (c) the court itself.

[10] *Party-initiated proceedings*. A party with sufficient interest in a matter may initiate contempt proceedings, be it a civil or criminal contempt. In practice, the majority of party-initiated proceedings are in respect of civil contempt.

[11] *Attorney General-initiated proceedings*. The Attorney General, as guardian of the dignity and integrity of the judicial institution, may initiate contempt proceedings generally. This is especially so where the contemptuous conduct is manifested in *scandalising the court*, i.e. statements attacking the judiciary, or *in the face of the court* that the court has not itself cited. The Attorney General may but rarely gets involved in civil contempt matters *per se* unless there are compelling reasons therefor.

[12] *Court-initiated proceedings*. The court may cite a party for contempt by way of summary proceedings where the contemptuous conduct was manifested *in the face of the court*. The court may but rarely initiate contempt proceedings not manifested *in the face of the court*. Where the alleged contempt affects a party with a sufficient interest, he will more often than not initiate the proceedings. Otherwise, the Attorney General will take upon himself the duty to protect the court, especially when it is a *criminal contempt* manifested in *scandalising the court* or a contempt *in the face of the court* but was not cited by the court itself.

Classification – Manifestation of contempt

[13] Also referred to above is the classification of contempt along the lines of the manifestation of the contemptuous conduct. It may be

(a) an act that primarily also offends a party – this broadly correlates civil contempt, (b) contempt in the face of the court, or (c) scandalising the court – the latter two broadly correlates with criminal contempt.

Criminal in nature

[14] Regardless of how contempt is classified, what is clear is that all committal proceedings are criminal in nature and must be proven beyond reasonable doubt. Lord Denning MR in *Re Bramblevale Ltd*[6] held that, "A contempt of court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond reasonable doubt."

Civil rules for committal proceeding

[15] The rules for committal proceedings are, however, found in the Rules of Court 2012 ("Rules of Court") and not, as one might expect, in the Criminal Procedure Code [*Act 593*]. The Supreme Court in *Arthur Lee Meng Kwang v Faber Merlin (M) Sdn Bhd & Ors*[7] ("*Arthur Lee*") affirmed that, "Until different rules are made under s 16 of the Courts of Judicature Act, the procedure for contempt proceedings in the Supreme Court is governed by O 52 of the Rules of the High Court 1980 read with r 4 of the Rules of the Supreme Court."

Summary process and full due process

[16] There are two different sets of procedure depending on the manifestation of the contempt. Where the contempt is manifested *in the face of the court*, a summary procedure under Order 52 rule 2A of the Rules of Court will apply. In all other cases, the full due process under Order 52 rules 2B, 3 and 4 of the Rules of Court will apply.

Procedural safeguards require strict compliance

[17] As contempt is criminal in nature, there are rules put in place for the protection of the contemnor and these rules are regarded as procedural safeguards. These procedural safeguards stand apart from other rules in that they must be strictly complied with.

6 [1970] 1 Ch 125 at 137.
7 [1986] CLJ 58.

[18] There is no room for the court to overlook non-compliance of procedural safeguards under Order 1A (Regard shall be to Justice) or Order 2 rule 1 (Non-Compliance with Rules) of the Rules of Court. Non-compliance here is fatal regardless of whether the contemnor has been prejudiced thereby.

[19] This distinct character of procedural safeguards was explained by the Supreme Court in *Arthur Lee*[8] and more recently the Federal Court in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v Lim Pang Cheong @ George Lim & Ors*[9] ("*Tan Sri Dato' Rozali*"). The courts in both cases cited with approval a passage from the judgment of Lord Cross in *Re B (JA) (An Infant)*:[10]

> Committal is a very serious matter. The courts must proceed very carefully before they make an order to commit to prison; and rules have been laid down to secure that the alleged contemnor knows clearly what is being alleged against him and has every opportunity to meet the allegations. For example, it is provided that there must be personal service of the motion on him even though he appears by solicitors, and that the notice of motion must set out the grounds on which he is said to be in contempt; further, he must be served as well as with the motion, with the affidavits which constitute the evidence in support of it.
>
> It is clear that if safeguards such as these have not been observed in any particular case, then the process is defective even though in the particular case no harm may have been done. For example, if the notice has not been personally served the fact that the respondent knows all about it, and indeed attends the hearing of the motion, makes no difference. In the same way, as is shown by *Taylor v Roe*, if the notice of motion does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of motion, that is a fatal defect, even though the defendant gets to know everything before the motion comes on, and indeed answers the affidavits.
>
> When, however, one passes away from safeguards which are laid down in the interests of the contemnor and comes to consider mere verbal deficiencies in the documents in question — cases where the documents do not comply strictly with the rules, but it is impossible

8 Ibid.
9 [2012] 3 MLJ 45.
10 [1965] 1 Ch 1112.

> that in any conceivable case the contemnor could be in any way prejudiced by the defects—then it seems to me that there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would be in any other proceeding.

[20] In *Arthur Lee*, the Supreme Court went on to conclude as follows:

> There is therefore a distinction in principle between cases where there have been non-observance of some safeguards laid down in O 52 of the RHC in the interest of the alleged contemnor, and a mere technical irregularity. Whilst the former is fatal, the latter is not. In our opinion, this is the correct principle to be applied in all contempt proceedings under O 52 of the RHC, …

[21] And, likewise, in *Tan Sri Dato' Rozali*, the Federal Court prefaced the passage with the following statement:

> [29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided *procedural safeguards in committal proceeding which requires strict compliance*.
>
> (Emphasis added.)

Exception – Verbal deficiencies

[22] Of course, not every infraction is automatically fatal. Mere verbal deficiencies in the documents in question amounting to no more than technical irregularities that cannot possibly prejudice the contemnor are not necessarily fatal and would be considered in light of Order 1A (Regard shall be to Justice) and Order 2 rule 1 (Non-Compliance with Rules) of the Rules of Court, as they would in any other proceeding.

[23] This was explained by the Court of Appeal in *Wong Chim Yiam v Bar Malaysia*[11] ("*Wong Chim Yiam*"):

> [20] There is, however, a distinction in principle between cases where there has been non-observance of some safeguard laid down in the interests of the alleged contemnor, and a mere technical irregularity. In instances where the court is called upon to consider mere verbal

11 [2019] 2 CLJ 391.

> deficiencies in the documents in question; cases where documents do not comply strictly with the rules, but where it is impossible that in any conceivable case the alleged contemnor could be in any way prejudiced by the defects, then there is no reason why the courts should be any slower to waive such technical irregularities in a committal proceeding than they would in any other proceeding (see O. 1A & O. 2 rr. 1, 2 and 3 of the ROC 2012).

Ambiguity or uncertainty

[24] The other thing about contempt being criminal in nature is that any ambiguity or uncertainty must be resolved in favour of the contemnor. The Court of Appeal in *Tan Boon Thien & Anor v Tan Poh Lee & Ors*[12] ("*Tan Boon Thien*") held as follows:

> [34] … Further, we say that as the result of contempt proceedings being criminal in nature involving the liberty of the proposed contemnor (see the Federal Court decision in *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849; [2012] 2 AMR 429), any ambiguity and uncertainty must be resolved in favour of the alleged contemnor (see the Supreme Court decision in *Wee Choo Keong; Houng Hai Hong & Anor v. MBf Holdings Bhd & Anor & Other Appeals* [1995] 4 CLJ 427). Thus, r. 2B should be read in favour of the proposed contemnor. We therefore disagree with the High Court in *Tang Hak Ju* (supra) and prefer the view and approach in *101 Pelita Plantation Sdn Bhd v. Lah Anyue Ngau & Ors* (supra).

Procedural safeguards in the Rules of Court

[25] The procedural safeguards are found in Order 45 (Enforcement of judgment to do or abstain from doing an act) and Order 52 (Committal) of the Rules of Court. As this article is only intended to be a snapshot, I have confined the discourse to just the key procedural safeguards.

Order 45 – Enforcement of judgment to do or abstain from doing an act

[26] Order 45 of the Rules of Court inherently only applies to civil contempt as it pertains to the enforcement of an order to do or to abstain from doing something by way of committal proceedings. In particular, Order 45 rule 5 of the Rules of Court provides as follows:

12 [2020] 3 CLJ 39.

5. *Enforcement of judgment to do or abstain from doing an act*

(1) Where –

(a) a person required by a judgment or order to do an act within a time specified in the judgment or order refuses or neglects to do it within that time or, as the case may be, within that time as extended or abridged under Order 3, rule 5; or

(b) a person disobeys a judgment or order requiring him to abstain from doing an act, then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

(A) with the leave of the Court, an order of committal;

…

Procedural safeguard – Personal service of court order endorsed with penal notice

[27] Order 45 rule 7(2) and (4) of the Rules of Court are regarded as procedural safeguards. They require the personal service of the court order duly endorsed with a penal notice to ensure that the contemnor is aware of the court order and penal consequences of not complying therewith:

7. *Service of copy of judgment or order prerequisite to enforcement under rule 5*

…

(2) Subject to Order 26, rule 7(3), and paragraphs (6) and (7) of this rule, an order shall not be enforced under rule 5 unless –

(a) a copy of the order had been served personally on the person required to do or abstain from doing the act in question; and

(b) in the case of an order requiring a person to do an act, the copy has been so served before the expiration of the time within which he was required to do the act. …

…

(4) There shall be endorsed on the copy of an order served under this rule a notice in Form 83 informing the person on whom the copy is served –

(a) in the case of service under paragraph (2), if he neglects to obey the order within the time specified therein, or, if the order is to abstain from doing an act, that if he disobeys the order, he is liable to process of execution to compel him to obey it; and

(b) in the case of service under paragraph (3), that if the body corporate neglects to obey the order within the time so specified or, if the order is to abstain from doing an act, that if the body corporate disobeys the order, the body corporate is liable to process of execution to compel the body to obey it.

Proceedings against a corporation

[28] Order 45 rules 5(1)(B) and 7(3) of the Rules of Court are supplementary provisions for court orders against a corporation. They require the court order to be served on a named director or officer of the corporation against whom committal may be sought:

5. *Enforcement of judgment to do or abstain from doing an act*

(1) Where –

…

then, subject to these Rules, the judgment or order may be enforced by one or more of the following means:

…

(B) where that person is a body corporate, with the leave of the Court, an order of committal against any director or other officer of the body; …

…

7. *Service of copy of judgment or order prerequisite to enforcement under rule 5*

…

(3) Subject as aforesaid, an order requiring a body corporate to do or abstain from doing an act shall not be enforced as mentioned in rule 5(1)(B) or (C) unless –

(a) a copy of the order has also been served personally on the officer against whom an order of committal is sought; and

(b) in the case of an order requiring the body corporate to do an act, the copy has been so served before the expiration of the time within which the body was required to do the act. …

Discretion to enforce prohibitory order notwithstanding failure to comply

[29] Order 45 rule 7(6) of the Rules of Court creates an exception for court orders requiring a party to abstain from doing an act, i.e. a prohibitory order. It has no application to mandatory orders. Where the order is prohibitory, the court is given the discretion to enforce the order notwithstanding any failure to personally serve an order endorsed with a penal notice, if the contemnor had notice of the order:

7. *Service of copy of judgment or order prerequisite to enforcement under rule 5*

…

(6) An order requiring a person to *abstain from doing an act* may be enforced under rule 5 notwithstanding that service of a copy of the order has not been effected in accordance with this rule if the Court is satisfied that, pending such service, the person against whom or against whose property it is sought to enforce the order has had notice thereof either –

(a) by being present when the order was made; or

(b) by being notified of the terms of the order, whether by telephone, telegram or otherwise.

[30] At first blush, the exception appears self-explanatory. Notably, its applicability is only temporary, pending the extraction and service of the order, and it makes no mention of excusing the endorsement of the penal notice. However, judicial interpretation of Order 45 rule 7(6) of the Rules of Court has given it a broader application.

Judicial interpretation of discretion to enforce

[31] In *Class One Video Distributors Sdn Bhd v Chanan Singh Sher Singh & Anor*[13] ("*Class One*"), the High Court held that, by virtue of Order 45 rule 7(6) of the Rules of Court, for prohibitory orders, as long as a

13 [1997] 3 CLJ 694.

properly endorsed (with a penal notice) order has not been personally served on the contemnor, i.e. if the court order was not served, was improperly served and/or served but not endorsed with the penal notice – basically for any prohibitory order that has not complied with the said procedural safeguard – the court, nevertheless, has the discretion to enforce the court order by way of committal proceedings as long as it is satisfied that the plaintiff had notice of the same.

[32] In other words, for prohibitory orders, the test in reality, is not strict compliance with the service of the court order, but knowledge or awareness of the same. This interpretation has been generally accepted and applied in our courts.

[33] The explanation for this finding is found in the following passages of the judgment:

(a) "… in the case of an order requiring a person to abstain from doing an act, the Court, under O. 45 r. 7(6), is empowered in certain circumstances to enforce the order, notwithstanding that the service of a copy of the order has not been effected in accordance with this rule."

(b) "The question is what is meant by the words *'service of a copy of the order has not been effected in accordance with this rule'*. The words 'this rule' clearly mean r. 7, and service effected in accordance with r. 7 means in accordance with r. 7(2)(a) and (4), i.e. service of a copy of the order with the penal notice indorsed on it. It therefore follows that if a copy of the order has *not been served personally*, e.g. by registered post, or if it has been served personally but the copy served *does not contain the penal notice*, then the service of the copy of the order has not been effected 'in accordance with this rule', i.e. r. 7."

(c) "*In such a case*, the Court has a discretion under r. 7(6) to enforce the order if the following condition is satisfied, namely, the person against whom the order sought to be enforced has had notice thereof either:

  (a) by being present when the order was made, or

  (b) by being notified of the terms of the order, whether by telephone, telegram or *otherwise*."

(d) "Mr. Denman, for the respondent, on the other hand, submits that the service being referred to in para. (6) is service which has

> not been effected in accordance with 'this rule', which includes service of a copy which is not indorsed with a penal notice. The appellant, he argues, is and was at all material times a person who had notice of the terms of the order, not by telephone or telegram, but 'otherwise', namely by service of the order, which, despite the absence of the penal notice, did contain the terms of the order … In my judgment, Mr. Denman's interpretation is the right one. Protection is provided for the person against who it is sought to enforce the order by the words in para. (6) 'may be enforced'."
>
> (Emphasis added.)

Summary

[34] In summary, non-compliance with the safeguard provisions requiring personal service of properly endorsed *mandatory orders* are fatal; whereas it is not fatal for *prohibitive orders*, where the court may still enforce the order if it is satisfied that the contemnor was aware or knows of the court order.

Parties integral to compliance with order

[35] Order 45 rule 9 of the Rules of Court extends the requirement to personally serve the court order duly endorsed with a penal notice on a party to, "any person, not being a party to a cause or matter, against whom obedience to any judgment or order may be enforced", i.e. a contemnor whom, although not a party, is obviously integral for the party's compliance with the order. In such cases, the applicant must comply with the same procedural safeguards *vis-à-vis* the contemnor, as with the party. A common example would be the need to serve a *Mareva* injunction on the bank holding the party's account.

[36] It does not extend to all contemnors who may have interfered with the court order, i.e. civil contempt where the contemnor is not obviously integral to the party's compliance with the court order. It would be unreasonable to expect the applicant to foresee or anticipate who and how they may interfere with the party's compliance with the court order or judgment, bearing in mind that the categories of contempt are not only broad but also never closed *vide Chandra Sri Ram*.[14]

14 See n 2 above.

Contemnors not protected by Order 45 safeguards

[37] Contemnors who are not parties to or integral to compliance with a court order, are not protected by the safeguard provisions under Order 45 of the Rules of Court in civil contempt matters. In such circumstances, the test is whether the contemnor was aware or knew of the court order and that he was interfering with it, as it only can be, which is the general test for contempt apart from safeguard provisions. The interference usually comes in the form of aiding and abetting the breach of an order.

Aiding and abetting a breach of an order

[38] The Federal Court in *TO Thomas v Asia Fishing Industries Pte Ltd*[15] was faced with an advocate accused of contempt of court by aiding and abetting a client to disobey a court order, held as follows:

> It is true to say that "the court order" is not directed at appellant. But, as the learned judge pointed out correctly that a stranger to an action who aids and abets the breach of a prohibitory order would be obstructing the course of justice. *Seaward v Paterson* [1897] 1 Ch 545 is authority for the proposition that the court has undoubted jurisdiction to commit for contempt a person not included in an injunction or a party to the action who, knowing of the injunction, aids and abets a defendant in committing a breach of it …
>
> … In more recent times *Seaward v Paterson* [1897] 1 Ch 545 was cited by Lord Denning MR in *Acrow (Automation) Ltd v Rex Chainbelt Incorporated & Anor* [1971] 3 All ER 1175, 1180 to show that "it has long been held that the court has jurisdiction to commit for contempt a person, not a party to the action, who knowing of an injunction, aids and abets the defendant in breaking it. The reason is that, by aiding and abetting the defendant, he is obstructing the course of justice. The leading case is *Seaward v Paterson* [1897] 1 Ch 545."

Undermining pending application

[39] Very occasionally, civil contempt may even extend to interference with the administration of justice where the court has yet to make an order on a pending application. In *Jasa Keramat Sdn Bhd v Monatech (M) Sdn Bhd*[16] ("*Jasa Keramat*"), the contemnor was committed for

15 [1977] 1 MLJ 151.
16 [2001] 4 MLJ 577.

contempt in those specific circumstances for interference with the due administration of justice even before the *Mareva* injunction was made. This is what the Court of Appeal had to say:

> From the judgments referred to above, it is clear that the existence of an injunction order is not a pre-requisite for contempt of court. The test is not the breach of the order but interference with the due administration of justice or, as some learned judges put it, interference with the course of justice …
>
> … Can one honestly say that these transfers were done in the ordinary course of business? We do not think so. It is very clear to us that the transfers were for no other reason than to defeat the application for the *Mareva* injunction that was pending, and the judgment that may be given in favour of the appellant and the execution thereof, if and when made. The transfers were clearly done in bad faith to defeat the appellant's claims. It is a very clear case of interference with the due administration of justice or the course of justice. It is sufficiently serious and sufficiently closely connected with the particular proceedings.

Order 52 – Committal

[40] The procedure for all contempt proceedings, civil and criminal, are found in Order 52 of the Rules of Court. Some segments of the rules apply to only certain classification of contempt, while other classifications are exempted from certain rules.

Contempt in the face of the court

[41] For contempt that is manifested in the face of the court, the committal procedure is a summary one pursuant to Order 52 rule 2A of the Rules of Court:

> 2A. *Contempt committed in the face of the Court*
>
> (1) If a contempt is committed in the face of the Court, it shall not be necessary to serve a formal notice to show cause, but the Court shall ensure that the person alleged to be in contempt understands the nature of the offence alleged against him and has the opportunity to be heard in his own defence, and the Court shall make a proper record of the proceedings.
>
> (2) Where a Judge is satisfied that a contempt has been committed in the face of the Court, the Judge may order the contemnor to appear before him on the same day at the time fixed by the Court for the purpose of purging his contempt.

(3) Where such person has purged his contempt by tendering his unreserved apology to the Court and the Judge considers the contempt to be not of a serious nature, the Judge may excuse such person and no further action shall be taken against him.

(4) Where such person declines or refuses to purge his contempt, then the Judge shall sentence him.

Contempt other than in the face of the court

[42] For contempt other than one that is manifested in the face of the court, i.e. all other contempt, the committal procedure is pursuant to Order 52 rules 2B to 6 of the Rules of Court. There are four main components: (a) notice to show cause, (b) leave to apply for committal order, (c) the application, and (d) the hearing itself.

Exemption for contempt on the motion of the court

[43] Even then, proceedings commenced at the court's own motion are exempted from having to comply with the first two mentioned provisions, i.e. (a) the show cause notice, and (b) leave to apply for committal order, under Order 52 rule 5 of the Rules of Court:

5. *Saving for power to commit without application for purpose*

Nothing in the foregoing provisions of this Order shall be taken as affecting the power of the Court to make an order of committal of its own motion against a person guilty of contempt of Court.

All others

[44] That leaves contempt that is not in the face of the court and/or is not commenced at the motion of the court, which incidentally forms the majority of cases. These matters are subject to the full range of the due process *vide* Order 52 rules 2B to 6.

Procedural safeguards

[45] I am reminded once again to confine the discourse to just the key procedural safeguards. There are three: (a) personal service of the notice to show cause, (b) the statement of the offence, and (c) personal service of the committal cause papers.

Personal service of show cause notice

[46] Order 52 rule 2B of the Rules of Court requires a formal notice to show cause to be served personally on the contemnor:

> 2B. *Other cases of contempt*
>
> In all other cases of contempt of Court, a formal notice to show cause why he should not be committed to the prison or fined shall be served personally.

[47] For a time, applicants, erring on the side of caution, had taken this to mean a separate notice preceding the application for leave to apply for an order of committal. The Court of Appeal in *Tan Boon Thien*[17] also understood this to be the case and held that the failure to strictly comply therewith is fatal.

[48] However, the Federal Court recently overruled the Court of Appeal in *Tan Boon Thien* ((W) 02(i)-45-09/2020). It held that the notice to show cause referred to in Order 52 rule 2B of the Rules of Court is not a separate notice but the committal cause papers referred to in Order 52 rule 4 of the Rules of Court. The Federal Court succinctly explained its decision in the following passages:

> The notice referred to in Order 52 Rule 2B is to be issued at the behest of the Court, and not the parties. Private parties do not issue notices to show cause to each other. It is the Court [that] does. It is after all, the Order of Court which has been breached. And it is therefore the Court that ensures compliance and redresses any contravention. And that is therefore what Order 52 Rule 2B is concerned with – ensuring compliance and redressing non-compliance.
>
> It then follows that such a notice can only come into being after the initiation of contempt proceedings by making the requisite application to Court. And that is why the notice in Order 52 Rule 2B ties in with the documents referred to in Order 52 Rule 4(3).
>
> In this context, we respectfully concur with the decision of Lim Chong Fong J in *Tang Hak Ju v Pengarah Tanah dan Galian Pulau Pinang* [2017] 2 CLJ 345 that the notice to show cause referred to in Order 52 Rule 2B refers to the documents stated in Order 52 Rule 4(3), particularly the notice of application itself.

17 See n 12 above.

…

Moreover, the Rules of Court ensure that the potential contemnor is fully safeguarded. This takes the form of Order 52 Rules 3 and 4. As such, there is no basis on which to construe Order 52 Rule 2B as imposing a further mandatory requirement for a pre-notice prior to even initiating contempt proceedings against a contemnor who has been party to, and therefore is fully conversant with an order of court made against him or involving him. Such a construction would defeat the need for prompt and full compliance with orders of court which carry the force of the law.

The statement of the offence

[49] The applicant must obtain leave of court to commence contempt proceedings *vide* Order 52 rule 3 of the Rules of Court:

3. *Application to Court*

(1) No application to a Court for an order of committal against any person may be made unless leave to make such an application has been granted in accordance with this rule.

(2) An application for such leave must be made *ex parte* to the Court by a notice of application supported by a statement setting out the name and description of the applicant, the name, description and address of the person sought to be committed and the grounds on which his committal is sought, and by an affidavit, to be filed before the application is made, verifying the facts relied on.

[50] The main purpose for the leave application is for the applicant to satisfy the court that the statement clearly and fully sets out a sustainable charge against the contemnor in the statement. Failure to meet this threshold is fatal. The Federal Court in *Tan Sri Dato' Rozali*[18] made this abundantly clear in its judgment:

[36] The safeguards in r 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.

18 See n 9 above.

> [37] We wish to state in clear term that the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself. The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang* case (see also *Syarikat M Mohamed v Mahindapal Singh & Ors* [1991] 2 MLJ 112).
>
> …
>
> [45] It was contended on behalf of the respondents that the statement filed by the applicants is vague, ambiguous, imprecise and lacking in material particulars. The statement in support of the application for leave as against the first respondent is found in para 3 referred to earlier.
>
> …
>
> [55] … On that premise, we hold that para 3 of the statement filed in pursuant of O 52 r 2(2) of the RHC is unsustainable.

Personal service of committal cause papers

[51] Order 52 rule 4 of the Rules of Court requires that, upon obtaining leave, the committal cause papers must be served on the contemnor personally:

> 4. *Application for order after leave to apply granted*
>
> (1) When leave has been granted under rule 3 to apply for an order of committal, the application for the order must be made by notice of application to the Court,
>
> …
>
> (3) Subject to paragraph (4), the notice, accompanied by a copy of the statement and affidavit in support of the application for leave under rule 3 and the order granting such leave, must be served personally on the person sought to be committed.
>
> …

[52] This too is a procedural safeguard and failure to strictly comply therewith is fatal. In *Wong Chim Yiam*,[19] the appellant appealed against the High Court's decision not to commit the proposed contemnor for contempt on the grounds, *inter alia*, that the committal cause papers were not personally served on him. The Court of Appeal held the non-service was fatal notwithstanding that the contemnor was aware of it. The relevant parts of the judgment is reproduced as follows:

> [18] Given that contempt proceedings involve the liberty of an individual, committal is a very serious matter. As such, the court must proceed very carefully before making an order to commit to prison. In this light, rules have been promulgated to ensure that the alleged contemnor knows clearly what is being alleged against him and is accorded every opportunity to meet the allegations. For instance, it is expressly provided that an order requiring a person to do an act shall not be enforced unless the *order was served personally* on the person before the expiration of the time within which he was required to do the act (O. 45 r. 7(2)(b)). Similarly, a body corporate is also required to be served with the order under sub-r. (3).
>
> [19] In the event that safeguards such as these have not been observed in any particular case, then the process is defective even if no particular harm may have been done. For instance, if the *notice of application for an order of committal together with a copy of the statement* under O. 52 r. 3(2) has not been served personally on the alleged contemnor, the fact that the alleged contemnor knows all about it, and indeed attends the hearing of the proceedings, makes no difference (*Re B (JA) (An Infant)* [1965] CD 1112). Similarly, if the *notice of application does not give the grounds of the alleged contempt or the affidavits are not served at the same time as the notice of application*, that is a fatal defect, even though the alleged contemnor gets to know everything before the notice of application comes on, and indeed answers the affidavits (*Taylor v. Roe* [1893] WN 14).
>
> …
>
> [26] The fact that the appellant had knowledge of the contempt proceedings makes no difference. The requirement for personal service of the cause papers on the appellant is a mandatory requirement. In our view, this defect is fatal and by itself is a sufficient ground to warrant appellate intervention in setting aside the learned judge's order.
>
> (Emphasis added.)

19 See n 11 above.

Power to exempt service of order and committal cause papers

[53] Notwithstanding the abovementioned safeguard provisions with respect to the service of the court order and the committal cause papers, the court may order that the service be by way of substituted service or be dispensed with altogether under Order 45 rule 7(7) and Order 52 rule 4(4) of the Rules of Court respectively:

> Order 45
>
> 7. *Service of copy of judgment or order prerequisite to enforcement under rule 5*
>
> …
>
> (7) Without prejudice to its power under Order 62, rule 5, the Court may dispense with service of a copy of an order under this rule if it thinks it just to do so.
>
> Order 52
>
> 4. *Application for order after leave to apply granted*
>
> …
>
> (4) Without prejudice to the powers of the Court or Judge under Order 62, rule 5, the Court or Judge may dispense with service of the notice under this rule if it or he thinks it just to do so.
>
> Order 62
>
> 5. *Substituted service (O. 62 r. 5)*
>
> (1) If, in the case of any document which in accordance with these Rules is required to be served personally on any person, it appears to the Court that it is impracticable for any reason to serve that document personally on that person, the Court may make an order in Form 133 for substituted service of that document. …

[54] The power to dispense with service altogether or to order substituted service is a discretion given to the court to bypass the otherwise firm requirement to strictly comply with procedural safeguards. With that in mind, it should only be exercised sparingly where the contemnor was shown to be clearly evading service. The Court of Appeal, in addressing the application of Order 52 rule 4(4)

of the Rules of Court in *Wong Chim Yiam*[20] – which should apply to Order 45 rule 7(7) in similar fashion – held as follows:

> [25] In the first instance, there were no grounds warranting the granting of dispensation of service under O. 52 r. 4(4) of the ROC. We reiterate that application for dispensation of service ought to have been made prior to hearing date and not on the hearing date itself. In the absence of any evidence showing that the appellant was evading service of process, the order for dispensation of service should not have been granted especially since the application for dispensation was made so late and in a committal proceeding. We also do not see any reason being proffered by the respondent for the inordinate delay in making the application for dispensation of service.

Recent development – The *Mkini Dotcom* case

[55] Finally, I turn to the recent judgment of the Federal Court in *Peguam Negara Malaysia v Mkini Dotcom Sdn Bhd & Anor*[21] ("*Mkini*") that has raised much interest.

[56] Here, the contempt proceeding was commenced by the Attorney General against Mkini Dotcom for scandalising the court by allowing offensive comments to be published and remain on their website. Mkini Dotcom, however, had not been served with a notice to show cause. Notwithstanding the non-compliance, the Federal Court held that it was not fatal as the contemnor had not been prejudiced.

[57] The relevant part of the judgment reads as follows:

> [6] The other grounds relied upon by the respondents to set aside the leave are the followings:
>
> (a) O 52 r 2B of the Rules of Court 2012—procedural requirement:
>
> On the requirement of notice pursuant to O 52 r 2B which has not been complied with, on the facts of this case, we agree that the non-compliance is not fatal or prejudicial to the respondents; …

[58] The Federal Court in *Mkini* promulgated the "no prejudice test" for the breach of a procedural safeguard without expressly overturning the line of authorities which consistently held fast to the principle

20 Ibid.
21 [2020] 4 MLJ 791.

that non-compliance with procedural safeguards – in this case, the obligation to serve the notice to show cause on the contemnor – is fatal (unless service thereof has been expressly dispensed with).

[59] These authorities include decisions of the apex and appellate courts: the Supreme Court's decision in *Arthur Lee*,[22] the Federal Court's decision in *Tan Sri Dato' Rozali*,[23] and the Court of Appeal's decisions in *Tan Boon Thien*[24] and *Wong Chim Yiam*.[25]

[60] It is, however, observed that these preceding authorities, unlike *Mkini*, did not pertain to contempt manifested in the scandalising of the court, which proceedings were initiated by the Attorney General. They were all civil contempt proceedings initiated by litigant parties.

[61] There is, therefore, a possibility in light of *Mkini*, that non-compliance with procedural safeguards in committal proceedings initiated by the Attorney General for contempt in the form of scandalising the court may not be fatal if there is no resulting prejudice to the contemnor.

Conclusion

[62] This article is intended to do no more than to provide a snapshot of committal proceedings of civil contempt that judges frequently have to deal with. I hope that this discourse has been helpful.

22 See n 7 above.
23 See n 9 above.
24 See n 12 above.
25 See n 11 above.

A Balancing Act: Advocating for Section 37(6) of the Arbitration Act 2005

by

*Datuk Dr Prasad Sandosham Abraham**

[1] Throughout the course of my career, I have witnessed various legislative acts undergo amendments from time to time to correct a problem, remove a perversion, or be updated to ensure the prevailing laws keep up with the issues and needs of current times. One such example is the Arbitration Act 2005 [*Act 646*] ("the Act"), which was revised in 2011 and 2018 to curtail opportunities for judicial intervention to arbitration awards within its provisions. Amongst the notable amendments were the repeal of sections 42 and 43 of the Act. It is important to note that the purpose underlying the repeal of sections 42 and 43 was to reinforce the principles of minimalist court intervention and the finality of arbitration awards, both of which are key to enhancing public confidence in Malaysia's arbitral landscape.

[2] I wish to quote Thomas Jefferson at this point:

> I am not an advocate for frequent changes in laws and constitutions. But laws and institutions must go hand in hand with the progress of the human mind. As that becomes more developed, more enlightened, as new discoveries are made, new truths discovered and manners and opinions change, with the change of circumstances, institutions must advance also to keep pace with the times. We might as well require a man to wear still the coat which fitted him when a boy as civilized society to remain ever under the regimen of their barbarous ancestors.[1]

[3] I believe this quote still holds true today.

[4] When I retired from the bench, my view on this subject was clear, that the Malaysian courts should lean in favour of adopting a minimalist judicial intervention approach in arbitration proceedings.

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* Deputy Director of the Asian International Arbitration Centre.

1 Thomas Jefferson, *Thomas Jefferson, His Words and Vision* (Peter Pauper Press, Inc, 1997), p 18.

The agreement entered into between parties to submit to arbitration should, as far as possible, be protected and upheld, in line with the progressive trend witnessed in Model Law countries. Thus, I am wholly supportive of the changes introduced by the 2018 amendments.

[5] Sections 37 and 42 had long served as the buttresses of statutory support for judicial intervention in arbitration proceedings. Thus, the repeal of sections 42 and 43 resulted in two very significant changes. Firstly, on matters of points of law, it is now essential that where a party believes that it or the arbitration tribunal may benefit from clarification from the courts on any points of law, such party should make a prompt application under section 41 of the Act during the course of the arbitral proceedings. Secondly, section 37 is the only recourse now left under the Act for a party dissatisfied with an arbitration award to seek the remedy of having it set aside.

[6] Section 37 in itself broadly provides that an arbitration award may be set aside at the courts' discretion, if, *inter alia*, the award is in conflict with the public policy of Malaysia, the making of the award was induced or affected by fraud or corruption, or if a breach of the rules of natural justice had occurred during the arbitral proceedings or in connection with the making of the award, in addition to the specifically envisaged circumstances provided in section 37(1)(a) of the Act.

[7] The recent Federal Court decision in *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*[2] is an example of the modern judicial attitude favouring a minimalistic approach when presented with setting aside applications on the basis of breaches of natural justice. The court found that the very opening words of section 37(1) of the Act – "may be set aside" – showcases that the court retains a residual discretion not to set aside an arbitration award, even where grounds for setting aside may have been made out. In this appeal, the Federal Court recognised that the courts' power in section 37(1) of the Act is unfettered, but set out eight guiding principles for when an application to set aside an arbitration award arising from a breach of natural justice may be allowed. I reproduce the same for the reader's benefit here, as it may well serve us today: (i) first, the court must consider: (a) which rule of natural justice was breached; (b) how it was breached; and (c) in

2 [2020] 12 MLJ 198.

what way the breach was connected to the making of the award; (ii) second, the court must consider the seriousness of the breach in the sense of whether the breach was material to the outcome of the arbitral proceeding; (iii) third, if the breach is relatively immaterial or is not likely to have affected the outcome, discretion will be refused; (iv) fourth, even if the court finds that there is a serious breach, if the fact of the breach would not have any real impact on the result and the arbitral tribunal would not have reached a different conclusion, the court may refuse to set aside the award; (v) fifth, where the breach is significant and might have affected the outcome, the award may be set aside; (vi) sixth, in some instances, the significance of the breach may be so great that the setting aside of the award is practically automatic, regardless of the effect on the outcome of the award; (vii) seventh, the discretion given to the court was intended to confer a wide discretion dependent on the nature of the breach and its impact and therefore, the materiality of the breach and the possible effect on the outcome are relevant factors for consideration by the court; and (vii) eighth, whilst materiality and causative factors are necessary to be established, prejudice is not a prerequisite or requirement to set aside an award for breach of the rules of natural justice.

[8] When contemplating upon the concept of public policy, insight may be obtained from Article V of the New York Convention 1958 which gives domestic courts the discretion to refuse the enforcement of an arbitration award where such an award is in conflict with a nation's public policy. This leaves the gamut of public policy which as a concept, may be applied to principles of law and justice both in the merit and procedural respect,[3] wholly to the interpretation of our domestic courts. The Federal Court decision in the case of *Jan De Nul (M) Sdn Bhd & Anor v Vincent Tan Chee Yioun & Anor*[4] is of relevance to us here for it finds that in order to invoke public policy, an arbitration award would need to either shock the conscience, be clearly injurious to the public good or be wholly offensive to the ordinary reasonable and fully informed member of the public. I also echo her Ladyship's Mary Lim J (now FCJ) judgment in *The Government of India v Cairn*

3 Howard M Holtzmann and Joseph E Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration: Legislative History and Commentary* (1995).

4 [2019] 2 MLJ 413.

Energy India Pty Ltd & Ors[5] where her Ladyship remarked that public policy as envisaged in section 37(1)(b)(ii) of the Act must be construed narrowly and with caution, which she propounded, would go towards supporting arbitration "giving healthy respect for autonomy, confidentially, commerciality and a host of multifarious reasons why many corporate entities opt for arbitration in the first place".

[9] All applications made under section 37 should undoubtedly be assessed on a case-to-case basis, allowing the court to make an independent assessment on the facts as to whether a fit and proper case has been made out for judicial intervention to set aside an arbitration award. I remain supportive of the position that courts should adopt a restrictive approach when presented with such applications for setting aside arbitration awards, and recommend that courts only exercise the discretion to intervene based on qualitative grounds. Indeed, section 8 of the Act was amended in 2011 to adopt the Model Law position, and this reinforces the policy of judicial non-interference, save for the specific circumstances prescribed in the Act. In reflecting upon the role to be played by the judiciary under section 37 of the Act, Malaysian courts have consistently exercised their inherent powers and discretion in judicial intervention with deliberation. As perfectly exhibited by the court's position in *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*,[6] such "intervention should only be exercised in *clear and exceptional circumstances*" (emphasis added). However, we must not overlook the fact that there are cases where the errors made by the arbitration tribunal may not be as severely lacking in due process and fairness to warrant a setting aside of an arbitration award. Whilst these errors may not be acute enough to meet the benchmark tests presently in place for setting aside applications based on grounds of breaches of natural justice or public policy, I believe even where procedural misconduct occurs to a lesser degree, there must be an avenue for the party or parties aggrieved to seek redress. I envisage that problems which negatively impact the public's confidence in the process of arbitration will arise should the courts lean too strongly towards taking an overly protective pro-arbitration stance. Particularly concerning would be where arbitration awards of questionable quality are delivered and the lack of due process and fairness in the arbitration

5 [2014] 9 MLJ 149.
6 [2016] 2 MLJ 697.

tribunal's conduct and decision-making process are perceived to go unaddressed and unchecked.

[10] It is trite that a principal tenet of the arbitral system is that parties are entitled to expect that proceedings shall be properly conducted by the arbitration tribunal within the barometers of fairness, efficacy, and equal treatment and opportunity to present one's case, all of which fall under the scope "due process" or "natural justice" rights. To quote Fisher J:

> [i]f the parties [to a dispute] say that they want arbitration, but in the same breath say that they do not want enforceable natural justice, their two statements are incompatible. Arbitration is a process by which a dispute is determined according to *enforceable standards of natural justice.* The scope of the particular natural justice to be applied in a given case may be modified by agreement. *But enforceable natural justice cannot be excluded altogether if the process is to remain arbitration* (emphasis added).[7]

[11] My involvement in the management of the Asian International Arbitration Centre ("AIAC") following my retirement from the bench has made me question whether a proper balance is consistently being struck between the policy tensions of protecting the autonomy of the arbitral system against the need to ensure, by judicial supervision, compliance with the basic requirements of due process. The constitution of an arbitration tribunal *vis-à-vis* the appointment of arbitrators, is largely determined by the stipulations of the arbitration agreement binding disputing parties. I am aware that arbitrators may be empaneled with the AIAC or with other arbitral institutions or even other professional bodies, for example, the Persatuan Arkitek Malaysia ("PAM"), or be independent and not empaneled with any such body. Arbitrators may come from a legal background or have no prior legal training despite being vastly experienced professionals from non-legal backgrounds. This variation in training, skillset and background of arbitrators, domestically at least, may manifest itself in a knowledge gap in relation to the practice, principles and procedures associated with arbitration. This raises in my mind, concerns regarding the legal, technical and procedural expertise of arbitrators and overall, the quality of arbitration awards being rendered in Malaysia.

7 *Methanex Motunui Ltd v Spellman* [2004] 1 NZLR 95.

[12] I believe that there is no time like the present for us to once again visit the topic of the courts' duty to exercise its powers in order to ensure that due process is always observed when arbitration awards are rendered and to this extent, I wish to suggest that there needs to be a more liberal approach adopted in judicial intervention when scrutinising arbitration awards. The procedural conduct of the arbitration tribunal must be subject to a broader, more liberal form of judicial scrutiny where and when the circumstances justify it. This will ensure that natural justice in the form of due process is consistently satisfied as well as meeting the expectations of parties participating in arbitrations in Malaysia *vis-à-vis* arbitration as a resolution process, and arbitration awards are analogous with the requirements of due process.

[13] I acknowledge that in some cases, the grounds for setting aside an award are more acute than in others, where an arbitration award issued is beyond remedy or rectification. One such example is the recent case of *Low Koh Hwa @ Low Kok Hwa (practising as sole Chartered Architect at Low & Associates) v Persatuan Kanak-Kanak Spastik Selangor & Wilayah Persekutuan and another case*[8] wherein it was found that the arbitration award was capable of being set aside due to the arbitrator's failure to make a full and timeous disclosure of his existing relationship with the Honorary Director of the respondent in this dispute, who was also the sole witness for the respondent, and such failure was material, significant, and had a real impact and effect on the arbitration award. This was a case of apparent bias, which is clearly in conflict with Malaysia's public policy, and the remedy of setting aside the arbitration award was beyond question.

[14] However, to my mind, there may be other cases where, based on lesser grounds, the courts may consider a less interventionist, alternative avenue to setting aside an arbitration award, when so requested by the aggrieved party.

[15] It appears that Parliament in its wisdom had provided for such an avenue in section 37(6) of the Act. In circumstances where the arbitration award would be perceived to cause injustice or contain an irregularity which may still be remedied by the arbitration tribunal, there may be room to argue, on a case-by-case basis, that the award may be saved and due process observed, by remitting the award back to the

8 [2021] MLJU 430.

arbitration tribunal to be so remedied. Foreshadowing arguments of excessive and unnecessary judicial intervention, I believe section 37(6) will not encourage a floodgate of remissions of awards to arbitration tribunals for even though a party requests for the arbitration tribunal to resume proceedings to remedy the grounds for setting aside, the governing factor for a court to order remitting an award back to the arbitrator is where the court on the application of a party considers, on the facts of the case, it to be "appropriate". As such, only genuine cases which need to be redressed will be considered as "appropriate". It is my belief that such an approach would better serve justice, whilst maintaining that an award shall only be set aside if it is found to be so wholly offensive. This approach is also in line with the Model Law, for allowing arbitrators the opportunity to amend their arbitral rulings will encourage saving arbitration awards, thereby supporting arbitration as a whole.

[16] The aforementioned case of *Master Mulia Sdn Bhd v Sigur Rus Sdn Bhd*[9] may serve as one such example. The arbitrator in question had not alerted the disputing parties to two items of extraneous evidence that the arbitrator had relied upon, failing to give the parties an opportunity to: (a) test the two items of extraneous evidence; and (b) adduce admissible evidence, including expert evidence, to prove or disprove the existence of the two items of extraneous evidence, and/or corroborate or rebut the two items of extraneous evidence. Likewise, in the case of *Petronas Penapisan (Melaka) Sdn Bhd v Ahmani Sdn Bhd*[10] it was found that the arbitration tribunal's award contained decisions on matters beyond the scope of the submission to arbitration and was in breach of section 37(1)(a)(v) and (1)(b) of the Act, when it had considered a 20% "inflation" factor, which was not brought up by the parties, and the parties were neither alerted to it nor were they invited to address that point. The case of *UDA Land Sdn Bhd v Puncak Sepakat Sdn Bhd*[11] is also an example of an instance where the setting aside of an arbitration award due to the "grave errors" of an arbitration tribunal in rejecting a counterclaim on the basis of lacking jurisdiction to deal with it and by failing to apply correct legal principles, may be relooked at in light of a remission to the said tribunal, instead of setting aside.

9 See n 2 above.
10 See n 6 above.
11 [2020] MLJU 892.

[17] I believe that the views expressed by the Court of Appeal's decision in the first hearing of *Garden Bay Sdn Bhd v Sime Darby Property Bhd*[12] may at this juncture shed light upon how the courts may alternatively address applications to set aside the arbitration award.

[18] The facts of this case are expanded here. Briefly, the respondent had appointed the appellant as its contractor for turfing and landscaping works but disputes arose between the parties which were referred to arbitration. The appellant, being the claimant in the arbitration, claimed a sum of RM338,666.89 from the respondent, being the balance sum unpaid, interest and costs. The respondent counterclaimed for general damages to be assessed for the appellant's delay in completing the works, as well as a sum of RM246,978 for, *inter alia*, rectification works. The arbitration tribunal determined that the respondent shall pay the appellant a sum of RM282,512 with interest and costs and that the appellant was liable to pay the respondent a sum of RM21,154.39 in relation to the counterclaim. The respondent, dissatisfied with the award, applied to the High Court in the first instance to set aside the whole arbitration award, despite part of the award being allowed by the mutual consent of the parties, pursuant to section 37 and/or section 42 of the Act. The High Court allowed the setting aside application. However, the Court of Appeal, in overturning the High Court's decision, emphasised the importance of section 37(6) of the Act.

[19] Hamid Sultan JCA, in delivering the judgment of the Court of Appeal, stated that section 37(6) of the Act is significant as a saving provision for all injustices and/or maladies complained of in relation to an arbitration award. Specifically, the Court of Appeal noted that since an arbitrator is paid to deliver an enforceable award, it is not the court's function to set aside an award under section 37 or the former section 42 of the Act without giving an opportunity to the arbitration tribunal to deliver an enforceable award. As such, parties were reminded that an application should be made to the court to seek appropriate directions pursuant to section 37(6) of the Act in cases deemed fit and proper for remission to the arbitration tribunal, warning that a failure to do so may be viewed as an abuse of process and may result in the setting aside application being dismissed *in limine*.

12 [2018] 2 MLJ 636.

[20] In the related matter of *Garden Bay Sdn Bhd v Sime Darby Property Bhd*[13] which was based on an identical factual scenario, the High Court in the second instance, by consent order, remitted the award back to the arbitration tribunal pursuant to section 37(6) of the Act and ordered that the arbitration tribunal state sufficient reasons for its assessment of the sum awarded to the respondent with respect to the counterclaim. The arbitration tribunal did so and issued a "supplemental award". Thereafter, the respondent once again applied to the High Court to set aside both the award and the supplemental award, whilst the appellant sought the recognition of the same. The respondent was once again successful in having the High Court in the second instance set aside the arbitration awards. However, this was once again overturned by the Court of Appeal which upheld the award and the supplemental award made by the arbitration tribunal. The Court of Appeal observed that the High Court erred when it failed to consider both the award and the supplementary award in their entirety – had the High Court done so and undertaken a proper analysis of the arbitration tribunal's reason for the dismissal of the counterclaim, it would have been apparent that both parties had been given the opportunity to present their respective cases before the arbitration tribunal and there was no breach of the rules of natural justice to warrant the setting aside of the whole award.

[21] The Hong Kong case of *P & M*[14] also illustrates the basis upon which an application may be made to move the courts for the remission of an arbitration award back to the arbitration tribunal. The grounds relied upon in this case were that the arbitration tribunal had exceeded its powers, or in the alternative, that the arbitration tribunal had failed to conduct the arbitration proceedings in accordance with the procedure agreed to by the parties. Finding that there had been a "serious error which affects due process and the structural integrity of the arbitral proceedings", the Hong Kong High Court held that substantial injustice had been occasioned to the plaintiff which constituted a serious irregularity. Upon such finding, the court then contemplated its powers under the Schedule of the Arbitration Ordinance Cap 609, in particular section 4(5) which expressly provided:

13 [2021] 3 CLJ 751.
14 [2018] HKCFI 2280.

> The Court must not exercise its power to set aside an award or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the arbitration tribunal for reconsideration.

[22] It was in light of such a provision taken together with the fact that the plaintiff had made no allegation of bias or misconduct against the arbitration tribunal, that the court held that there was no question that the arbitration tribunal would be able to consider the matter upon remission *vis-à-vis* providing the plaintiff with a fair opportunity to make its submissions to the arbitration tribunal.

[23] The English case of *Fleetwood Wanderers Ltd (t/a Fleetwood Town Football Club) v AFC Fylde Ltd*[15] is additionally referred, where the arbitrator had sought the opinion of the Football Association's judicial services manager before rendering his award but he neither notified the parties of this approach nor gave them any opportunity to make submissions on the opinion once it was received. The acts of the arbitrator in seeking an opinion from the Football Association and conducting his own research without notifying the parties and giving each party a reasonable opportunity of putting his case forward, constituted a breach of his general duty to act fairly and impartially as between the parties, and comprised a "serious irregularity" under the relevant provisions of the English Arbitration Act. In this case, the irregularity applied to a discrete aspect of the claim, upon which very little evidence had been directed; the irregularity could be remedied by allowing further submissions and evidence; and there was no suggestion of bias or reason to challenge the professionalism of the arbitrator. The court decision was not to set aside the award and instead to remit only a limited issue to the arbitrator for reconsideration.

[24] Our domestic courts in adopting such an approach, whenever viable, may lend promise to an alternate method of redress for due process grievances going forward. Professor Pietro Ortolani in his article[16] has given clear insights as to the approach a court could take in dealing with an application remitting an award back to the

15 [2018] EWHC 3318 (Comm).

16 Ortolani, P, "Application for Setting Aside as Exclusive Recourse against Arbitral Award" in I Bantekas, P Ortolani, S Ali, M Gomez, and M Polkinghorne, *UNCITRAL Model Law on International Commercial Arbitration: A Commentary* (Cambridge: Cambridge University Press, 2020), pp 858–898.

arbitration tribunal. Whilst the individual facts of each case would be the determining factor, some principles may be elucidated from his article to deal with applications under section 37(6) of the Act. I would like to set out if I may a certain portion of his article which I find useful in this context and I quote, "the three conditions that must be met before an award may be remitted to the tribunal, and these are (1) the competent court at the seat of arbitration must have been seised with a setting-aside application; (2) one of the parties must request the remission; and (3) the court must consider the remission 'appropriate'".

[25] I wish to add to these conditions, several examples of potential occasions in which the court may consider remission to be appropriate and encourage parties to apply for it. These are, where the arbitration tribunal has considered extraneous evidence without inviting the parties to make submissions addressing or responding to the said evidence, where the arbitration tribunal neglected to grant the disputing parties sufficient opportunity to make and/or complete their submissions with regard to the subject-matter at hand, where the arbitration tribunal had without malice deviated from the arbitration procedure agreed upon by the parties, where the arbitration tribunal had made its arbitration award unsupported by its reasonings, and furthermore as envisaged by Article 39 of the UNCITRAL Arbitration Rules where the arbitration tribunal has omitted in its award to make a finding in respect of an issue pleaded and/or ventilated by the parties before it. These envisaged occasions are not exhaustive. Section 37(6) of the Act provides the court with a procedural remedy that is to adjourn an application for setting aside and where appropriate, direct the arbitration tribunal to resume proceedings to deal with matters that would eliminate the grounds for the setting aside application. In making its remission orders, the court has sufficient flexibility to give clear directions pertaining to the issues that the arbitral tribunal must deal with. Thus, in my view section 37 of the Act is exhaustive, complete, and sufficient for purposes of scrutinising and rectifying, to a certain degree, deficiencies in arbitration awards and the arbitration process.

[26] In encouraging a more frequent use of section 37(6) as an alternate remedy for setting aside an arbitration award, I recognise that there are constraints which the court must consider in deciding appropriateness, when making such a remission order. I am guided by the suggestions

made by Professor Pietro Ortolani and concur that in practice, the court is likely to assess the length, complexity and overall feasibility of the activities that the arbitrators would hypothetically need to carry out, in order to remove the alleged ground for annulment.[17] It is worth mentioning that the arbitration tribunal in receiving such directions will not be constrained by the principle of "*functus officio*". Indeed, the language of section 37(6) envisages that upon remission of the arbitration award by the court, the arbitration tribunal may "resume the arbitration proceedings" or "take such other action that [in the arbitration tribunal's opinion] will eliminate the grounds for setting aside".

[27] I conclude by offering my thoughts on section 37 of the Act as it currently stands. Section 37 dually empowers the court to set aside a perverse arbitration award or in the alternative, choose to remit it back to the arbitration tribunal, in circumstances it considers to be appropriate. I am aware that arbitral institutions like the AIAC are empowered in their own right to exercise some degree of scrutiny over the conduct of arbitrators and consequently, the quality of arbitration awards issued. The mechanisms employed by these institutions include adherence to a code of conduct, formative reviews, removal from reconsideration for arbitral appointments, to name some. However, once an arbitration award has been issued, the power to afford immediate remedy and relief to the aggrieved party or parties ultimately lies with the courts. Whilst there should be no argument that the courts are to continue taking a minimalist approach towards judicial intervention, in doing so, it becomes more encumbered upon the courts to ensure that this growth in independence within arbitration consistently meets the standards of due process. This is important even where an intervention to remit an irregular arbitration award back to the arbitration tribunal in essence becomes an adjournment of the review of the said award, stuck in the courts' dockets. This will well serve our efforts to cultivate a landscape of an independent arbitral regime, in that arbitrators will be alerted to: (a) perversions which have occurred which may lead to a setting aside of their arbitration awards, and (b) exercise a greater degree of diligence and caution towards ensuring compliance with due process. My belief is that

17 *Re Corporatión Transnacional de Inversiones SA de CV and & Ors v STET Intl SpA & Ors* [1999] CanLII 14819 (ONSC).

such an approach would result in an improved arbitration regime, meeting the expectation of parties involved in the arbitration process and improving the quality of arbitration proceedings and arbitrators in Malaysia. In turn, this would go a long way towards building confidence in the alternative dispute resolution process in this country.

Secondary Victim Claims: A Failure of Common Law or Common Sense?

by

David Pittaway QC and *Thomas Crockett**

[1] The cardinal feature and strength of a common law system is its pragmatism. Generally, it has organically developed in such a way that most reasonably well-informed observers would consider it provides for what is right and just in most cases. It must be right that limits are placed on the ability for "secondary victims" to recover damages for the effect that another's tortious actions or omissions primarily affecting another, have upon them. Many commentators have observed however that the English law of secondary victim claims or (as they are still and somewhat anachronistically referred to as) "nervous shock" cases still fail to meet the competing interests of society as a whole to ensure that the confines of these limits allow for just and equitable results.

[2] Variously described by one academic as the law where "the silliest rules" prevail,[1] by another as consisting little more than "a long list of anomalies",[2] and by two of the UK's most pre-eminent and senior judges of recent years as a "patchwork quilt of distinctions which are difficult to justify"[3] and an "area of the law [where] the search for principle was called off",[4] most would consider the only answer to be for statutory intervention. This is a call which despite its increasing venerability, has as yet gone unanswered by legislators, despite the nation's highest court grappling with the issue on no less than five occasions over the second half of the twentieth century.

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1 J Stapelton, "In Restraint of Tort" in P Binks, *The Frontiers of Liability*, Vol II (Oxford: OUP, 1994), p 95.

2 M Jones, "Negligently Inflicted Harm" (1997) 13 PN 111 at 113.

3 Lord Steyn in *White v Chief Constable of South Yorkshire* ("*White*") [1999] 2 AC 455 at 500 B.

4 Lord Hoffmann in *White*, ibid, at p 511 B.

[3] Until the imposition of conclusive statutory change, this is an area of the law likely to be subjected to continuing challenges by litigants and their lawyers. Recent cases concerning the question of what amounts to "reasonable proximity" would suggest that the common law may develop as far as it is able to mitigate the perceived problems which have arisen since the watershed case of *Alcock v Chief Constable of South Yorkshire Police*[5] ("*Alcock*").

[4] Historically, the courts determined cases according to the doctrine of reasonable foreseeability. In *Dulieu v White & Sons*[6] ("*Dulieu*"), Kennedy J sitting in the Divisional Court of the King's Bench Division held that damages which result from nervous shock occasioned by fright, though unaccompanied by any actual impact, may be recoverable in an action for negligence. But he held that the shock "must be a shock which arises from a reasonable fear of immediate personal injury to" the claimant.

[5] In *Hambrook v Stokes Brothers Ltd*,[7] a claim brought by a mother affected by shock, not from any apprehension of personal injury to herself, but from such apprehension as to her young children, it was held that the limitation from *Dulieu* was erroneous. Lord Justice Atkin opined:

> Personally I see no reason for excluding the bystander in the highway who receives injury … from apprehension of or the actual sight of injury to a third party. There may well be cases where the sight of suffering will directly and immediately physically shock the most indurate heart; and if the suffering of another be the result of an act wrongful to the spectator, I do not see why the wrongdoer should escape.[8]

[6] In a later case, Lord Justice Mackinnon giving the unanimous judgment of the Court of Appeal in *Owens v Liverpool Corporation*[9] held:

> On principle we think that the right to recover damages for mental shock caused by the negligence of a defendant is not limited to cases in which apprehension as to human safety is involved. The principle must

5 [1992] 1 AC 310.
6 [1901] 2 KB 669.
7 [1925] 1 KB 141.
8 Ibid, at p 157.
9 [1939] 1 KB 394.

> be that mental or nervous shock, if in fact caused by the defendant's negligent act, is just as really damage to the sufferer as a broken limb – less obvious to the layman, but nowadays equally ascertainable by the physician. That alleged shock results from apprehension as to a less important matter may well be material in considering whether the allegation be proved. But fear that unfounded claims may be put forward, and may result in erroneous conclusions of fact, ought not to influence us to impose legal limitations as to the nature of the facts that it is permissible to prove.[10]

[7] It was not until much later in the twentieth century, that the House of Lords (then and until 2010, the UK highest appeal court) determined that control mechanisms ought to be applied to secondary victim claims for "nervous shock" claims in *McLoughlin v O'Brian*[11] ("*McLoughlin*"). Lord Wilberforce attempted to inject a notion of objectivity into the law, whilst endeavouring to also maintain a high threshold for actionable claims. His tripartite test, based on the victim proving shock and direct perception,[12] was largely followed in the seminal case of *Alcock* eight years later.

[8] Lord Oliver in *Alcock* identified the factors which he concluded should be considered in such cases, namely:

> First, that in each case there was a marital or parental relationship between the plaintiff and the primary victim; secondly, that the injury for which damages were claimed arose from a sudden and unexpected shock to the plaintiff's nervous system, thirdly, that the plaintiff in each case was either personally present at the scene of the accident or was more or less in the immediate vicinity and witnessed the aftermath shortly afterwards; and fourthly, that the injury suffered arose from witnessing the death of, extreme danger to, or injury and discomfort suffered by the primary victim. Lastly, in each case there was not only an element of physical proximity to the event but a close temporal connection between the event and the plaintiff's perception of it combined with a close relationship of affection between the plaintiff and the primary victim. It must, I think, be from these elements that the essential requirement of proximity is to be deduced, to which has to be added the reasonable foreseeability

10 Ibid, at p 400.
11 [1983] AC 410.
12 Ibid, at p 421H.

> on the part of the defendant that in the combination of circumstances there was a real risk of injury of the type sustained by the particular plaintiff as a result of his or her concern for the primary victim.[13]

[9] Subsequent judgments saw the law struggle to apply these "control mechanisms" in a consistent and readily predicable way in secondary victim cases.[14] The main point of contention between litigants being and remaining the question of physical and temporal proximity with the index sudden shocking event.

[10] A strict interpretation was upheld in some cases: in *Taylorson v Shieldness Produce Ltd*,[15] parents of a child gravely injured in a car accident could not recover for their psychiatric injuries because they did not witness the accident itself, notwithstanding they saw him afterward and he died three days later; and in *McFarlane v EE Caledonia*,[16] where Lord Justice Stuart-Smith giving the judgment of the Court of Appeal held that:

> … both as a matter of principle and policy, the Court should not extend the duty to those who are mere bystanders or witnesses of horrific events unless there is a sufficient degree of proximity, which requires both nearness in time and place and a close relationship of love and affection between plaintiff and victim.[17]

[11] Yet the "control mechanisms" were interpreted significantly more benignly in other cases. In *North Glamorgan NHS Trust v Walters*[18] ("*Walters*"), Lord Justice Ward LJ, in considering the issue of whether a fit by a child which led to the child's death 36 hours later was a sudden event for the application of the *Alcock* criteria. He held that:

> … the law … does permit a realistic view being taken from case to case of what constitutes the necessary "event". Our task is not to construe the word as if it had appeared in legislation but to gather

13 *Alcock*, n 5 above at p 411 F.
14 Following *Page v Smith* [1996] AC 155, in which the majority of the House of Lords held that primary and secondary victims should be distinguished, in cases concerning the former the only question was whether the defendant was under a duty of care to avoid causing personal injury to the claimant, but for secondary victims, the "control mechanisms" were maintained.
15 [1994] EWCA Civ 16.
16 [1994] 2 All ER 1.
17 [1994] PIQR 154 at 166.
18 [2002] EWCA Civ 1792.

> the sense of the word in order to inform the principle to be drawn from the various authorities … It is a useful metaphor or at least a convenient description for the "fact and consequence of defendant's negligence", per Lord Wilberforce, or the series of events which make up the entire event beginning with the negligent infliction of damage through to the conclusion of the immediate aftermath whenever that may be. It is a matter of judgment from case to case depending on the facts and circumstance of each case.[19]

[12] Perhaps reflecting some judicial disquiet as to the prevailing "control mechanisms", Mr Michael Kent QC (sitting as a deputy High Court judge) in *Wild v Southend University Hospital NHS Foundation Trust*[20] ("*Wild*") referenced the *dicta* of Lord Justice Ward in *Walters*, where he commented that: "It is too late to go back on the control mechanisms stated in *Alcock,* I do not think that those mechanisms should be applied too rigidly or mechanistically."[21] They were not interpreted too rigidly in *Galli-Atkinson v Seghal*,[22] there the Court of Appeal held that what could be construed as the "aftermath" of a shocking event could be extended to the visit by a mother to the body of her daughter in a mortuary, despite this being the argued-for "event" in *Alcock*.

[13] Secondary victim cases concerning events which occurred in hospitals have provided their own share of results at first instance, such as which are not wholly consistent with one another. These most frequently give rise to questions relating to the question of physical and temporal proximity, given the likelihood that serious incidents occurring as a result of clinical negligence tend not to lead to sudden or immediate consequences for primary victims. In *Taylor v Somerset HA*[23] the claim of a wife of a man who suffered a cardiac arrest in hospital, was held unable to recover damages in respect of her psychiatric injury because she did not witness his death itself, notwithstanding she was present for his deterioration and saw his

19 Ibid, at p 34.

20 [2014] EWHC 4053, QB.

21 At p 48 of *Walters*; referred to at p 31 of *Wild* which the deputy High Court judge continuing to comment: "[Ward LJ in Walters] regarded it as still a developing area of the common law and, though he did not think was the decision the Court was taking amounted to "an incremental step advancing the frontiers of liability, if it did, I for my part would take that step on the facts of this case".

22 [2003] EWCA Civ 697.

23 [1993] PIQR P262.

body later on in distressing circumstances. In *Sion v Hampstead HA*,[24] the slow demise of a patient was not considered to meet the *Alcock* criteria that the shock needed to be "sudden"; but in *Walters*, the Court of Appeal upheld the judgment of Thomas J, notwithstanding that the "shocking event" took place over some 36 hours. Lord Justice Ward concluded that the law permitted a realistic view being taken from case to case of what constituted the necessary "event", this not being necessarily concomitant with the tortious act. It was a matter of judgment depending on the facts and circumstances of each case. He described it in the case before him "as a seamless tale with an obvious beginning and an equally obvious end, which played out over 36 hours but was undoubtedly one drawn-out experience".[25]

[14] Following the matter again coming before the House of Lords in *White v Chief Constable of the South Yorkshire Police*,[26] the complex judicial balance concerning public policy against the opening of "floodgates" on the one hand and perceived wider public feeling that psychiatric injuries should really be treated much the same as physical ones on the other, had been eventually abandoned in favour of calling for a statutory solution.[27] Lord Hoffmann stated:

> It seems to me that in this area of the law, the search for principle was called off in *Alcock* … No one can pretend that the existing law, which your Lordships have to accept, is founded upon principle.[28]

[15] Lord Steyn concurred:

> My Lords, the law on the recovery of compensation for pure psychiatric harm is a patchwork quilt of distinctions which are difficult to justify. There are two theoretical solutions. The first is to wipe out recovery in tort for pure psychiatric injury … But that would be contrary to precedent and, in any event, highly controversial. Only Parliament could take such a step. The second solution is to abolish all the

24 [1994] EWCA Civ 26.

25 At p 34. This has been interpreted as an explosion of an exception to the more obvious conception of proximity in later cases and confined to its own facts, including by the Court of Appeal in *Ronayne v Liverpool Women's Hospital NHS Foundation Trust* [2015] EWCA Civ 588.

26 See n 3 above.

27 J Murphy, "Negligently inflicted psychiatric harm: a re-appraisal" (1995) 15(3) *Legal Studies* 415–433.

28 [1999] 1 All ER 1 at 48.

> special limiting rules applicable to psychiatric harm … [P]recedent rules out this course and, in any event there are cogent policy considerations against such a bold innovation. In my view the only sensible strategy for the court is to say thus far and no further. The only prudent course is to treat the pragmatic categories as reflected in authoritative decisions such as the *Alcock* case … and *Page v Smith* … as settled for the time being but by and large to leave any expansion or development in this corner of the law to Parliament. In reality there are no refined analytical tools which will enable the courts to draw lines by way of compromise solution in a way which is coherent and morally defensible. It must be left to Parliament to undertake the task of radical law reform."[29]

[16] Certainly, at the time this must have felt to be a judicial echo of the recommendations contained in the Law Commission Report which strongly called for parliamentary reform.[30]

[17] In Australia the issue had already been resolved. The High Court in *Tame v New South Wales*[31] ("*Tame*") rejected altogether Lord Wilberforce's approach, in favour of that of Lord Bridge's approach in *McLoughlin*, which was to apply a modified version of Lord Wilberforce's "*Anns* Test",[32] where the imposition of liability was said to require a "sufficient relationship of proximity based upon foreseeability" and consideration why there should *not* be a duty of care.[33] Rather than attempting to work within the confusing and anomalous framework of the post-*McLoughlin* case law, the court in *Tame* abandoned the necessity for shock and direct perception, in favour of basing liability upon reasonable foreseeability. This reform echoed

29 Ibid, at p 38.

30 "Liability for Psychiatric Illness", Number 249 (1998), available online at http://www.lawcom.gov.uk/docs/lc249(1).pdf. In 2015, a private members Negligence and Damages Bill got no further than a first reading in the House of Commons. This sought to abolish all of the "control mechanisms" for secondary victims' claims and place the scope of a duty of care owed to third parties in respect of psychiatric injuries on a statutory footing, see https://bills.parliament.uk/bills/1701.

31 (2002) 191 ALR 449.

32 See *Anns v Merton LBC* [1978] AC 728.

33 *McLoughlin*, n 11 above at pp 311, 318–319; *Tame*, n 31 above at [96]–[108]. Lord Bridge applied a modified version of Lord Wilberforce's "*Anns* Test", where the imposition of liability was said to require a "sufficient relationship of proximity based upon foreseeability" and consideration why there should *not* be a duty of care.

the developments seen previously in various other Commonwealth jurisdictions in the 1990s and the law as it applied in England prior to the imposition of the "control mechanisms".[34]

[18] It may be that reform and rationalisation of the law is coming by organic developments. This may fit in with some commentators' characterisation of the law of secondary victims being in its "embryonic stages" some 20 years ago.[35] Perhaps this can be attributed to society's apparent failure or reluctance to recognise a serious disruption of one's peace of mind as being as worthy of community and legal support as a physical injury to the body being increasingly abandoned. There are perhaps some signs that the common law may yet coalesce around an interpretation of the correct confines of the law which corresponds with the changing perceptions of society more broadly, whilst ensuring that sensible and workable definitions of who may constitute a secondary victim can be maintained.

[19] The courts have upheld the need for the events giving rise to the secondary victim's injuries to be considered particularly and unusually shocking. In *Ward v Leeds Teaching Hospitals NHS Trust*,[36] the claim was by a mother who had witnessed her grown-up daughter fail to emerge from anaesthesia following an otherwise routine operation to extract a wisdom tooth. She averted that she sustained psychiatric injury after she saw her daughter motionless, saw her intubated in intensive care, saw her in distressing circumstances post-mortem, and being told her brain would be kept for examination. The claim was dismissed on the grounds that the *Alcock* criteria could not be met as the factual circumstances the claimant found herself in were insufficiently shocking and were not outside the range of human experience to allow for potential recovery.

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34 See N Mullany and P Handford, "Moving the Boundary Stone by Statute – the Law Commission on Psychiatric Illness" (1999) UNSWLJ 2, fns 76, 79–80. Ontario: *Mason v Westside Cemeteries Ltd* [1996] 135 DLR (4th) 361, *per* Madam Justice Molloy; *Anderson v Wilson* [1997] OJ No 548, CA; *Vanek v Great Atlantic & Pacific Co of Canada* [1999] 48 OR (3d) 228. British Columbia: *McDermott v Ramadanovic Estate* [1988] BCLR (2d) 45 at 53, *per* Southin J; *Rhodes Estate v Canadian National Railway* (1990) CanLII 5401 (BC CA). New Zealand: *Bryan v Philips New Zealand Ltd* [1999] 1 NZLR 632, *per* Barker J (regarding recovery of damages for "cancerphobia").

35 N Mullony and P Hanford, *Tort Liability for Psychiatric Damage* (Australia: Law Book Co, 1993), pp 308, 311.

36 [2004] EWHC 2106, QB.

[20] In *Taylor v A Novo (UK) Ltd*,[37] ("*Taylor v A Novo*") Lord Dyson MR in an eloquent judgment reviewed the law and analysed the issue of whether the death of Mrs Taylor was a relevant incident for the purposes of her daughter's claim as a secondary victim. In it, the Master of the Rolls attempted to give clarity to the vexed question of proximity and the distinction between legal and physical concepts. He was careful to refer to the continued existence of the "control measures" and deprecated any pushing at the boundaries of the law as interpreted by the prevailing House of Lords authorities on the basis that the law must reflect the societal benefit of placing some limitation on the scope of who constitutes a secondary victim.

[21] Mrs Taylor was injured in an accident at work as a result of which she sustained injuries to her head and left foot. Three weeks later she collapsed and died at home following a deep vein thrombosis. Her daughter did not witness the accident but did witness her death. Lord Dyson held:

> … the correct question is whether Mrs Taylor and Novo were in a relationship of proximity in the legal sense. The difficulty in answering that question is that, as Lord Oliver said, the concept of proximity depends more on the court's perception of what is the reasonable area for the imposition of liability than any process of logic. In the context of claims by secondary victims, the control mechanisms are the judicial response as to how this area should be defined."[38]

[22] Lord Dyson turned his attention to both the legal and physical senses of proximity. He held:

> … The word "proximity" has been used in two distinct senses in the cases. The first is a legal term of great importance in the law of negligence generally. It is used as shorthand for Lord Atkin's famous neighbour principle. Used in this sense, it is a legal concept which is distinct from and narrower than reasonable foreseeability. It describes the relationship between parties which is necessary in order to found a duty of care owed by one to the other. … in secondary victim cases, the word "proximity" is also used in a different sense to mean physical proximity in time and space to an event. Used in this sense, it serves the purpose of being one of the control mechanisms which,

37 [2013] EWCA Civ 194.
38 Ibid, at p 28.

> as a matter of policy, the law has introduced in order to limit the number of persons who can claim damages for psychiatric injury as secondary victims or to put it in legal terms, to denote whether there is a relationship of proximity between the parties. In a secondary victim case, physical proximity to the event is a necessary, but not sufficient, condition of legal proximity.
>
> … Lord Oliver said, the concept of proximity depends more on the court's perception of what is the reasonable area for the imposition of liability than any process of logic. In the context of claims by secondary victims, the control mechanisms are the judicial response to how this area should be defined. This has involved the drawing of boundaries which have been criticised as arbitrary and unfair. But this is what the courts have done in an area where they have had to fix the ambit of liability without any guiding principle except Lord Atkin's famous, but elusive, test.[39]

[23] Lord Dyson MR distinguished those authorities set out above where support had been given to the existence of a claim for secondary victims. He considered that the trial judge correctly concluded that Mrs Taylor sustaining injuries and her death three weeks later were distinct events. He held that:

> First, it seems to me that, if the judge is right, Ms Taylor would have been able to recover damages for psychiatric illness even if her mother's death had occurred months, and possibly years, after the accident (subject, of course, to proving causation). This suggests that the concept of proximity to a secondary victim cannot reasonably be stretched this far. Let us now consider the situation that would have arisen if Mrs Taylor died at the time of the accident and Ms Taylor did not witness the death, but she suffered shock when she came on the scene shortly after the "immediate aftermath". In that event, Ms Taylor would not have been able to recover damages for psychiatric illness because she (possibly only just) would have failed to satisfy the physical proximity control mechanism. The idea that Ms Taylor could recover in the first situation but not in the others would strike the ordinary reasonable person as unreasonable and indeed incomprehensible. In this area of the law, the perception of the ordinary reasonable person matters. That is because where the boundaries of proximity are drawn in this difficult area should, so

39 Ibid, at pp 26–28. Lord Atkin's "neighbour principle" is of course taken from *Donoghue v Stevenson* [1932] AC 562 at 580.

> far as possible, reflect what the ordinary reasonable person would regard as acceptable …
>
> … The courts have been astute for the policy reasons articulated by Lord Steyn to confine the right of action of secondary victims by means of strict control mechanisms. In my view, these same policy reasons militate against any further substantial extension. That should only be done by Parliament.
>
> … A paradigm example of the kind of case in which a claimant can recover damages as a secondary victim is one involving an accident which (i) more or less immediately causes injury or death to a primary victim and (ii) is witnessed by the claimant … Ms Taylor would have been able to recover damages as a secondary victim if she had suffered shock and psychiatric illness as a result of seeing her mother's accident. She cannot recover damages for the shock and illness that she suffered as a result of seeing her mother's death three weeks after the accident.[40]

[24] In November 2019, Master Cook struck out the claimant's claim in *Paul (A Child) v Royal Wolverhampton NHS Trust*[41] ("*Paul*") on the grounds that he considered that the death of a man from a heart attack in January 2014 witnessed by his young daughters (that is, the claimants, who were both thereby allegedly caused psychiatric harm), some 14 months after an allegedly negligent omission to treat the deceased's coronary artery disease by the defendant hospital in November 2012 was so "separated in space and time from the negligence … [that it] cannot possibly be said to be the 'relevant event' for deciding the proximity required to establish liability under the established control mechanisms."[42] In short, the Master accepted that the "event" could have only occurred in November 2012 at the time of the alleged clinical negligence, not at the time of the deceased's death many months later.

[25] The matter was appealed and came before Mr Justice Chamberlain on May 13, 2020, with judgment given on June 4, 2020.[43] The judge commenced his discussion within his judgment with the observation that "A survey of the authorities indicates a degree of frustration about the lack of coherent principle underlying the law governing

40 Ibid, at pp 30–32.
41 [2019] EWHC 2893, QB.
42 Ibid, at p 41.
43 [2020] EWHC 1415, QB.

claims for psychiatric damage suffered by secondary victims."[44] He considered the broad and narrow senses of "proximity" drawing on the clarification in *Taylor v A Novo* that one can be used as analogous to the "neighbour principle" and the other in relation to physical and temporal connection to an event. The judge held that the collapse of the claimants' father was capable itself of being an "event" on the facts of the case sufficient arguably to give rise to liability. Chamberlain J held as an overarching principle that:

> … there is no reason to favour a conservative posture in which liability is accepted only where it has already been found to exist on indistinguishable facts. There is nothing to inhibit the courts from aiming for maximal coherence in the principles which govern the circumstances in which the existing control mechanisms will be satisfied. In doing so, they are bound by the rules of precedent, but are otherwise unconstrained.[45]

[26] The judge discussed three reasons why the collapse of the claimants' father may not be such an "event":[46] firstly, that it was not (approximately) synchronous, but this was not a mandatory feature identified in the higher authorities; secondly, that only a negligent act, rather than a negligent omission could constitute an "event", but this was also not really arguable on the prevailing case law; and thirdly, that the claimants were not present "at the scene of the tort".

[27] The latter point was the only one argued by the defendant, which advanced that the deceased's collapse was the manifestation of the breach. Distinguishing *Taylor v A Novo*, the judge held this was not a point bound to succeed as there was authority to the effect than non-manifest biological changes could constitute actionable damage, thus the claim was not amendable to summary determination and should proceed to trial. He held:

> Mr Paul's collapse from a heart attack on 26 January 2014 … [o]n the facts pleaded … was a sudden event, external to the secondary victims, and it led immediately or very rapidly to Mr Paul's death. The event would have been horrifying to any close family member who witnessed it, and especially so to children of 12 and 9. The fact that

44 Ibid, at p 58.
45 Ibid, at p 60.
46 Ibid, at pp 63–68.

> the event occurred 14½ months after the negligent omission which caused it does not, in and of itself, preclude liability. Nor does the fact that it was not an "accident" in the ordinary sense of the word, but rather an event internal to the primary victim. In a case where such an event is the first occasion on which damage is caused, and therefore the first occasion on which it can be said that the cause of action is complete, *Taylor v A. Novo* does not preclude liability.
>
> … I would therefore hold that the principle in *Taylor v A. Novo* is no bar to recovery in this case if it is shown that Mr Paul's collapse from a heart attack on 26 January 2014 was the first occasion on which the damage caused by the hospital's negligent failure to diagnose and treat his heart condition became manifest.[47]

[28] An appeal to the Court of Appeal is outstanding in *Paul*, and other secondary victim claims are currently stayed pending its outcome.

[29] Permission to appeal has also been granted in another secondary victim claim which came before Master Cook on a strike out application. In *Polmear v Royal Cornwall Hospitals NHS Trust*[48] however, the Master declined to strike out the claim, which involved similar facts to those in *Paul*. This claim was brought by the parents who suffered psychiatric harm having witnessed their daughter's collapse and death. She had been suffering from symptoms for months prior to this which should have then given rise to an actionable claim for damages on her behalf for the defendant hospital trust's admitted failure to diagnose her life-threatening condition. The Master followed *Paul* and declined to strike out the claim on the basis that it was at least arguable that prior actionable damage was no bar to recovery in secondary victim claims. The defendant hospital trust was granted permission to appeal on the grounds that *Paul* was not binding authority and itself under appeal, whereas *Taylor v A Novo* was, and this should have been followed with the effect that the claimant's claim had to be struck out.

[30] It seems likely the matter may once again come before the UK's highest court, but this time in the context of a world which has changed in the 22 years since the last time it was considered at this level in *White*, and dramatically so when contrasted to the socio-political hegemony at the time of *McLoughlin* or *Alcock*.

47 Ibid, at pp 75 and 80.
48 [2021] EWHC 196, QB.

[31] In today's age of increasingly accessible social media and rolling news with coverage of events channelled directly to the individual via their personal tablets or mobile telephones, and the increasing availability of such news via unregulated or filtered outlets, it has to be a question as to whether the need for physical proximity must remain a firm "control measure". Many observers may feel it anomalous that, for example, a mother of a child killed in an accident cannot recover damages for her subsequent post-traumatic stress disorder because she witnessed the accident live via an internet live stream on YouTube, but potentially could do so even if she never saw the accident itself but was physically present in its aftermath. Even what counts as the "aftermath" of an accident or "event" is subject to competing authority which would clearly benefit from clarification, given the conflicting authority on the point.

[32] Crucially, guidance as to the correct approach to physical and temporal proximity must be welcomed in the context of cases where psychiatric harm is caused to secondary victims as a result of witnessing the manifestation of the results of tortious acts or omissions which may have occurred a long time previously. It will be informative as to whether the distinction between a psychiatric injury caused by witnessing a manifestation as opposed to a consequence of a tortious act or omission can be usefully defined.

[33] For all litigants – victim, medical provider and insurer alike – the stakes are high. Restatement of the law is likely to mean that secondary victim claims in very many cases, including in a great deal of claims where the originating tort is one of clinical negligence, will be extremely difficult for claimants. Anything akin to a liberalisation of the "control mechanisms" is liable to increase the volume of claims, and give rise to potentially far increased liabilities in cases where harm to third parties is a foreseeable consequence of harm to a primary victim.

[34] Will a yet further authority settle the controversies? The idealist may hope that any future Supreme Court judgment may allow the triumph of the common law via the divination of a just and workable classification of the "control measures" for secondary victim claims which properly balance the competing interests of society. The realist may however look back over the last four decades at least and predict that the outcome may only consist of the restatement of the law as expounded with a call for parliamentary reform to settle the matter.

Constitutional Remedies in India: Salient Features and Impacts of Reviewing Power

by

*Dr Gan Chee Keong**

Introduction

[1] The Indian Constitution is the world's longest written Constitution (with 395 Articles and eight Schedules). It was passed by the Constituent Assembly on November 26, 1949.[1] Nevertheless, the Constituent Assembly began its work on December 9, 1946. It was assisted by several committees, the most important was the Drafting Committee, headed by Dr BR Ambedkar, while KM Munshi, Sir Alladi Krishnaswami Ayyar and N Gopalaswamy Ayyangar were its other eminent members. The new Indian Constitution came into force on January 26, 1950.[2] The Indian Constitution guarantees fundamental rights in the Constitution and also provides efficient means of enforcing those rights under Articles 32 and 226. On the text of Articles 32 and 226, where a fundamental right is involved, a party should be free to seek relief in the Supreme Court under Article 32 or in the High Courts under Article 226.[3]

[2] Article 32 of the Constitution of India provides:

> 32. (1) The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

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* Senior Federal Counsel, Legal Division, Ministry of Domestic Trade and Consumer Affairs. The purpose of this article is to explore India's experience in constitutional remedies. The author makes reference to India because para 1 of the Schedule to the Courts of Judicature Act 1964 (Malaysia) is *in pari materia* with Article 226 of the Indian Constitution. All views expressed are personal and do not represent those of the Ministry of Domestic Trade and Consumer Affairs. All errors are entirely mine.

1 Derek Oberoi, *Theory of the World Constitution (Indian and Other Countries)* (India: ABD Publishers, 2008).

2 JC Johari, *Governments and Politics of South Asia* (New Delhi, India: Sterling Publishers Private Limited, 1991).

3 PM Bakshi, *The Constitution of India with Comments & Subject Index* (India: Universal Book Traders, 1991).

(2) The Supreme Court shall have power to issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, whichever may be appropriate, for the enforcement of any of the rights conferred by this Part.

(3) Without prejudice to the powers conferred on the Supreme Court by clauses (1) and (2), Parliament may by law empower any court to exercise within the local limits of its jurisdiction all or any of the powers exercisable by the Supreme Court under clause (2).

(4) The right guaranteed by this article shall not be suspended except as otherwise provided for by this Constitution.

[3] Article 226 of the Indian Constitution provides:

226. (1) Notwithstanding anything in article 32, every High Court shall have power, throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases any Government, within those territories directions, orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose.

(1A) The power conferred by clause (1) to issue directions, orders or writs to any Government, authority or person may also be exercised by any High Court exercising jurisdiction in relation to the territories within which the cause of action, wholly or in part, arises for the exercise of such power, notwithstanding that the seat of such Government or authority or the residence of such person is not within those territories.

(2) The power conferred on a High Court by clause (1) or clause (1A) shall not be in derogation of the power conferred on the Supreme Court by clause (2) of article 32.[4]

[4] It should be noted that a mere declaration of rights even in the Constitution will not have much practical value unless effective remedies are also provided for the enforcement of these rights.[5]

4 Anon, *The Constitution of India*, The Manager of Publications Delhi, India, 1972.

5 Joseph AL Cooray, *Constitution Government and Human Rights in a Developing Society* (Colombo, Sri Langka: The Colombo Apothecaries Co Ltd, 1969).

The significance of the provision of remedies for the enforcement of fundamental rights under the Indian Constitution was mentioned by Dr BR Ambedkar, chairman of the Draft Constitution Committee of India as the "heart and soul of the constitution".[6] Accordingly, these provisions have been enshrined in the Indian Constitution which is the supreme law of India.

Articles 32 and 226 of the Indian Constitution

[5] Article 32 of the Indian Constitution empowers the Supreme Court to enforce fundamental rights.[7] The High Courts also have a parallel power pursuant to Article 226 for the enforcement of fundamental rights.[8] An application under Article 32 lies in the first instance to the Supreme Court, without first resorting to the High Courts under Article 226 as decided in the case of *Romesh Thappar v State of Madras*.[9] However, if the applicant approaches the Supreme Court then the decision of the Supreme Court is final. But if he approaches the High Court, thereafter, the decision of the High Court may be appealed to the Supreme Court.[10] In fact, this can cause more delay and can be more costly for the applicant than taking a direct action to the Supreme Court.

[6] The decision of the Supreme Court under Article 32 or the High Courts under Article 226 would operate as *res judicata* and it would not be open to a person to file a suit or avail himself of any other remedy under an ordinary law, on the same cause of action which had been the subject of determination by the Supreme Court or the High Courts, if the matter was decided on merit. In other words, the doctrine of *res judicata* applies when the petition is decided on merit.[11] Nonetheless, there is an exception to the rule of *res judicata* with respect to a petition

6 M Hidayatullah, *Constitution Law of India*, Vol I (New Delhi, India: Arnold-Heinemann Publishers Pvt Ltd, 1984), p 612. Dr Ambedkar stated that:

> If I was asked to name any particular Article in this Constitution as the most important – an Article without which this Constitution would be nullity – I could not refer to any other Article except this one. It is the very soul of the Constitution and the very heart of it …

7 Indian Constitution 1950, Art 32(1).

8 Ibid, Art 226(1).

9 AIR 1950 SC 124.

10 *Daryao v State of UP* AIR 1961 SC 1457.

11 Mohammed Imam, *The Indian Supreme Court and the Constitution: A Study of the Process of Constitution* (Lucknow, India: Eastern Book Company, 1973).

in *habeas corpus*. In *Ghulam Sarwar v Union of India*,[12] Justice Subha Rao held that dismissal of a *habeas corpus* petition by the High Court did not operate as *res judicata* as it was not a judgment and also because the principle was inapplicable to a fundamentally lawless order which the Supreme Court had to decide on merit.

[7] The provisions of the Indian Limitation Act, 1963 do not apply to petitions under Articles 32 and 226, but inordinate delay in invoking the jurisdiction of the courts may be a good ground for declining to grant relief. However, if the delay could be satisfactorily explained, the courts would not refuse the remedy to the petitioner. For instance, in the case of *Anand Prakash Saksena v Union of India*,[13] the petitioner's application was dismissed because he sought to challenge the appointment after a long lapse of time without giving any adequate explanation as to the delay in filing the writ petition. In *Rabindra Nath Bose v Union of India*,[14] the Supreme Court stated that no relief should be given to the petitioners who, without any reasonable explanation, approached the court under Article 32 of the Constitution after inordinate delay. In the case of *Ramchandra Shanker Deodhar v State of Maharashtra*,[15] the Supreme Court observed that the period of limitation prescribed in the Limitation Act, 1963 should be used as a guide and not as an absolute rule.

[8] On the question of whether evidence can be taken in a proceeding under Article 32, the Supreme Court in the case of *KK Kochunni v State of Madras*[16] has laid down that in a proceeding under Article 32, the Supreme Court is not debarred from taking evidence of witnesses by the issuing commission or examining witnesses in court as fundamental rights are affected. The Supreme Court may appoint commissions for the purpose of investigation and gathering of facts and data in regard to the complaint of a breach of a fundamental right, particularly where the petitioner in a public interest litigation is unable to gather the relevant evidence. The Supreme Court in the case of *Bandhua Mukti Morcha v Union of India*[17] also held that the

12 AIR 1967 SC 1335.
13 AIR 1968 SC 754.
14 AIR 1970 SC 470.
15 AIR 1974 SC 259.
16 AIR 1959 SC 725.
17 AIR 1984 SC 802.

commission's report cannot be excluded from evidence on the mere grounds that it had not been subjected to cross-examination. As both the Supreme Court and the High Courts under Articles 32 and 226 have the same writ jurisdiction, the same principle also applies to the High Courts under Article 226.

[9] Article 32(1) guarantees the right to move the Supreme Court for appropriate writs for the purpose of enforcing the fundamental rights included in Part III of the Indian Constitution (Part III of the Indian Constitution deals with fundamental rights). In other words, the right to move the Supreme Court where a fundamental right has been infringed is itself a fundamental right. However, Article 226 does not provide such a guarantee. In *KK Kochunni v State of Madras*,[18] the apex court has ruled that the right to move the Supreme Court under Article 32 is itself a guaranteed right. Therefore, Article 32 is a guaranteed right, whereas Article 226 is not so. Article 32 being a fundamental right cannot be curtailed by any legislation. Article 13 of the Indian Constitution provides that any law in force either before or after the enactment of the Indian Constitution which is inconsistent with the provisions of fundamental rights under Part III is void to the extent of such inconsistency.[19]

[10] Under Article 32, the power conferred on the Supreme Court can be exercised only for the enforcement of the fundamental rights conferred by Part III of the Indian Constitution. According to the case of *Chiranjit Lal Chowdhuri v Union of India*[20] where there is no question of the enforcement of fundamental rights, Article 32 has no application. In contrast, Article 226 of the Indian Constitution confers a power on all the High Courts of India not only for the enforcement of fundamental rights but for "any other purpose", i.e. for the enforcement of any other legal rights.[21] In other words, Article 226 has a much broader scope than Article 32. As for territorial jurisdiction, the powers of the Supreme Court under Article 32 are

18 AIR 1959 SC 725.

19 Anon, *The Constitution of India with Short Notes* (India: Eastern Book Company, 1970).

20 AIR 1951 SC 41.

21 Mahendra P Singh (ed), *VN Shukla's Constitution of India*, 8th edn (Lucknow, India: Eastern Book Company, 1990).

not limited by any territorial limitation.[22] It extends not only to all authorities within the territory of India, but also to those operating outside, provided that such authorities are under the control of the Government of India. On the other hand, the powers vested in the High Courts by Article 226 are subject to territorial limitation. In the case of *Madan Gopal v Secretary to Government of Orissa*[23] the power of the High Court may only be exercised in all the territories in which it has jurisdiction, and the writ issued by the High Court may only be given to any person or authority within those territories.

[11] As far as jurisdiction over writs is concerned, both the Supreme Court and the High Courts, under Articles 32 and 226, have the same jurisdiction over writs. The two courts may issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, for the purpose of enforcement of the fundamental rights included in Part III of the Indian Constitution. Even though the High Courts have the power to issue such writs for "any other purpose", but with respect to the enforcement of fundamental rights, the principles governing the issue of these writs or orders must be identical in the case of the Supreme Court and the High Courts.[24] The Supreme Court in the case of *Rashid Ahmed v Municipal Board, Kairana*[25] stated that the language used in Articles 32 and 226 regarding writ issuance is very broad and are not confined to issuing prerogative writs only.

[12] There is another feature of Article 32 that does not exist in Article 226, and that is the term "appropriate proceedings" in Article 32(1) which is wide enough to empower the court to follow any procedure, provided that it is appropriate for the enforcement of fundamental rights, where the court is not bound to follow the technicalities of adversarial litigation.[26] Therefore, so long as the purpose of the proceeding is the enforcement of a fundamental right, even a letter addressed to the court can legitimately be regarded as

22 HM Seervai, *Constitution Law of India: A Critical Commentary*, 3rd edn (Bombay, India: NM Tripathi Private Ltd, 1983).
23 AIR 1962 SC 1513.
24 HM Seervai, *Supplement to Constitutional Law of India* (India: Tripathi, 1968).
25 AIR (37) 1950 SC 163.
26 Acharya Dr Durga Das Basu, *Shorter Constitution of India*, 13th edn (India: Wadhwa and Company Law Publishers, 2001).

an "appropriate proceeding".[27] Under Article 226, there is another feature that is not in Article 32, that is, the phrase "any other purpose" which is not only used to enforce fundamental rights, but to enforce other legal rights as well.[28]

[13] In essence, the right to constitutional remedies is a guaranteed right in the Constitution as both Articles 32 and 226 are secured on the principle of the supremacy of the Constitution. The Supreme Court in the case of *Minerva Mills Ltd v Union of India*[29] has ruled that Articles 32 and 226 are part of the basic structure of the Constitution. Thus, Parliament cannot amend the Constitution so as to destroy the basic feature or the basic structure of the Constitution.[30] This is an important constitutional safeguard of fundamental rights. Articles 32 and 226 of the Indian Constitution guarantee that the courts shall be open to every person for redress; it strengthens the right of access to the courts to seek redress when a person's fundamental rights are infringed.

Salient features of the provisions for the enforcement of fundamental rights under the Indian Constitution

[14] In India, the provisions of remedies for the enforcement of fundamental rights under Articles 32 and 226 of the Indian Constitution empower the Supreme Court and the High Courts to enforce the fundamental rights provided for under Part III of the Indian Constitution. The language used in Articles 32 and 226 is very wide. The powers of the Supreme Court and the High Courts extend to issuing orders, writs or directions as may be considered necessary for enforcement of the fundamental rights, and in the case of the

27 Mahendra P Singh, *VN Shukla's Constitution of India* (Lucknow, India: Eastern Book Company, Lucknow, 1990). In *Sunil Batra v Delhi Adminstration* AIR 1980 SC 1579, a letter was written by a prisoner lodged in jail to a judge of the Supreme Court entailing the poor living conditions and questionable treatment of inmates in the jail. In his letter, he also complained of the brutal assault and torture by a head warder on another prisoner as a means to extract money from the victim through his visiting relatives. The Supreme Court had treated the letter as a writ petition. It is now called the "epistolary jurisdiction" of the court.

28 Durga Das Basu, *Cases on the Constitution of India (1950–51)* (Calcutta, India: SC Sarkar & Sons Ltd, 1952).

29 AIR 1980 SC 1789.

30 Carmelo V Sison and Roshan T Jose (eds), *Constitution and Legal Systems of Asean Countries* (Philippines: Academy of Asean Law and Jurisprudence, 1990).

High Courts, for other purposes as well. Justice Das in the case of *KK Kochunni v State of Madras*[31] has stated that:

> Under Art 32 we must, in appropriate case, exercise our discretion and frame our writ or order to suit the exigencies of this case brought about by the alleged nature of the enactment we are considering.

[15] The fundamental rights enshrined in Part III of the Indian Constitution with provisions for their enforcement through the Supreme Court under Article 32 and the High Courts under Article 226 encompasses judicial review. Therefore, legislative or executive acts that go beyond the competence of the authority concerned or that affect fundamental rights may be struck down in appropriate proceedings.[32] This is another prominent feature of Articles 32 and 226 of the Indian Constitution. It should be noted that a constitution is a living document and must therefore be interpreted broadly and liberally taking into account the social, economic and political setting in which it is intended to operate. It is here a judge is called upon to perform a purposive, dynamic, and creative function to achieve the goals of the Constitution through the process of judicial activism.

(a) Reliefs under Articles 32 and 226

[16] The Supreme Court and the High Courts under Articles 32 and 226 have the same writ jurisdiction. Both courts may issue directions or orders or writs, including writs in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, for the purpose of enforcement of the fundamental rights included in Part III of the Indian Constitution. The writs referred above are known as prerogative writs in English law. The expression "prerogative writ" is one of the English common law which refers to the extraordinary writs issued by the sovereign on the ground of inadequacy of ordinary legal remedies. Eventually, these writs came to be issued by the High Court as the agency through which the sovereign exercised his judicial powers.[33]

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31 AIR 1959 SC 725.

32 Professor GC Venkata Subbarao, *Indian Constitution Law (A critical and comprehensive commentary on the Constitution of India based upon a comparative study of Indian, American, English and Commonwealth judicial precedents)*, Vol I (Madras, India: The Madras Law Journal Office, 1970).

33 Acharya Dr Durga Das Basu, *Introduction to the Constitution of India*, 6th edn (New Delhi, India: Prentice-Hall of India Private Limited, 1994).

[17] The power of the Supreme Court and High Courts is not restricted to the five writs specifically mentioned in Articles 32 and 226. It is because the power of the court is "inclusive" and the court has power to issue writs "in the nature of" the five specified writs. This means that the court has flexibility in the matter of issuing writs.[34] In *MC Mehta v Union of India*,[35] the Supreme Court stated that under Article 32, the Supreme Court is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of fundamental rights. In other words, the court has the discretion in the matter of framing writs to fit the factual matrix of a particular case. In another case of *Chiranjit Lal Chowdhuri v Union of India*,[36] the Supreme Court also ruled that Article 32 gives very wide discretionary power to the court in framing writs to suit the exigencies of a particular case.

[18] The language used in Articles 32 and 226 of the Indian Constitution is very wide and the powers of the Supreme Court as well as of the High Courts in India are not confined to issuing prerogative writs only, but extend to issuing orders or directions appropriate to the circumstances, unfettered by the technicalities of the English "prerogative writs". This can be seen in the case of *TC Basappa v T Nagappa*,[37] of which Justice BK Mukherjea has stated that:

> … In view of the express provisions in our Constitution we need not now look back to the early history or the procedural technicalities of these writs in English Law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges …

[19] The Supreme Court and the High Courts also can make orders such as declaration, injunction or damages if that be the proper relief. For instance, in the case of *KK Kochunni v State of Madras*,[38] the Supreme Court has laid down that the court's powers under Article 32 are wide enough to make even a declaratory order (with consequential relief by way of injunction), where that is the proper relief to be given to the aggrieved party. In *Common Cause, a Registered Society v Union*

34 MP Jain, *Indian Constitutional Law (With Constitutional Documents)*, 6th edn (Haryana, India: LexisNexis Butterworths Wadhwa Nagpur, 2010).
35 AIR 1987 SC 1086.
36 AIR 1951 SC 41.
37 AIR 1954 SC 440.
38 AIR 1959 SC 725.

of India,[39] the Supreme Court has pointed out that the court has the right to award damages to compensate the loss caused to a person on account of violation of his fundamental rights in the matter of enforcement of fundamental rights.

[20] The Supreme Court and the High Courts also have the power to issue general directions, including laying down general guidelines having the effect of law to fill the vacuum till such time the legislature steps in to fill in the gap by making the necessary law. The court has issued guidelines and directions in cases as follows:

(a) *Lakshmi Kant Pandey v Union of India*[40] – the Supreme Court set guidelines for the adoption of minors by foreigners.

(b) *K Veeraswami v Union of India*[41] – the Supreme Court set guidelines for the purpose of maintaining the independence of the judiciary.

(c) *Supreme Court Advocates-on-Record Association v Union of India*[42] – the Supreme Court established important principles in the matter of the appointment and transfer of judges of the Supreme Court and the High Courts.

(d) *Common Cause v Union of India*[43] – the Supreme Court gave instructions to the government to improve the whole scheme related to the operations and needs of blood banks in India.

(e) *Visakha v State of Rajasthan*[44] – the Supreme Court set guidelines for the maintenance of the workplace in relation to sexual harassment of working women.

(f) *Dinesh Trivedi, MP v Union of India*[45] – the Supreme Court recommended the establishment of a high-level committee to monitor the investigation in the Vohra Committee Report.

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39 AIR 1999 SC 2979 at 3020. Justice S Saghir Ahmad said that:

> It is in the matter of enforcement of Fundamental Rights that the Court has the right to award damages to compensate the loss caused to a person on account of violation of his Fundamental rights.

40 AIR 1984 SC 469.

41 (1991) 3 SCC 655.

42 (1993) 4 SCC 441.

43 AIR 1996 SC 929.

44 (1997) 6 SCC 241.

45 (1997) 4 SCC 306.

(g) *Vineet Narain v Union of India*[46] – the Supreme Court formulated appropriate instructions based on the recommendations of the Independent Review Committee Report to fill the vacancy.

(h) *Union of India v Association for Democratic Reforms*[47] – the Election Commission was directed to require each candidate to submit information in relation to matters stated by the Supreme Court as a necessary part of the nomination paper.

(i) *State of West Bengal v Sampat Lal*[48] – guidelines that have a legal effect and must be strictly adhered to were set by the court.

[21] It may however be emphasised that the court can mould relief to meet the exigencies of the specific circumstances. It is in the discretion of the court to decide the appropriate remedy to be given to the petitioner for the enforcement of his fundamental rights. If a proper direction or writ is not prayed for, an application under Articles 32 and 226 cannot be thrown out by the court. Thus, when an order in the nature of *mandamus* is sought in a particular form, nothing debars the court from granting it in a different form. There is no obligation on the courts to give any particular remedy to the petitioner.[49] Generally, the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting prerogative writs, but this is not an absolute ground for refusing a writ under Articles 32 and 226 as the powers given to the courts are much wider and are not confined to the issue of prerogative writs only. Thus, the existence of an alternative relief is no ground for the refusal of the proper relief under Articles 32 and 226 where a fundamental right has been infringed.[50]

(b) Judicial review

[22] Judicial review is the basic feature of the Indian Constitution which has been entrusted to the Supreme Court and the High Courts

46 AIR 1998 SC 889.
47 (2002) 5 SCC 294.
48 AIR 1985 SC 195.
49 Durga Das Basu, *Commentary on the Constitution of India (Being a comparative treatise on the universal principles of Justice and Constitutional Government with special reference to the organic instrument of India)*, 5th edn (Calcutta, India: SC Sarkar & Sons (Private) Ltd, 1965).
50 DK Singh, *VN Shukla's Constitution of India*, 6th edn (Lalbagh, India: Eastern Book Company, 1982).

under Articles 32 and 226 of the Indian Constitution. It is the duty and responsibility of the courts, as provided under the Constitution to maintain the balance of power between the legislature, the executive and the judiciary.[51] McBain explained the principle of judicial review. He stated that the Constitution is the supreme law, it confers limited powers on the government, and the powers conferred have been provided in the Constitution. As a result, the government cannot exercise powers it has not been given. If the government consciously or unconsciously exceeded these limitations there must be some authority competent to hold it in control and thwart its unconstitutional attempt.[52]

[23] In *SS Bola v BD Sardana*,[53] the Supreme Court of Indian observed that it is the duty and responsibility of the court as provided in the Constitution to maintain the balance of power between the legislature, the executive and the judiciary. The reason for providing the power to the judiciary is because the judiciary from the nature of its function, will always be the least dangerous to the political rights of the Constitution as it will be least in a capacity to annoy or injure them. The judiciary only serves to interpret the law. It does not have the power to enforce or legislate the laws. It is true that the judiciary has neither power nor will, but only judgment.[54] The judiciary is separated from the legislature and the executive under the doctrine of separation of powers. Therefore, judicial independence is important for maintaining judges' impartiality and the rule of law.

[24] Indeed, there are two kinds of judicial review depending on the nature of the state action against which it is directed. If it is directed against the executive or administrative authorities, it is called judicial review of administrative action. If, on the other hand, it is directed against a statute of legislature or subsidiary legislation, it is called

51 DJ De, *Interpretation & Enforcement of Fundamental Rights* (Calcutta, India: Eastern Law House, 2000).

52 Sunder Raman, *Amending Power under the Constitution of India: A Politico-legal Study* (Calcutta, India: Eastern Law House, 1990).

53 AIR 1997 SC 3127.

54 Anirudh Prasad, *Centre and State Powers under Indian Federalism* (New Delhi, India: Deep & Deep Publication, 1981), p 46. According to Alexander Hamilton:

> … The judiciary on the contrary, has no influence over either the sword or the purse, no direction either of strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither *force* nor *will*, but merely *judgment*; and must ultimately depend upon the executive arm for the efficacious exercise even of the faculty.

judicial review of legislation.[55] Speaking of the origins of the doctrine of judicial review, judicial review is a judicial innovation of the United States Supreme Court. The United States Constitution does not contain an express provision for judicial review. Nevertheless, Chief Justice Marshall had affirmed the doctrine of judicial review to be part of the living law in the case of *Marbury v Madison*.[56] Chief Justice Marshall in his judgment had asserted that the government of limited powers gave to the judges the power to determine the validity of legislation. The principle of judicial review in the United States has global influence, and is firmly rooted in the American system.[57]

[25] The doctrine of judicial review in the United States is also entrenched in the Indian Constitution. There are numerous Articles, for instance, Articles 13(1), (2), 32, 226, 245(1), 254, 367 and 372(1), which form the basis for judicial review under the Indian Constitution.[58] However, this writing focuses on the powers of the courts for judicial review under Articles 32 and 226. The predominant method of enforcement of constitutional rights is through writs. Under Articles 32 and 226, the courts have been entrusted with the power to determine the question of the constitutionality of legislative or executive acts in cases of the infringement of fundamental rights. The writ jurisdiction of the Supreme Court and the High Courts of India has contributed greatly to the development in the constitutional evolution of India. Meanwhile, writs may be issued to invalidate unconstitutional laws made in violation of fundamental rights.[59] Furthermore, the power of judicial review under Article 226 is much wider than the corresponding powers of the Supreme Court under Article 32 as the article also provides that the power conferred on a High Court may be exercised for any other purpose.

[26] Under the Constitution, the power of judicial review is a basic feature of the Indian Constitution which has been entrusted to the courts, namely, the Supreme Court and the High Courts, under

55 VS Deshpande, *Judicial Review of Legislation* (Lalbagh, India: Eastern Book Company, 1975).
56 (1803) 2 L Ed 60.
57 Dr A Lakshminath, *Basic Structure and Constitutional Amendments: Limitations and Justiciability*, (New Delhi, India: Deep & Deep Publications Pvt Ltd, 2010).
58 Ibid, at p 53.
59 Dr Chakradhar JHA, *Judicial Review of Legislative Acts*, 1st edn (Bombay, India: NM Tripathi Private Limited, 1974).

Articles 32 and 226 of the Indian Constitution respectively. In *Minerva Mill Ltd v Union of India*,[60] the Supreme Court declared judicial review as one of the basic features of the Constitution but the reasoning given was different. Similarly, in *SR Bommai v Union of India*,[61] the Supreme Court reasoned that the power of judicial review is a constituent power and cannot be abdicated by the judicial process of interpretation. Then in *L Chandra Kumar v Union of India*,[62] it was held that the power of judicial review over legislative action vested in the High Courts under Article 226 and in the Supreme Court under Article 32 of the Indian Constitution is an integral and essential feature of the Constitution, constituting part of its basic structure.

[27] The power of judicial review under Articles 32 and 226 is very wide, therefore, these powers have to be be exercised with great caution and control. Judicial review is not about creating what is sometimes referred to as judicial oligarchy or judge-made law.[63] Accordingly, certain restrictions should be imposed on judicial review. The Indian Constitution has imposed some limitations on judicial review. For instance, a number of rights are not unconditionally guaranteed and may be subjected to reasonable restrictions.[64] However, the restrictions imposed must be reasonable restrictions; if the restrictions are unreasonable restrictions upon the fundamental rights, then the court reserves the right to strike down the legislation.[65] Essentially, judicial review powers under Articles 32 and 226 is one of the checks and balances in the separation of powers, and the judges through judicial review will keep all authorities within the constitutional limits.

(c) Judicial activism

[28] Brijesh Babu described in his book, *Human Rights and Social Justice*, that judicial activism is a political term used to describe judicial rulings that are suspected to be based upon personal and political considerations other than existing law. Judicial restraint is

60 AIR 1980 SC 1789.
61 AIR 1994 SC 1918.
62 (1997) 3 SCC 216.
63 HR Khanna, *Making of India's Constitution*, 2nd edn (Lalbagh, India: Eastern Book Company, 2008).
64 RN Spann (ed), *Constitutionalism in Asia* (London: Asia Publishing House, 1964).
65 Dr Durga Das Basu, *Tagore Law Lectures On Limited Government and Judicial Review* (Calcutta, India: SC Sarkar & Sons (Private) Ltd, 1972).

sometimes used as an antonym of judicial activism.[66] Judicial restraint takes an attitude of non-involvement in regard to government action as the policy making is the wisdom of the legislative or the executive. Essentially, judicial activism is closely tied to constitutional interpretation. In its American practice, judicial activism denotes the search for an absolute meaning of the words in the constitutional text as the governing test in constitutional interpretation.[67] Briefly, judicial activism allows the court to play an unconventional role in granting relief to the aggrieved party according to its moral and social sense of justice in situations where statutory law is silent or even contrary to its own judgment in a particular situation. It has also been defined by some jurists as "non-interpretive judicial review". It is also called judicial law-making.[68]

[29] In India, the doctrine of judicial activism has flourished as a result of the dynamic courts and activist judges who perform a purposive, dynamic, and creative function in safeguarding the fundamental rights. The courts of India have adopted a broad and liberal interpretation of the Indian Constitution taking into account the social, economic and political policies which enable the courts to devise the remedies to meet the exigencies of the specific circumstances under Articles 32 and 226 of the Indian Constitution through judicial innovation.[69] In *Francis Coralie Mullin v Union Territory of Delhi*,[70] Justice Bhagwati said that constitutional provisions must be construed not in a narrow and constricted sense but in a wide and liberal manner so as to anticipate and take account of changed conditions and purposes so that the constitutional provision does not get atrophied or fossilised, but remains flexible enough to meet the newly emerging problems and challenges.

[30] In short, judicial activism plays an important role in moulding the law to meet the challenges of time. In this regard, Lord Denning

66 Brijesh Babu (ed), *Human Rights and Social Justice* (New Delhi, India: Global Publications, 2010).
67 SN Ray, *Judicial Review and Fundamental Rights* (Calcutta, India: Eastern Law House, 1974).
68 Dr KL Bhatia, *Judicial Activism and Social Change* (New Delhi, India: Deep & Deep Publications, 1990).
69 DJ De, *The Constitution of India*, Vol 1 (Hyderabad, India: Asia Law House, 2002).
70 1981 AIR SC 746.

made the historic observation in the case of *Seaford Court Estates Ltd v Asher*[71] as follows:

> When a defect appears, a Judge cannot simply fold his hands and blame the draftsman. He must set to work on the constructive task of finding the intention of Parliament … and then he must supplement the written word so as to give "force and life" to the intention of the legislature … A Judge should ask himself the question how, if the makers of the Act had themselves come across this ruck in the texture of it, they should have straightened it out? He must then do as they would have done. A Judge must not alter the material of which the Act is woven, but he can and should iron out the creases.

[31] The legislature can amend the Constitution to meet the ever-changing needs of the society. Nonetheless, the amendment of the Constitution should be the last resort as too frequent amendments to the Constitution will reduce its symbolic value. Therefore, judicial activism is significant, as the courts through judicial creativity can interpret the words and expressions in the Constitution in such a manner as to infuse sense into them. For such meaningful interpretation, it would be necessary that words and expressions in the Constitution are given a meaning in accordance with the advancement of time so that the Constitution may long endure and be preserved. Accordingly, judicial activism has made the Supreme Court of India into what has been called "The World's Most Powerful Court" by many commentators around the world. This is largely attributable to the development of the jurisprudence of judicial activism under Articles 32 and 226 of the Indian Constitution.[72]

[32] The continuous dynamic behavioural activism of the Supreme Court of India helps develop remarkable new jurisprudence such as the doctrine of the basic structure of the Constitution, public interest litigation, the constitutional expression of "due process" under Article 21 of the Indian Constitution and the principle of moulding of reliefs under Articles 32 and 226. The Indian judges have assumed the power to subject constitutional amendments to strict judicial scrutiny and review. They have creatively crafted the doctrine of the basic

71 [1949] 2 All ER 155.

72 SP Sathe and Sathya Narayan (eds), *Liberty, Equality and Justice: Struggles for a New Social Order* (Lucknow, India: EBC Publishing (P) Limited, 2003).

structure of the Constitution. The doctrine propounded is to the effect that there is an implied restraint on the amending power of Parliament, such that the power could not be exercised so as to destroy the basic structure of the Constitution. The courts have declared the rule of law, equality, fundamental rights, secularism, federalism, democracy and judicial review as essential features of the basic structure, which amendatory power may not ever lawfully transgress.[73]

[33] In India, judicial activism through a process known as public interest litigation has emerged as a powerful mechanism of social change. Public interest litigation means any public-spirited citizen can move or approach the court for the public interest by filing a petition in the Supreme Court under Article 32 of the Indian Constitution or in the High Courts under Article 226 of the Indian Constitution. Since the early 1980s, through the device of public interest litigation, the courts of India had interfered liberalising the concept of *locus standi* and principle of standing to file public interest litigation. In *SP Gupta and others v President of India and others*,[74] the Supreme Court of India had extremely liberalised the law of standing and is thus a revolutionary step towards freeing the substantive justice from the shackles of procedure. Thus, the courts' attention can be drawn even by writing a letter, sending a telegram or based on newspaper articles. This can be seen in cases as follows:

(a) *People's Union for Democratic Rights v Union of India*[75] – the Supreme Court received a letter from the petitioner regarding the case of violation of various labour laws in the Asiad project. The letter was considered by the court as a writ petition brought through public interest litigation.

(b) *Mohanlal Sharma v State of UP*[76] – a telegram was received by the court from the petitioner regarding the alleged death of his son in a police lockup. The telegram was registered as a writ petition by the court.

73 Randall Peerenboom (ed), *Asian Discourses of Rule of Law: Theories and implementation of rule of law in twelve Asian countries, France and the US* (New York: RoutledgeCurzon, 2004).

74 AIR 1982 SC 149.

75 AIR 1982 SC 1473.

76 (1989) 2 SCC 600.

(c) *Mukesh Advani v State of MP*[77] – the petitioner, a lawyer practising in the Supreme Court, addressed a letter by attaching the *Indian Express* newspaper dated September 14, 1982 to the Supreme Court judge depicting the horrid plight of bonded labour from Tamil Nadu working in the stone quarries at Raisen in Madhya Pradesh. The letter was considered as a writ petition.

[34] Unlike the United States Constitution, the Indian Constitution does not explicitly mention the constitutional expression of "due process" in any part of it. Nevertheless, the Supreme Court of India through judicial activism, by a process of interpretation of Article 21, had introduced the constitutional expression of "due process" in the Indian Constitution. Due process is the principle that the government must respect all of the legal right that is owed to a person according to the law. Due process holds the government subservient to the law of the land and protects individuals from the excesses of the state.[78] Article 21 of the Indian Constitution states that no person shall be deprived of his life or personal liberty except according to procedure established by law which, according to *Maneka Gandhi v Union of India*,[79] should not only be "just and right" but should also not be arbitrary, fanciful or oppressive.[80] In other words, the Supreme Court in *Maneka Gandhi*'s case had substituted the "due process" clauses in Article 21 in place of "procedure established by law".

[35] As mentioned earlier, the court can mould relief to meet the exigencies of the specific circumstances. It is within the discretion of the court to decide the appropriate remedy to be given to the petitioner for the enforcement of his fundamental rights under Articles 32 and 226. It is also called the principle of moulding of reliefs. This is another principle established through judicial activism. Under this principle, the powers of the Supreme Court as well as of the High Courts of India in Articles 32 and 226 are not confined to issuing prerogative writs only, but extend to issuing orders or directions appropriate to the circumstances, unfettered by the technicalities of the English

77 AIR 1985 SC 1363.

78 AH Hawaldar, "Evolution of Due Process in India" (2014) Oct–Dec, *Bharati Law Review* 107, http://docs.manupatra.in/newsline/articles/Upload/C64E2EB3-321D-470D-A4C8-0EE5E55BA21A.pdf (accessed on March 22, 2021).

79 AIR 1978 SC 597.

80 BR Sharma, *Constitutional Law and Judicial Activism* (New Delhi, India: Ashish Publishing House, 1990).

"prerogative writs".[81] The Supreme Court and the High Courts also can make orders such as declaration, injunction or damages if that be the proper relief under Articles 32 and 226. Moreover, the Supreme Court and the High Courts also have the power to issue general directions, including laying down general guidelines having the effect of law to fill the vacuum till such time the legislature steps in to fill in the gap by making the necessary law.

[36] All these examples illustrate the development of new jurisprudences as a result of judicial activism. Thus, judicial activism allows the court to play a fundamental role in protecting fundamental rights through judicial creativity. Nevertheless, there is a great need for caution while expanding the parameters of judicial activism as judicial excess will disturb the balance of powers enshrined in the Constitution, and jeopardize the independence of the judiciary.[82] The courts have neither the expertise nor resources to take over the functions of the executive. If the court becomes a judicial dictator, it is a concern that action may be taken.[83] Accordingly, in the case of *Duport Steel Ltd v Sirs*[84] the court warned that if judges exercise their powers exceeding their proper judicial role, Parliament might respond by cutting down the power of the judiciary. Certainly, it can lead to conflict or controversy between the judiciary and the legislature. Judges must know their limits and must not try to run the government. Although judicial activism is a dynamic process of judicial outlook in a changing society, it should not amount to "judicial tyranny".

Impacts of reviewing power

[37] The provisions of remedies for the enforcement of fundamental rights under Articles 32 and 226 of the Indian Constitution empower the Supreme Court and the High Courts to enforce the fundamental rights provided for under Part III of the Indian Constitution. The court can mould relief to meet the exigencies of the specific circumstances. It is in the discretion of the court to decide the appropriate remedy

81 K Subba Rao, *Some Constitutional Problems: Sir Chimanlal Setalvad Law Lectures* (India: University of Bombay, 1970).

82 VR Krishnan Iyer, *A Constitutional Miscellany* (India: Eastern Book Company, 1986).

83 BL Hansaria, *Right to Life and Liberty under the Constitution (A Critical Analysis of Article 21)* (Bombay, India: NM Tripathi Private Ltd, 1993).

84 [1980] 1 All ER 529.

to be given to the petitioner for the enforcement of his fundamental rights. The courts are also entrusted with the power to review the constitutionality of legislative or executive acts in cases of infringement of fundamental rights. In fact, the continuous dynamic behavioural activism of the Supreme Court of India helps develop various remarkable new jurisprudences which enable the courts to play a fundamental role in protecting fundamental rights through judicial activism. The courts, as the guardian of the Constitution, can safeguard the fundamental rights with these powers. Consequently, fundamental rights thus receive effective protection.

[38] However, the government often considers that these powers hamper socio-economic development as there have been legislations or executive actions intended to promote socio-economic development which were reviewed by the Indian courts on the ground of violation of fundamental rights. Historically, the case of *Golaknath v State of Punjab*[85] ("*Golaknath*"), which was decided in 1967 (during the term of former Prime Minister Indira Gandhi), was the culmination of a serious conflict between the judiciary and the executive, where the Supreme Court had denied the legislature's right to amend the Constitution to take away or abridge fundamental rights. Subsequently, the executive through the legislature amended the Indian Constitution to limit the judicial powers, and the then Prime Minster Indira Gandhi denounced judges and their judgments in her effort to bend the judiciary to her power between 1966 and 1977. This is one of the critical controversies between the judiciary and the legislature and executive that has happened in India.

(a) Constitutional safeguard of fundamental rights

[39] The provisions of remedies for the enforcement of fundamental rights under Articles 32 and 226 of the Indian Constitution empower the Supreme Court and the High Courts to enforce the fundamental rights provided for under Part III of the Indian Constitution. Therefore, any legislation or executive action intended to promote socio-economic development which take away or abridge the fundamental rights can be reviewed by the courts on the ground of violation of fundamental rights. Nevertheless, the government often considers that these powers are obstructing socio-economic development, and therefore, takes drastic measures by amending the Indian Constitution to circumvent

85 AIR 1967 SC 1643.

the decision as well as limiting the judicial powers. Thus, it is an abuse of power if the legislature circumvents the court's decision by amending or introducing a new law or a constitutional amendment.[86]

[40] The courts, by examining the constitutionality of legislative or executive action, are merely discharging the function provided for by the Constitution as the Constitution is the supreme law of the land. If the legislation or the executive action has exceeded the jurisdiction provided by the Constitution, or attempts to infringe the fundamental rights in a manner not justified by the relevant provisions of the Constitution, the judiciary is required to step in to protect the fundamental rights and call upon the legislature or the executive to act within its sphere according to the provisions of the Constitution.[87] Hence, effective protection of fundamental rights requires a robust system of judicial review. The courts, as guardians of the Constitution, can effectively safeguard fundamental rights with their broad powers under Articles 32 and 226 of the Indian Constitution.

[41] The judiciary is the weakest institution in comparison to the legislature and the executive. The judiciary only serves to interpret the law. It does not have the power to enforce or legislate the laws. It may truly be said that the judiciary has neither force nor will, but merely judgment. The reasons for providing the power to the judiciary is because the judiciary from the nature of its function, will always be the least dangerous to the political rights of the Constitution as it will be least in a capacity to annoy or injure them. It seems that in a power struggle between the judiciary and the legislature, the former is always bound to lose.[88] If the court's decision is not in their favour, the government through Parliament can amend any of the provisions of the Constitution to override the effect of a judicial decision. Under such circumstances, there can be no constitutional democracy without an effective and powerful judiciary.

[42] The role of the courts in the protection of fundamental rights set out in Part III of the Indian Constitution warrants a robust position.

86 VG Ramachandran, *Fundamental Rights and Constitutional Remedies*, Vol II (Lucknow, India: Eastern Book Company, 1959).

87 PB Gajendragadkar, *Tagore Law Lectures: The Indian Parliament and the Fundamental Rights* (Calcutta, India: Eastern Law House, 1972).

88 Hari Chand, *The Amending Process in the Indian Constitution* (New Delhi, India: Metropolitan Book Co (Private) Ltd, 1972).

The courts must have strong powers to review the constitutionality of legislative or executive action if fundamental rights are to have meaning. Fundamental rights are indeed protected by such vast powers. The broad and liberal interpretation of the Constitution adopted by the courts allow them to exercise judicial activism under Articles 32 and 226 of the Indian Constitution in safeguarding the fundamental rights. For example, the courts through judicial activism had creatively crafted the doctrine of the basic structure of the Constitution. The doctrine propounded is to the effect that there is an implied restraint on the amending power of Parliament, such that the power could not be exercised so as to destroy the basic structure of the Constitution. The courts have declared fundamental rights as an essential feature of the basic structure, which amendatory power may not ever lawfully transgress.[89]

[43] Under the Ninth Schedule to the Indian Constitution, the central and state laws included in the Ninth Schedule cannot be challenged in court even if they violate the fundamental rights. The Ninth Schedule became a part of the Indian Constitution in 1951. It was created by the new Article 31B of the Indian Constitution. However, after the landmark judgment of *Kesavananda Bharati v State of Kerala*[90] ("*Kesavananda*"), it is now well established that although there is a constitutional validity of such laws and government is entitled to place any law in the Ninth Schedule, these laws are also prone to judicial scrutiny if they do not comply with doctrine of basic structure established in the *Kesavananda Bharati* case. This can be observed in the following cases:

(a) *Waman Rao v Union of India*[91] – it was held that while all additions to the Ninth Schedule up to the date of *Kesavananda* were not open to challenge, additions made subsequent to the date of *Kesavananda* were open to challenge on the ground that they offended the basic structure of the Constitution.

(b) *Indira Gandhi v Raj Narain*[92] – Justice Khanna struck down the provision introduced into the Constitution to immunise the election of Indira Gandhi on the ground that the amendment

89 Lawrence Ward Beer (ed), *Constitutionalism in Asia: Asian Views of the American Influence* (California: University of California Press, 1979).
90 AIR 1973 SC 1461.
91 AIR 1981 SC 271.
92 AIR 1975 SC 2299.

was a negation of an essential feature of democracy and therefore offensive to the basic structure of the Constituton.

(c) *Minerva Mills Ltd v Union of India*[93] – one of the questions which came up for consideration was whether clauses (4) and (5) of Article 368 introduced by section 55 of the Constitution (Forty-second Amendment) Act 1976 were valid. Clause (4) sought to immunise all amendments of the Constitution made pursuant to the power under Article 368 and clause (5) declared that there was no limitation to the constituent power of Parliament under Article 368. The court struck down clauses (4) and (5) of section 55 of the Constitution (Forty-second Amendment) Act 1976.

(d) *IR Coelho v State of Tamil Nadu*[94] – the Supreme Court held that every addition to the Ninth Schedule subsequent to *Kesavananda* had to satisfy the requirement that it did not offend the basic structure of the Constitution.

[44] Judicial review powers under Articles 32 and 226 is one of the checks and balances in the separation of powers, and the judges through judicial review will keep the executive and legislative branches within their constitutional limits. If the legislative or the executive action has exceeded the constitutional limits or infringed the fundamental rights, the judiciary is required to step in to protect the fundamental rights. The former Prime Minister Indira Gandhi once stated that as long as she had a majority in Parliament and following the prescribed procedure, she could declare emergency at any time, extend the life of Parliament to a full hundred years, amend the Constitution in any manner she liked, and she could not be questioned as long as she had the majority in Parliament.[95] Similarly, Jawaharlal Nehru while holding the post of Prime Minister had warned the court not to hinder the government's plan to abolish the Zamindari system. He said that the Parliament was supreme and that the courts could not interfere with such social reform measures.[96] Those two statements suggest that the government can act at will, without any control. Therefore, the courts

93 AIR 1980 SC 1789.

94 AIR 2007 SC 861.

95 Rajeev Dhavan & Alice Jacob (eds), *Indian Constitution Trends and Issues* (Bombay, India: NM Tripathi Private Ltd, 1978).

96 Mr Justice PB Mukharji, *The Critical Problems of the Indian Constitution* (Bombay, India: University of Bombay, 1967).

must have strong powers to review the constitutionality of legislative or executive action under Articles 32 and 226, so that the court will be able to protect fundamental rights without fear or favour.

(b) Controversy between the judiciary and the executive and the legislature

[45] In India, most of the controversy that arises between the executive (government) and the judiciary (court), is with regard to the right to property and the action of the government to deny the power of judicial review of the court through amendments to the Constitution. Historically, the *Golaknath* case which decided in 1967 (during the term of former Prime Minister Indira Gandhi) was the culmination of a serious conflict between the court and the government, where the Supreme Court had denied the Parliament's right to amend the Constitution to take away or abridge the fundamental rights. Subsequently, the government through the Parliament amended the Indian Constitution to limit the judicial powers, and the then Prime Minster Indira Gandhi denounced judges and their judgments in her effort to bend the courts to her power between 1966 and 1977.

[46] Prior to *Golaknath*, the government often considered that the courts were hampering socio-economic development, agricultural reform and urban and rural planning as there were legislations or executive actions intended to promote socio-economic development such as laws abolishing Zamindari, abolition of intermediary interests in agricultural land and requisition of urban property, which were reviewed by the courts of India on the ground of violation of fundamental rights. In *Kameswar Prasad v Province of Bihar*,[97] the High Court had struck down the Zamindari Abolition Acts on the ground that they violated the right to property and other fundamental rights guaranteed by the Constitution. As a result of the decision, the government of India through Parliament amended the Constitution by introducing the new Article 31B. It conferred complete immunity to the legislations included in the Ninth Schedule from being reviewed by the court for the purpose of confirming the laws abolishing Zamindari.[98] The

97 AIR (38) 1951 Patna 246.

98 Mangal Chandra Jain Kagzi, *The Kesavananda's Case: An analysis of the just reported case, namely, His Holiness Kesavananda Bharati v State of Kerala, Writ Petition No 135 of 170* (Delhi, India: Metropolitan Book Co Private Ltd, 1973).

new Article 31B was subsequently used and continues to be used to prevent challenge to many legislations made by the Centre and the states by including them in the Ninth Schedule.

[47] The amendment limited the jurisdiction of the courts under Articles 32 and 226. This resulted in a controversy between the court and the government. Since then, the relationship between the court and the government has remained unchanged. Worse still, the Supreme Court in the case of *State of West Bengal v Mrs Bella Banerjeee*[99] had interpreted Article 31(2) of the Indian Constitution with the view that the law seeking to provide for acquisition of private property for public purpose had to provide for compensation which must be a "just equivalent" of what the owner had been deprived. As the decision was likely to lead to impossible situations, the government through Parliament amended Article 31(2) of the Indian Constitution by providing that no law for compulsory acquisition shall be called in question in any court on the ground that the compensation provided by that law was not adequate. The amendment also provided that the legislation itself would have to provide compensation for the property and should either set the amount of compensation or state the principles on which and the manner in which the compensation should be determined and given.[100]

[48] This controversy culminated in the decision of *Golaknath*[101] where the Supreme Court, by a majority, denied Parliament the right to amend the Constitution to take away or abridge a fundamental right. One commentator has described the *Golaknath* case as the case that began the "great war" between the Parliament and the courts. Technically, the decision did not invalidate the amendments in question, as the court issued a prospective judgment essentially putting Parliament on notice that the days of its amendatory interference with fundamental rights were over.[102] Later, in 1973, the Supreme Court in the case

99 AIR 1954 SC 170.

100 Rajeev Dhavan, *The Supreme Court of India and Parliamentary Sovereignty: A Critique of its approach to the recent Constitutional Crisis*, 1st edn (New Delhi, India: Sterling Publishers Pvt Ltd, 1976).

101 See n 85 above.

102 Gary Jeffrey Jacobsohn, "An Unconstitutional Constitution? A Comparative Perspective" (2006) 4(3) *International Journal of Constitution Law* 460, available online at http://heinonline.org.www.ezplib.ukm.my/ (accessed on December 22, 2014).

of *Kesavananda*[103] overruled the *Golaknath* decision and upheld the amendments abrogating fundamental rights, but it also laid down a much broader restriction on the power of amendment in which the basic structure of the Constitution could not be amended. Although the *Golaknath* case was overruled and Parliament can amend the Constitution on fundamental rights, the courts have assumed the power to strike down the amendments to the extent to which they destroy the basic structure of the Constitution. In fact, the *Golaknath* case is not dead, but has received another layer of constitutional protection.

[49] The reaction of government to this decision was dramatic. Following the judgments in *Kesavananda,* three senior most judges (Justices Shelat, AN Grover and KS Hegde) were superseded and their junior, Justice AN Ray, was appointed Chief Justice of India.[104] The appointment was made on April 25, 1973, a day after the Supreme Court's judgment in the *Kesavananda* case, where a 13-judge constitution bench, by a 7-6 verdict, had enunciated the basic structure doctrine of the Constitution. While Justice AN Ray was among the six dissenting judges in the case, Justices Shelat, Hegde and Grover, whom he had superseded, were on the side of the majority.[105] The government had also intervened in the question of the transfer of judges. During the emergency of 1975, 16 judges of the High Court were transferred from one High Court to another. There was a general belief that the government had taken this punitive action to punish those judges who had dared to make a judgment against the government. Article 222 of the Indian Constitution empowers the President to transfer a judge from one High Court to another after consulting the Chief Justice of India.[106] Parliament is also empowered by law to regulate the conditions of

103 See n 90 above at 1535. Justice Sikri stated that:

> The true position is that every provision of the Constitution can be amended provided in the result the basic foundation and structure of the constitution remains the same.

104 Upendra Baxi, *The Indian Supreme Court and Politics* (Lucknow, India: Eastern Book Company, 1980).

105 "Two hours given to Justice AN Ray to decide on CJI post?", *The Economic Times*, July 16, 2018, available at https://economictimes.indiatimes.com/news/politics-and-nation/two-hours-given-to-justice-a-n-ray-to-decide-on-cji-post/articleshow/65007659.cms? (accessed on March 22, 2021).

106 MP Jain, *Indian Constitutional Law*, 4th edn (Bombay, India: NM Tripathi Private Ltd, 1987).

service relating to leave, pension and other privileges and allowances of the Supreme Court and the High Court judges.[107]

[50] The intervention of the government in the matter of the appointment of the Chief Justice and the transfer of judges of the High Court, was viewed as an attack on the independence of the judiciary. It has had an impact on the government's relationship with the courts. The controversy continued when Prime Minister Indira Gandhi was barred from her post for six years after being found guilty of election corruption by the Allahabad High Court in 1975. There was a demand for her resignation and, in response, she declared a state of emergency throughout India, imprisoned political opponents, and restricted personal freedom in the country. Then, the government amended the Constitution to undo the decision of the Allahabad High Court. This constitutional amendment provided that the election of the Prime Minister and the Speaker could not be questioned in any court of law; it could only be challenged before a committee formed by the Parliament.[108] The amendment not only reversed the judgment of the Allahabad High Court, but immunised the election of Prime Minster Indira Gandhi.

[51] In 1976 came the forty-second amendment. By the forty-second amendment, Article 226 of the Indian Constitution was completely mutilated. The removal of the words "for any other purpose" in Article 226 could appear to curtail individual freedom and making it impossible for a citizen to protect himself against misuse of bureaucratic power. Moreover, the jurisdiction and powers of the Supreme Court and the High Courts have been considerably diminished. The Supreme Court was barred from adjudicating on the vires of state acts, while the High Courts were barred from pronouncing on the constitutional validity of Central legislations. The requirement of the special majority of the courts in determining the constitutional validity of central and state laws has been imposed. Finally, the amending provision of Article 368 was itself amended and it provided that no amendment of the Constitution shall be called in question in any court and there shall

107 Dr Subhash C Kashyap (ed), *Practice and Procedure of Parliament (With particular reference to Lok Sabha)*, 4th edn (New Delhi: Metropolitan Book Company, 1991).

108 CC Aikman, "The Debate on the amendment of the Indian Constitution" (1978) 9 *Victoria University of Wellington Law Review* 357, available online at http://heinonline.org.www.ezplib.ukm.my/ (accessed on December 22, 2014).

be no limitation on the constituent power of Parliament to amend the Constitution.[109] This forty-second amendment significantly curtails the judicial power of the Supreme Court and the High Courts. This further complicates the government's relations with the courts. Although the government frequently amends the Constitution through Parliament to overturn the courts' decisions, the courts are still seeking ways to defend its judicial review powers.

Conclusion

[52] The language used in Articles 32 and 226 of the Indian Constitution is very broad. The powers of the Supreme Court and the High Courts extend to the issuance of orders, writs or directions as deemed necessary for the enforcement of fundamental rights, and in the case of the High Courts, for other purposes as well. The courts, as guardian of the Constitution, can safeguard the fundamental rights effectively with the vast powers conferred on it under Articles 32 and 226 of the Indian Constitution. However, the government often considers that these powers hinder socio-economic development and have an impact on the government's relationship with the court. It seems that in a power struggle between the court and Parliament and the government, the government and Parliament will enormously gain in power and the court is always bound to lose. The courts are the weaker institution than Parliament or the government. Therefore, Parliament and the courts need to exercise their power wisely, taking into account the impact of their decisions on the policies of the Indian Constitution. The solution to this strained relationship is that the government and Parliament should respect the courts as an independent and authoritative institution and there is no question of challenging, modifying or reducing the power of the courts, while the court does not decide on political, social and economic matters because it is in the power of the government and Parliament to decide on such matters.

109 See n 95 above at pp 59, 60, 65.

Mapping Uncharted Waters: Restitution for Indirect Benefits under Section 71 of the Contracts Act 1950

by

*Low Weng Tchung**

I. Introduction

[1] In *Fibrosa Spolka Akcyjna v Fairbairn Lawson Combe Barbour Ltd*,[1] Lord Wright in a famous passage observed that:

> It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep.[2]

[2] As a matter of policy, the law of restitution and unjust enrichment is based on the brocard "*nemo debet locupletari jactura aliena*": a man is not to enrich himself at the cost of another.[3] Unjust enrichment is like an elephant. It is difficult to describe, but you know it when you see it.

[3] Generally speaking, under Malaysian law a plaintiff desirous of bringing a claim for restitution to reverse an unjustified enrichment has the benefit of two separate and distinct causes of action. On the one hand, a claim may be brought based on the statutory restitutionary provisions of the Contracts Act 1950 [*Act 136*], in particular sections

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1 [1943] AC 32, HL.

2 Ibid, at p 61.

3 *Sinclair v Brougham* [1914] AC 398, HL at 434, *per* Lord Dunedin; *Morgan Guaranty Trust Co of New York v Lothian Regional Council* 1995 SC 151, CoS at 155, *per* Lord President Hope; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* 1998 SC (HL) 90, HL at 98, *per* Lord Hope of Craighead; *Banque Financière de la Cité v Parc (Battersea) Ltd and others* [1999] 1 AC 221, HL at 237, *per* Lord Clyde.

65, 66, 69 to 73 therein.[4] On the other hand, a claim may be brought at common law, following the groundbreaking 2015 decision of the Federal Court in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd*[5] ("*Dream Property*"), where the Federal Court authoritatively recognised a cause of action in unjust enrichment, which arises where a defendant has been enriched at the expense of a plaintiff and it would be unjust for the defendant to retain the enrichment in question. In doing so, the Federal Court expressly departed from English law by adopting the "absence of basis" approach of the Civilian and mixed law systems in determining whether an enrichment is "unjust".[6]

[4] Where a plaintiff, in the absence of any pre-existing contractual or legal liability towards the defendant, does or delivers any thing for or to the defendant not intending to do so gratuitously, and which results in a benefit or a realisable benefit to the defendant, the plaintiff may in certain cases be entitled to claim restitution from the defendant, in the form of reasonable remuneration or restitution for the value of the thing so done or delivered. Under the Contracts Act 1950, the right to restitution in such cases is recognised and contained in section 71 thereof, which provides as follows:

> 71. *Obligation of person enjoying benefit of non-gratuitous act*
>
> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.
>
> *ILLUSTRATIONS*
>
> (a) *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them.
>
> (b) *A* saves *B*'s property from fire. *A* is not entitled to compensation from *B*, if the circumstances show that he intended to act gratuitously.

[5] This article seeks to examine a series of relatively recent Court of Appeal decisions which have raised several important issues on the

4 The corresponding provisions under the Indian Contract Act, 1872 are ss 64, 65, 68 to 72.

5 [2015] 2 MLJ 441, FC.

6 See generally, Low Weng Tchung, *The Law of Restitution and Unjust Enrichment in Malaysia* (LexisNexis, 2015), paras [2.79]–[2.97].

proper interpretation of section 71 of the Contracts Act 1950, which merit closer examination. In particular, these decisions deal with a controversial area of the law of restitution and unjust enrichment, namely third-party enrichment situations where a defendant has benefited from works done or services performed by a plaintiff pursuant to a contract to which the defendant is not a party. In such circumstances, the question is whether the plaintiff, the contractual party who performed the services, may "leap-frog" its immediate contractual counterparty to claim for restitution against the defendant who is said to have ultimately benefited from the work done or services rendered.

II. Overview of Section 71 of the Contracts Act 1950

[6] In Malaysia, the leading authority on section 71 of the Contracts Act 1950 is the decision of the Privy Council in *Siow Wong Fatt v Susur Rotan Mining Ltd & Anor*[7] ("*Siow Wong Fatt*"). In that case, the Privy Council held that four conditions must be satisfied to establish a claim under section 71:

> The doing of the act or the delivery of the thing referred to in the section:
>
> (1) must be lawful;
>
> (2) must be done for another person;
>
> (3) must not be intended to be done gratuitously;
>
> (4) must be such that the other person enjoys the benefit of the act or the delivery.

[7] The Privy Council in *Siow Wong Fatt* observed that it was of "fundamental importance" that the four conditions above must be answered at the time that the act is done or the thing delivered.[8]

[8] The Supreme Court in *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)*[9] ("*New Kok Ann*")

7 [1967] 2 MLJ 118; [1967] 2 AC 269, PC.

8 [1967] 2 MLJ 118 at 120. Similarly, in *AV Palanivelu Mudaliar v Neelavathi Ammal* AIR 1937 PC 50; (1937) 1 Madras LJ 719, the Privy Council observed of s 70 of the Indian Contract Act, 1872 (the equivalent of s 71 of the Contracts Act 1950) that "the question of whether compensation should, or should not, be awarded must depend upon the intention of the appellant *at the time* of his doing the thing for which he demands the compensation."

9 [1987] 2 MLJ 57, SC.

remarked that where section 71 of the Contracts Act 1950 applies "it was only necessary to consider whether the four conditions referred to by their Lordships in the Privy Council case of *Siow Wong Fatt v Susur Rotan Mining Limited and Another* have been satisfied to establish the plaintiff 's claim under that section." A similar approach was adopted by the Federal Court in the recent decision of *Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan LH Fong)*,[10] where the Federal Court only referred to and applied *Siow Wong Fatt* in considering the claim before it based on section 71.

[9] Generally speaking, the Malaysian courts have not faced difficulty in applying the provisions of section 71 and *Siow Wong Fatt* to the facts of a given case. Indeed, it is a testament to the authority of and the respect accorded by the courts to the judgment of the Privy Council in *Siow Wong Fatt*, that the "four-conditions" test laid down therein has hitherto been faithfully followed and applied by the courts without much discussion or analysis.[11]

[10] Claims under section 71 have been allowed in a wide variety of situations where the defendant has enjoyed the benefit of anything lawfully done or delivered by the plaintiff, which was not intended to be done gratuitously, and whether or not the thing was done or delivered without prior request from the defendant.[12] Section 71 has even been invoked to allow a contract breaker to obtain restitution, which to date is generally speaking not allowed under English law.[13]

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10 [2017] 5 MLJ 273, FC.

11 It is thus both very surprising and disappointing to note that *Siow Wong Fatt* is neither discussed nor considered, not even warranting so much as a footnote, in *Pollock & Mulla*, the leading textbook on the Indian Contract Act, 1872: see for example N Bhadbhade (ed), *Pollock & Mulla, The Indian Contract and Specific Relief Acts*, 14th edn (2013).

12 See e.g. *New Kok Ann* (n 9 above); *AV Palanivelu Mudaliar v Neelavathi Ammal* (n 8 above); *Kumpulan Teknik Sdn Bhd v Murad Hashim Communication Sdn Bhd* [2012] 8 MLJ 573; [2012] 6 CLJ 80; *Poomani v Associated Finance Corporation Sdn Bhd* [1975] 1 MLJ 277; *The Perak Iron Mining Co Ltd v Chong Voon Kim* [1962] 1 MLJ 270, FMS CA; *Kuan Leong Hin v The State of Johore* [1941] 1 MLJ 231; [1941] FMSLR 213.

13 See e.g. *Lal Dutt Sarkar v Dhirendra Nath Roy and others* (1943) LR 70 IA 18; AIR 1943 PC 24; (1943) 1 Madras LJ 514, PC at 596. See also the Court of Appeal decision in *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2013] 6 MLJ 836, CA, where the Court of Appeal (by a majority) invoked s 71 to grant restitutionary remedies to a contract breaker where a contract was terminated for breach. However, the Court of Appeal's application of s 71 of the Contracts Act 1950 was reversed by the Federal Court, who instead decided the appeal based on the common law principle of unjust enrichment: see *Dream Property* (n 5 above).

[11] However, recovery under section 71 has been denied by the courts in situations where remuneration or compensation for the benefit conferred by the plaintiff upon the defendant is governed by the express terms and conditions of a valid and binding contract between the parties.[14] As the Court of Appeal observed in *Pembinaan SPK Sdn Bhd v Jalinan Waja Sdn Bhd*,[15] section 71 of the Contracts Act 1950 cannot be interpreted as providing a relief not intended by the parties.

[12] The position is the same at common law, as the law of restitution and unjust enrichment cannot be utilised so as to override, subvert or defeat the terms of any contract between the parties, especially where such contract has made express provision as to the allocation of risk between the parties. Generally speaking, in the absence of any vitiating factors such as fraud, duress or misrepresentation resulting in any agreement being avoided *ab initio*, and where the agreement has not been frustrated due to impossibility of performance, the agreement between the parties should not be disturbed, and the courts should not invoke the law of restitution and unjust enrichment to redistribute risks which have been allocated by the mutual agreement of the parties. This is indeed settled law.[16]

III. "Leapfrogging" and third-party enrichment: The nature of the problem

[13] Difficulties arise, however, in cases where a defendant is the *indirect* albeit ultimate recipient of a benefit conferred by the plaintiff

14 See e.g. *Kerajaan Malaysia v Ken Reach Builder Sdn Bhd* [2020] MLJU 1940, CA; *Sunissa Sdn Bhd v Kerajaan Malaysia & Anor* [2020] MLJU 283, HC. The Indian Supreme Court has held that the corresponding s 70 of the Indian Contract Act, 1872 cannot apply where there is a valid and binding contract between the parties: *Mahanagar Telephone Nigam Ltd v Tata Communications Ltd* AIR 2019 SC 1233.

15 [2014] 2 MLJ 322, CA.

16 *Kosbina Konsult (K) Sdn Bhd (in liquidation) v Madu Jaya Development Sdn Bhd* [2019] 3 MLJ 471, CA at [34], approving Low (n 6 above), paras [2.26] and [2.27]. See also *Aneka Melor Sdn Bhd v Seri Sabco (M) Sdn Bhd & Another Appeal* [2016] 2 CLJ 563, CA; *Pan Ocean Shipping Ltd v Creditcorp Ltd; The Trident Beauty* [1994] 1 All ER 470, HL; *Dollar Land (Cumbernauld) Ltd v CIN Properties Ltd* (n 3 above); *MacDonald Dickens & Macklin (a firm) v Costello and others* [2012] QB 244, CA (Eng); *Alwie Handoyo v Tjong Very Sumito and another* [2013] 4 SLR 308, CA (Sing); *Shanghai Tongji Science & Technology Industrial Co Ltd v Casil Clearing Ltd* (2004) 7 HKCFAR 79, HKCFA; *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1, HCA; *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 247 ALR 412, HCA.

discharging an obligation pursuant to a contract with a third party. Does section 71 of the Contracts Act 1950 permit the plaintiff to claim against the defendant, *dehors* the contract with said third party, for restitution of the value of the benefit enjoyed by the defendant?

[14] To be clear, it is immaterial that there is no contractual relationship between the plaintiff and the defendant in such a scenario, as "Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship but who has nevertheless received the benefit of the Appellant's lawful act which was never intended to be done gratuitously."[17] The controversy here is not so much that the defendant does not stand in contractual relation to the plaintiff. Rather, it is that the benefit received by the defendant was pursuant to the plaintiff's discharge of a contractual duty or obligation that the plaintiff owed to a *third party*, for which the duty of payment or remuneration was expressly allocated to that third party. In particular and more importantly, the plaintiff can be said to have assumed the risk of *non-payment* by the third party under the said contract. In such a case, the plaintiff is effectively attempting to "leapfrog" the contract with the third party to bring a restitutionary claim against the defendant.

[15] If the law is to recognise claims in restitution for benefits conferred upon indirect recipients, there is a real need to avoid conflict with any valid and subsisting contract(s), as these may have serious unintended consequences, both as a matter of principle and commercial reality. For example, suppose that *A* and *B* enter into a contract to construct a bungalow. *B* then subcontracts the construction works to *C*, and the bungalow is completed by *C*. Under the subcontract, *B* is obliged to pay for the works or services done by *C*. However, *B* is wound up without making payment to *C*. *A* enjoys the benefit of the bungalow constructed. If *C* is allowed to "leapfrog" *B* and claim for restitution from *A*, this will have the effect of disregarding or undermining the contractual allocation of risk between *B* and *C*, and will effectively redistribute the risk of *B*'s insolvency to *A*. The injustice to *A* may

17 *Kraas Solutions Sdn Bhd v Konsesi Kota Permatamas Sdn Bhd* [2018] 9 CLJ 26; [2018] 6 MLJ 202, CA at [64]. See also *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* [2015] 9 CLJ 1002, CA at [32]; *Fordeco Construction Sdn Bhd v Wong Sin Ten* [2008] MLJU 1083; [2008] 1 LNS 854 at [44].

be compounded where *A* had in fact already made payment to *B* in respect of the same benefit which *C* is now claiming, which may potentially result in *A* having to pay for the same thing twice over, even though *A* did not agree to assume the legal risk of non-payment by *B* under any subcontract. These are policy considerations to which we shall return below.

[16] The courts in major common law jurisdictions have consistently denied recovery in such cases. In *MacDonald Dickens & Macklin (a firm) v Costello and others*[18] ("*MacDonald Dickens*"), the English Court of Appeal held that the general rule is that restitutionary relief for unjust enrichment is not available against a defendant who had benefited from the claimant's services rendered pursuant to a contract to which that defendant was not a party. In that case, the claimant builders had entered into an agreement with a company owned by one Mr and Mrs Costello ("Costellos") to construct several houses on the Costellos' land. The Costellos had informed the claimant that they were using their company to make the contract with the claimant for tax reasons. The claimant sought to claim for restitution against the Costellos in respect of unpaid invoices submitted for works done by the claimant. The Court of Appeal held that although the Costellos had been enriched by the work carried out on their property by the claimants, since the claimants with full knowledge of the facts had entered into the contract with the company only and not with the Costellos, the claim for restitution against the Costellos could not succeed. According to the English Court of Appeal:[19]

> [T]he unjust enrichment claim against Mr and Mrs Costello must fail because it would undermine the contractual arrangements between the parties, that is to say, the contract between the claimants and Oakwood and the absence of any contract between the claimants and Mr and Mrs Costello. The general rule should be to uphold contractual arrangements by which parties have defined and allocated and, to that extent, restricted their mutual obligations, and, in so doing, have similarly allocated and circumscribed the consequences of non-performance. That general rule reflects a sound legal policy

18 See n 16 above.

19 Ibid, at p 251. *MacDonald Dickens* was approved by the UK Supreme Court in *Investment Trust Companies v Revenue and Customs Commissioners* [2017] UKSC 29; [2018] AC 275 at [51].

> which acknowledges the parties' autonomy to configure the legal relations between them and provides certainty, and so limits disputes and litigation.

[17] Similarly, in *Lumbers v W Cook Builders Pty Ltd*[20] ("*Lumbers*"), the appellant entered into a contract with one W Cook & Sons for the latter to design and build a house for him. Unbeknownst to the appellant, the said W Cook & Sons had subcontracted a related company, W Cook and Builders, to complete the house. W Cook and Builders then went into liquidation and sought to bring a *quantum meruit* claim against the appellant for the value of works done in completing the house. The High Court of Australia unanimously rejected W Cook and Builders' claim for restitution on the ground that the contractual matrix between W Cook & Sons and W Cook and Builders precluded the latter's claim.[21]

[18] In such situations, recovery is denied at common law on the basis that the defendant's enrichment in question is regarded as not being "at the expense" of the claimant, as there is no *direct* transfer of value between the defendant and the claimant. In the UK Supreme Court decision of *Investment Trust Companies v Revenue and Customs Commissioners*,[22] ("*Investment Trust*") which is the most recent authoritative decision on the subject-matter, Lord Reed (as he then was) observed:

> Where, on the other hand, the defendant has not received a benefit directly from the claimant, no question of agency arises, and the benefit does not consist of property in which the claimant has or can trace an interest, it is generally difficult to maintain that the defendant has been enriched at the claimant's expense. The point is illustrated by the case of *MacDonald Dickens & Macklin v Costello* [2012] QB 244, where the provision of services to a company was held not to enrich its directors and shareholders. [23]

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20 See n 16 above.

21 See also *Mann v Paterson Constructions Pty Ltd* (2019) 373 ALR 1, HCA; *Ew Sang Hong Ltd v Hong Kong Housing Authority* [2008] HKCA 109; [2008] 3 HKC 290. See however *Wee Chiaw Sek Anna v Ng Li-Ann Genevieve* [2013] 3 SLR 801 at [158], where the Singapore Court of Appeal refrained from suggesting there was an absolute rule against leapfrogging, although on the facts the court held that there was no enrichment at the expense of the appellant.

22 See n 19 above.

23 Ibid, at [51].

[19] The issue of "leapfrogging" and third-party enrichment is one that has generated much academic debate in the common law world.[24] However, and with respect to the spirited views of the learned authors, it appears that apart from the limited exceptions recognised by the UK Supreme Court in the *Investment Trust* case above, *vis* direct transfers, agency and tracing of proprietary rights, it is unlikely that the courts will recognise or allow "leapfrogging" claims for unjust enrichment at common law. Indeed, the English Court of Appeal in the recent decision of *Leibson Corporation and others v TOC Investments Corporation and others*[25] emphasised "the need to avoid any conflict with contracts between the parties, and in particular to prevent 'leapfrogging' over an immediate contractual counterparty in a way which would undermine the contract".

[20] For completeness, although under Malaysian law the courts now adopt the "absence of basis" test to determine whether an enrichment is "unjust", English law will still be applicable, or in any event highly persuasive, in determining whether a defendant's enrichment is "at the expense" of the plaintiff. Based on the authorities referred to above, it appears unlikely that leapfrogging would be allowed in an unjust enrichment claim under Malaysian common law.

IV. Incidental benefits

[21] For the avoidance of doubt, we are not here talking about a situation where a plaintiff who acts in his own self-interest confers an *incidental* benefit on a defendant. This can be illustrated by the well-known example taught to students of the law of restitution and unjust enrichment: suppose a plaintiff who lives in an apartment switches

24 See e.g. Andrew Burrows, "At the Expense of the Claimant: A Fresh Look" (2017) *Restitution Law Review* 167; Andrew Burrows, "Narrowing the Scope of Unjust Enrichment" (2017) 133 LQR 537; Hendrik LE Verhagen, "The Policies against Leapfrogging in Unjust Enrichment: A Critical Assessment" (2018) *Edinburgh Law Rev* 55; E Ball, *Enrichment at the Claimant's Expense: Attribution Rules in Unjust Enrichment* (2016); Paul Davies, "No Leapfrogging of Contract in Unjust Enrichment" [2012] 71 *Cambridge Law Journal* 37; Alvin WL See, "Contract, Unjust Enrichment and Leapfrogging" (2012) *Restitution Law Review* 125; Robert Williams, "Three Quarrelling Parties, Two Oral Contracts and a Claim in Restitution" (2010) *Restitution Law Review* 51; Amy Goymour, "Too Many Cooks: Three Parties, Contracts and Unjust Enrichment" [2008] 67 *Cambridge Law Journal* 469; James Edelman, "Unjust Enrichment and Contract" (2008) LMCLQ 444.

25 [2019] 2 BCLC 381 at [62].

on his central heating; the heat rises and warms the defendant's apartment unit directly above the plaintiff, thereby conferring an incidental benefit upon the defendant. Can the plaintiff claim for restitution against the defendant? The answer is a resounding "no". In such a case, recovery is denied at common law on the basis that the defendant's enrichment was not at the expense of the plaintiff.[26]

[22] The position is the same under section 71 of the Contracts Act 1950. In *Governor-General in Council, represented by the General Manager, South Indian Railway v The Municipal Council, Madura*,[27] the plaintiff railway company was ordered by the Provincial Government of Madras, pursuant to the Indian Railways Act, 1890, to enlarge at the railway company's own cost the waterway of one of its culverts, and additional accommodation work for the use of the defendant municipal council. The additional works were necessitated by heavy flooding in the locality, whereby the insufficiency of the culverts meant that unless further protective works were carried out, flood damage to the local town could not be prevented. The plaintiff railway company had written to the Provincial Government of Madras and the defendant stating that the expense of the works was being incurred under protest, and that proceedings would be taken against them for recovery of the costs incurred. However, both the Provincial Government of Madras and the defendant municipal council made it clear to the plaintiff that they repudiated all liability for such expenses. The plaintiff proceeded to complete the works, and brought proceedings against the defendant claiming the cost of the works done.

[23] The Privy Council, affirming the decision of the lower courts, held that the plaintiff railway company could not rely on section 70 of the Indian Contract Act, 1872 (the equivalent of section 71 of the Contracts Act 1950) to recover the expenses incurred from the defendant. Lord Simonds, delivering the advice of the Privy Council, observed:

> Their Lordships are of the opinion that the decision [that the appellant could not rely on section 70] is clearly right. The appellant can only

26 *The Ruabon Steamship Company Ltd v The London Assurance* [1900] AC 6, HL; *Edinburgh and District Tramways Co Ltd v Courtenay* 1909 SC 99, CoS; *Shilliday v Smith* [1998] SC 725; *Investment Trust Companies v Revenue and Customs Commissioners* (n 19 above).

27 (1948) LR 75 IA 213; AIR 1949 PC 39; (1948) 2 Madras LJ 546, PC.

> succeed on this point if he establishes that the Railway lawfully did the work for the respondent, not intending to do so gratuitously, and that the respondent enjoys the benefit thereof. It may be conceded that the work was lawfully done and that the Railway did not intend to do it gratuitously. But their Lordships agree with the learned Judges of the High Court that the work was not done for the respondent nor does the respondent enjoy the benefit of it within the meaning of the section. The Railway executed the work for no other reason than that it was ordered to do so by the Government and presumably thought it politic to obey the order rather than challenge its validity. The respondent throughout denied its liability to meet any expense. It is true that the first suggestion of further protective works, which ultimately took the form (inter alia) of an enlargement of the culvert, came from the respondent, but the Railway was left in no doubt that, if it executed this work at the requisition of the Government, the respondent would not pay for it. It would in their Lordships' opinion, put an extravagant construction upon s. 70 of the Indian Contract Act to hold that in such circumstances the work was done by the Railway for the respondent. Nor does the respondent enjoy the benefit of the work except in an indirect sense: substantially the persons who derive a benefit are the owners and occupiers of the buildings and lands in the locality.[28]

[24] In *Siow Wong Fatt*[29] the appellant ("Siow") owned a prospectors licence and mining lease in respect of certain lands. Siow entered into an agreement with one Tang Hai Mining Company which allowed that company to prospect the lands and undertook to grant to them a sub-lease if and when a lease should be granted to him in consideration of payment of further sums and a tribute. The said Tang Hai Mining Company then sold their rights under the first agreement to one Shan Sai Sow, who in turn transferred the benefits and burdens of that agreement to a company formed by Shan called the Kota Mining Co Ltd. Kota Mining then entered into an agreement with the respondent Susur Rotan Mining Ltd whereby Kota Mining granted its rights under the earlier agreements to Susur Rotan. Susur Rotan then incurred significant expenses in constructing a road eight or nine miles long leading to the mineral land. However, Susur Rotan

28 (1948) 2 Madras LJ 546 at 548–549.

29 See n 7 above.

was unable to commence mining operations on the land through no fault of Siow. Susur Rotan nevertheless sought to claim compensation from Siow pursuant to section 71 of the Contracts Act 1950 in respect of its expenditure in constructing the road. The Privy Council held that Susur Rotan had failed to establish its claim under section 71 of the said Act. This was because at the time the road was constructed, Susur Rotan had done so for its own benefit, even though Siow had ultimately benefited from the construction of the roads. According to the Privy Council:

> It is the second point which in their Lordships' judgment is decisive of this case. As a matter of phraseology the section seems clear upon it. To bring the section into play the person when doing the act or delivering the thing must do the act "for another person" or deliver some thing "to him". So that his then present intention must be to do the act or to deliver the thing for or to another. It was argued before their Lordships … that doing the act means no more than that the act must be one which in fact benefits another. It was argued that the crucial point was that although you may do the act for your own benefit yet if in the end *ex post facto* you do not obtain that benefit but another does then you may claim against that other under section 71 as an act done for him. This seems to their Lordships a complete misreading of the section.
>
> Their Lordships are fortified in their judgment by the observations of Lord Simonds on section 70 of the Indian Contract Act in *Governor-General of India Madura* (1948) LR 75 IA 213 at p 221.
>
> It is clear for the reasons already given that when the road was built in 1961 it was built by Susur Rotan, though no doubt with the full knowledge, agreement and indeed day to day approval of Mr. Siow, for its own benefit for under the chain of contracts it was the body who was going to exploit the mineral lands. It was not done for another …
>
> It seems clear to their Lordships that Susur Rotan fails to establish this second condition.
>
> The third condition, that it must not be intended to be done gratuitously supports, as their Lordships think, their view of the second condition namely that doing the act for another person must be literally construed, for it is difficult to describe an act done for oneself as gratuitous; the adjective does not fit.

> Put rather differently it seems clear that the act of building the road in this case was, for the reasons just mentioned, intended to be done gratuitously for the simple reason that at the time it was done Susur Rotan did not intend to look to another for reimbursement of its expenditure.
>
> In their Lordships' judgment Susur Rotan also fail to satisfy this condition.[30]

[25] At first glance, the decision of the Privy Council in *Siow Wong Fatt* seems to suggest that under section 71 of the Contracts Act 1950, a plaintiff is not permitted to "leapfrog" its immediate contractual counterparty to claim for restitution against a defendant who is the indirect albeit ultimate beneficiary of acts done or things delivered by the plaintiff under the said contract. In *Siow Wong Fatt*, the plaintiff Susur Rotan had indirectly acquired rights of mining over Siow's land through a chain of four subcontracts. It had no direct contractual relationship with Siow. Although Siow was the ultimate beneficiary of the expenditure incurred by Susur Rotan, the Privy Council made it clear that Susur Rotan could not recover from Siow under section 71 as Susur Rotan had constructed the roads for its own benefit, and did not intend to look to another for reimbursement when the act was done.

[26] However, on closer examination, it may be argued that the Privy Council's interpretation of section 71 in *Siow Wong Fatt* did not truly address the issue of "leapfrogging" or third-party enrichment at all. *Siow Wong Fatt* clearly was not a case involving subcontracting of works originally required to be done by a third party, or where the defendant was the ultimate beneficiary of an act done by a plaintiff pursuant to a contractual obligation owed towards a third party. Although there was a chain of subcontracts in play, the fact remained that at the time Susur Rotan constructed the road, it did so because it was commercially the owners of the mining rights over the mineral lands, and the construction of the road was commercially necessary to access the mineral lands and the ore therein. In other words, it was clear that Susur Rotan had acted solely for its own benefit. *Siow Wong Fatt* is therefore a case dealing with *incidental* benefits as opposed to

30 Ibid. See also *Murthi v Annapoorani* [1973] 1 MLJ 45 at 46, where the court observed that "it is for the plaintiff to prove that the act done must be for the defendant and not merely incidental to her".

indirect benefits,[31] and does not provide a clear or authoritative answer to the issue at hand.

[27] Accordingly, the crucial question that remains to be answered in the context of section 71 of the Contracts Act 1950 is this: where a plaintiff does an act pursuant to a contractual obligation owed towards a third party, can the plaintiff be said to have done the act for the defendant for the purposes of a claim under section 71 of the Contracts Act 1950?

[28] Specifically in the context of construction and housing development cases, where such scenarios often (if not invariably) arise, the question can be posed in the following manner: at the time a plaintiff performs an obligation under a subcontract with a main contractor, is the plaintiff to be regarded as having done so:

(i) for itself or its own benefit, in expectation of receiving payment of the contract price?

(ii) for the main contractor, to discharge its contractual obligation owed to the main contractor under the contract? Or

(iii) for the ultimate beneficiary, e.g. the employer, who was not a party to the contract?

[29] Certainly, at the time the plaintiff performs its contractual obligations, it does not do so assuming that its contractual counterparty will not or cannot pay, or will become insolvent. After all, contracts are made to be performed, not broken.[32] The plaintiff performs its contractual obligations in the expectation of being remunerated pursuant to the terms of the contract by the contractual counterparty who was under the express obligation to make payment. However, if the contractual counterparty fails to pay the plaintiff or becomes insolvent, can the plaintiff look to the ultimate beneficiary (the defendant) for a remedy in restitution under section 71?

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31 Thus, the author's suggestion in Low (n 6 above), para [9.53], that it is well settled that s 71 of the Contracts Act 1950 does not give rise to any claim for compensation in respect of incidental or *indirect* benefits conferred on another person, appears to be too widely stated and must be treated with caution.

32 *Golden Strait Corp v Nippon Yusen Kubishika Kaisha, the Golden Victory* [2007] 2 AC 353, HL at 377, *per* Lord Bingham.

[30] For the longest of time, the Malaysian courts did not have an opportunity to address the issue of "leapfrogging" or third-party enrichment in the context of claims for restitution under section 71 of the Contracts Act 1950.[33] However, a series of recent Court of Appeal decisions have brought into sharp focus the interpretation to be given to the words "for another person" under section 71 of the Contracts Act 1950, in the context of "leapfrogging" or third-party enrichment cases. In these cases, the Court of Appeal has given section 71 a broad and liberal interpretation, and has boldly granted restitutionary relief in situations where recovery would be firmly denied at common law. It is to these important decisions that we now turn.

V. Recent Court of Appeal decisions: Uncharted waters

[31] The origins of what can be described as a seismic shift in the Malaysian courts' approach towards "leapfrogging" in third-party enrichment cases can be traced to the landmark decision of the Court of Appeal in *Tanjung Teras Sdn Bhd v Kerajaan Malaysia*[34] ("*Tanjung Teras*"). In that case, the defendant was the subcontractor of one Jeram Permata (Cheras) Sdn Bhd ("JP") who in turn had entered into a sale and purchase agreement dated May 24, 2003 with the Pesuruhjaya Tanah Persekutuan for the purchase of a piece of property, on which JP was to construct 226 units of medium-cost apartments as staff quarters for the Jabatan Bomba dan Penyelamat, Malaysia. JP had failed to complete the project within the stipulated time period, and the plaintiff terminated the contract on July 13, 2007. In proceedings brought by the plaintiff to have the defendant and JP declared as trespassers on the said property, the defendant counterclaimed against the plaintiff seeking compensation pursuant to section 71 of

33 One example of an unsuccessful attempt to invoke section 71 can be found in *Tien Wah Press (Malaya) Sdn Bhd v Classic Merge (M) Sdn Bhd* [2001] MLJU 106; [2001] 1 LNS 364. There, the plaintiff supplied goods in the form of inner boxes to the second defendant, who was a contractual manufacturer of mosquito coils for the first defendant. The second defendant utilised the inner boxes to package the mosquito coils before delivering the final products to the first defendant. The High Court held that the plaintiff could not claim compensation from the first defendant pursuant to section 71 of the Contracts Act 1950 for the inner boxes supplied, as the plaintiff had supplied the goods to the second defendant, and not the first defendant. The plaintiff's act was held to have been done for, and enjoyed by, the second defendant.

34 See n 17 above.

the Contracts Act 1950 on the ground that the plaintiff had benefited from the works done by the defendant as subcontractor.

[32] At first instance, the High Court dismissed the defendant's counterclaim based on section 71. After considering *Siow Wong Fatt*, the High Court held that the defendant subcontractor had failed to establish that the defendant had intended to carry out the construction works for the plaintiff at the time the works were done. On the facts, the court held that the defendant subcontractor had performed the works for the main contractor, and not the plaintiff. As such, the defendant had failed to show that the said works were done "for the plaintiff".

[33] However, on appeal, the Court of Appeal allowed the defendant's claim based on section 71. The court observed:[35]

> We are unable to agree with the learned High Court Judge's reasoning on the second condition. She would appear to have given a very mechanical or narrow interpretation to the second condition. She had overlooked the observation made by the PC, in regard to the second condition, that at the time of the construction of the road, Susur Rotan was not doing it for the benefit of Siow but for its own benefit under the chain of contracts because it was the body that was going to exploit the mineral land. It was also clear from the facts that at the time of the construction, Susur Rotan was not looking to Siow or any one else for reimbursement of the costs involved.
>
> Coming back to the case before us, the factual scenario is very different from *Siow Wong Fatt*. The facts here were that (1) the project was built for and on behalf of the plaintiff to be used as the staff quarters of JBDPAN; (2) the project was undertaken by JP for the plaintiff under the agreement for which JP had expected to be paid under the agreement; (3) the super structure work was part of the works under the project; (4) JP had appointed the defendant as its sub-contractor to construct the super structure work; (5) the defendant had certainly expected to be paid for the super structure work by JP on a back-to-back basis.
>
> Having regard to the juristic basis behind s. 71 which is premised on the equitable principle of restitution, good conscience and prevention of unjustment (*sic*) enrichment, we hold as a matter of fact that at the time the super structure work was done by the defendant, it

35 Ibid, at [45]–[47].

was done for the plaintiff as the ultimate owner of the project and the plaintiff was the direct beneficiary of the project. The defendant had intended to be paid for carrying the works. The fact that the defendant would receive payment from JP and not the plaintiff did not alter the fact that the defendant never intended the work to be done gratuitously. The second condition ought to have been found in favour of the defendant.

[34] It is worth emphasising that the Court of Appeal in *Tanjung Teras* cautioned against giving section 71 of the Contracts Act 1950 a "mechanical or narrow interpretation". In *GDP Architects Sdn Bhd v Universiti Teknologi Mara,*[36] Mary Lim J (now FCJ) observed that "The decision of the Court of Appeal in [*Tanjung Teras*] indicates that when applying the principles of section 71, one should take a more robust approach as opposed to a rigid literal interpretation and construction of the law and the facts."[37] What is clear, however, is that the decision of the Court of Appeal in *Tanjung Teras* was truly unprecedented: it was the first case under Malaysian law where a leapfrogging restitutionary claim was allowed. As will be seen below, *Tanjung Teras* has proven to be extremely influential, and became the catalyst for a rapid expansion of the scope of recovery under section 71 by the Court of Appeal in subsequent cases.[38]

[35] In *Kraas Solutions Sdn Bhd v Konsesi Kota Permatamas Sdn Bhd*[39] ("*Kraas Solutions*"), the respondent plaintiff was granted a concession by the Government of Malaysia and Universiti Teknologi Mara ("UiTM") for a period of 23 years to construct and supply facilities and infrastructure for a UiTM campus site. It was part of the plaintiff's obligation under the concession agreement to supply loose and built-in furniture to the UiTM campus. The plaintiff appointed one Tech Art Sdn Bhd ("Tech Art") as the main contractor to supply loose and built-in furniture, soft finishing and special equipment. Tech Art, in turn, subcontracted one Novanexus Design Studio to undertake "Design and Build-Loose and Built-in Furniture and Soft Furnishing" works. Unbeknownst to the plaintiff, Novanexus Design Studio then

36 [2016] MLJU 943.

37 Ibid, at [58].

38 The Court of Appeal is of course bound by its own previous decisions: see e.g. *Kesatuan Pekerja-Pekerja Bukan Eksekutif Maybank Bhd v Kesatuan Kebangsaan Pekerja-Pekerja Bank & Ano*r [2018] 2 MLJ 590, FC at [21].

39 See n 17 above.

entered into arrangements with one Novanexus Design and Build Sdn Bhd and they jointly and/or severally entered into arrangements with the appellant defendant, by which the defendant would supply the furniture or goods ("goods") to the project site. The defendant delivered the goods to the project site, which goods were accepted by and remained in the plaintiff's possession. In proceedings brought by the plaintiff, the defendant counterclaimed against the plaintiff, *inter alia*, for restitution under section 71 of the Contracts Act 1950 for the value of the goods supplied by the defendant.

[36] The High Court dismissed the defendant's counterclaim, but on appeal the defendant's claim for restitution was allowed by the Court of Appeal. The Court of Appeal, applying *Siow Wong Fatt* and *Tanjung Teras*, observed as follows:[40]

> With respect, we are of the view that s. 71 of the CA can be properly invoked by the appellant, and we agree with the above submissions of the appellant. It is true, as stated by the learned judge, that the appellant has a contractual relationship with Novanexus and the appellant should be paid by Novanexus for any delivery of goods to Novanexus. In this case, according to the CSA, the appellant was to deliver the goods to the respondent at the project site, but payment must be made to the appellant by Novanexus. Since no such payment has been made by Novanexus, it follows that the appellant is entitled to compensation, or be restored the goods delivered … Therefore, if the respondent wishes to retain the goods or the benefit, the respondent has to pay the appellant for the amount claimed by the appellant. With respect, we cannot agree with the learned judge's reasoning as it would render s. 71 meaningless. Section 71 is precisely to facilitate recovery against a party with whom there is no contractual relationship but who has nevertheless received the benefit of the appellant's lawful act which was never intended to be done gratuitously.

[37] The remarkable feature of *Kraas Solutions* was that the defendant and the plaintiff were separated by at least four subcontracts: the plaintiff was not even aware that the works in question had been subcontracted to the defendant. Yet the defendant was allowed to leapfrog the chain of subcontracts to obtain restitutionary relief against the plaintiff under section 71.

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40 Ibid, at [62]–[64].

[38] In *Mega Mayang M & E Sdn Bhd v Utama Lodge Sdn Bhd*[41] ("*Mega Mayang*"), the respondent was the developer and employer of an apartment project. Through a tender process, the appellant was awarded two subcontracts for cold water and sanitary plumbing services, as well as air-conditioning and mechanical ventilation services. The two subcontracts were entered into between the appellant and the respondent's main contractor, Sara-Timur Sdn Bhd ("Sara-Timur"), and the appellant was identified under the subcontracts as the domestic subcontractor. Pertinently, clause 20 of the letter of award issued by the respondent provided that "the Employer shall issue all payment cheques to the Sub-Contractor company name and made payable to the Sub-Contractor via Main Contractor." During the project, the appellant submitted its claims for work to Sara-Timur, which were copied to the respondent. The respondent paid against these claims by cheques issued to the appellant but delivered to the appellant, through Sara-Timur. Sara-Timur was subsequently wound up. The appellant submitted its final claim for works done under the subcontracts, which were rejected by the respondent. The appellant then commenced proceedings against the respondent claiming, *inter alia*, for restitution under section 71 of the Contracts Act 1950. The appellant's claim for restitution was dismissed by the High Court but allowed on appeal to the Court of Appeal. The Court of Appeal, again applying *Siow Wong Fatt* and *Tanjung Teras*, observed:[42]

> It would appear that the learned Judge had dismissed the claim on the basis that the fourth condition under section 71 of the Contracts Act was not met and that the appellant knew at all times, that it was the subcontractor, contracting with Sara-Timur and not, the respondent. We deduce from the lack of deliberations on the other three conditions that those other conditions were fulfilled on the facts. In this respect, we agree with the learned Judge that the first three conditions were in fact, satisfied. The act or works carried out by the appellant are lawful; done not for itself but for another; and, the act or works were never done gratuitously. The appellant always required payment for any of its work done pursuant to the two subcontracts.
>
> As for the fourth requirement, we must, with respect, disagree with the learned Judge. We are of the unanimous view that even this fourth requirement is met. …

41 [2018] MLJU 1323; [2018] 1 LNS 1452, CA.
42 Ibid, at [30], [31], [44] and [45].

> The unflinching evidence led at trial showed that the respondent was always in direct control and influence over the appellant. Not only did the respondent supervise the appellant's work, it assessed and paid for the appellant's work. Although there was no contract between the parties, it is quite evident to us, that the appellant's work was always to be paid for by the respondent, the party that benefited from the appellant's work. Not only was there no evidence that the appellant carried out its works with no intention or expectation of being paid for such works, there was not even a suggestion that the appellant ever did its work gratuitously. The appellant's work involved payment; the only question who was to be the paymaster. In our view, it is clear that it was by the respondent and for the reasons as relied on by the appellant.
>
> It is our firm view that all the conditions under section 71 have been fulfilled. The appellant's work was lawfully done; it was not done for itself but for another; the work was never intended to be done gratuitously but in every expectation that it would always be paid. The learned Judge was plainly erroneous in dismissing the appellant's claim.

[39] It is important to note at this juncture that in *Mega Mayang*, the third party which had subcontracted the works to the appellant subcontractor had become insolvent and was wound up. However, the appellant was allowed to leapfrog the subcontract to directly claim against the respondent developer/employer for restitution of the value of the works done.

[40] The latest Court of Appeal decision concerning leapfrogging in third-party enrichment situations is *Lim Meow Khean & Ors v Pakatan Mawar (M) Sdn Bhd (in liquidation) & Ors*[43] ("*Lim Meow Khean*"). Unlike *Tanjung Teras, Kraas Solutions* and *Mega Mayang*, the case of *Lim Meow Khean* did not involve benefits conferred on a defendant pursuant to a subcontract to which it was not a party.

[41] In *Lim Meow Khean*, the plaintiffs were purchasers of certain factory lots in Melaka. The purchasers had entered into sale and purchase agreements with the first defendant developer who was subsequently wound up, and the second defendant was the master chargee over the project lands pursuant to loan agreements and debentures entered

43 [2021] MLJU 127; [2021] 1 LNS 173, CA.

into with the first defendant. Some of the purchasers applied for and obtained a loan from their respective banks and some were cash buyers. In the former case, the purchasers had, as security for the loan facilities obtained, absolutely assigned their rights, interest and title in their respective lots in the sale and purchase agreements to their respective banks. Even after the winding up of the first defendant, the purchasers who had taken loans continued to service their loans and some had fully repaid their loans with their respective banks. The purchasers then discovered that, without their or their banks' consent, the first defendant through its liquidators had disposed of the properties and indeed the whole of the project lands to a third party. This was done with the consent of the second defendant as the master chargee, who had executed the discharge of charge in order for the transfer to be effected. This was so notwithstanding that the second defendant had given an express undertaking to certain purchasers or their banks to exclude or exempt the relevant factory lots for which redemption had been paid from any order for sale.

[42] The Court of Appeal, in allowing the plaintiffs' claims, held among others that the first and second defendants had been unjustly enriched at the plaintiffs' expense. The court further held that section 71 of the Contracts Act 1950 also provided the plaintiffs with the basis for a restitutionary claim against the first and second defendants. In so holding, the Court of Appeal referred to, *inter alia*, *Siow Wong Fatt*[44] and *Tanjung Teras*,[45] but did not discuss in detail how the four conditions laid down in *Siow Wong Fatt* were satisfied.[46] However, earlier in its judgment, the court in discussing the first and second defendants' liability in unjust enrichment had observed that:[47]

> To allow D1 and D2 to keep the whole benefit of the purchase price paid by the third party purchaser PDG Development Sdn Bhd

44 See n 7 above.

45 See n 17 above.

46 *Quaere* whether the decision of the Court of Appeal in *Lim Meow Khean* could be explained or understood as a case of "restitutionary damages" being awarded for breach of the contractual undertaking given to the purchasers or financiers of purchasers who had redeemed their factory lots: see *Attorney-General v Blake* [2001] 1 AC 268, HL; *Esso Petroleum v Niad Ltd* [2001] All ER (D) 324 (Nov). *Cf Experience Hendrix LLC v PPX Enterprises Inc* [2003] 1 All ER (Comm) 830, CA (Eng); *Dream Property* (n 5 above).

47 [2021] MLJU 127 at [152], [176], [181]–[188] and [204].

without accounting for the portion paid by the Plaintiffs/Purchasers whether direct to D1 or by way of redemption to D2 for the benefit of D1 would be to unjustly enrich D1 and D2. …

D2 now had sold to a third party through the Liquidators to realise its security and thus D2 had benefited from this. It is a benefit gained at the expense of the Purchasers who had paid the purchase price to D1 direct or for its benefit by redeeming their factory lots from D2 by paying the redemption sum for the works done at the various stages of completion. …

Whilst it is true that D2 was realising its security as a secured Chargee, it cannot do so at the expense of the Purchasers/Borrowers. It is not for D2 to say that it was taking a hair cut in realising RM20 million from the private sale when its loan given to D1 was about RM26.8 million. The issue is D2 would not have been able to keep the whole of the RM20 million for itself if it had recognised the interest of the purchasers and had negotiated with the third party purchaser PDG Development Sdn Bhd to recognise the purchasers' interest in the lands sold for which D2 had undertaken to exclude or exempt from an order for sale.

Another way of looking at the issue is that the Master Titles sold to the third party purchaser would have fetched a much lower price had it not been for the improvement in the lands resulting from the factories built at various stages of completion. …

The Plaintiffs/Purchasers, including the cash Purchasers, did not pay for the construction of the factory on their lots purchased from the Developer D1 only for D1 and D2 the Master Chargee to realise their full benefit in the originally vacant lots now having factories at various stages of completion on the Project Lands and taking a windfall gratuitously without making the necessary compensation to the Plaintiffs/Purchasers. …

With respect to all the Purchasers, D2 are also liable for restitution for unjust enrichment even if D2 had not given any undertaking to the End Financiers or to exclude or exempt their factory units from foreclosure or an order for sale, in cases of cash Purchasers. It cannot be denied that under the business plan of D1 accepted by D2, the purchase price paid had gone towards improving the value of the Project Lands held under the Master Titles which lands were sold by D1 with the consent of D2.

[43] In *Lim Meow Khean*, save for the purchasers who had obtained financing from the second defendant master chargee, most of the purchasers did not have any direct contractual relationship with the second defendant master chargee. The operative contract was the sale and purchase agreement between the purchasers and the first defendant developer. Yet restitution was awarded pursuant to section 71 against *both* the first and second defendants. The Court of Appeal placed great emphasis on the fact that the second defendant master chargee had expressly recognised the purchasers' acts of paying the purchase price towards redemption of their respective factory lots, and had given an express undertaking to exclude those lots from foreclosure after the first defendant had been wound up. It is well established that the words "lawfully does anything" in section 71 are wide enough to include payment of money.[48] Clearly, when the purchasers or their financiers made payment towards the purchase price of the purchasers' respective factory lots, they did not intend to do so gratuitously. In consideration of such payment to redeem the factory lots, the purchasers had looked to the second defendant master chargee to honour its undertaking to exclude the said factory lots from foreclosure. The payment of monies by the purchasers or their financiers could thus be said to be an act lawfully done for the second defendant master chargee within the meaning of section 71.

VI. Discussion and analysis

[44] The recent decisions of the Court of Appeal highlighted above are groundbreaking and remarkable. In these decisions, the Court of Appeal essentially construed the words "for another person" in section 71 of the Contracts Act 1950 to apply to the person who has ultimately, albeit indirectly, enjoyed the benefit of the act done by the party claiming restitution.

[45] In *Tanjung Teras*, the defendant was a subcontractor who had no direct contractual relationship with the plaintiff employer. The position was the same in *Mega Mayang*, where the appellant subcontractor did not have any contract with the respondent employer, although in that case the obligation of payment was expressly undertaken by the

48 See, e.g. *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* (n 9 above); *Poomani v Associated Finance Corporation Sdn Bhd* (n 12 above); *Osman bin Haji Mohamed v Chan Kang Swi* [1924] 4 FMSLR 292.

employer. Likewise, in *Kraas Solutions*, there was no contract between the plaintiff concessionaire and the defendant furniture supplier, and the parties were in fact separated by at least four subcontracts. In *Lim Meow Khean*, there was no contractual nexus between the plaintiff purchasers and the second defendant master chargee, save for certain purchasers who appointed the second defendant as their financier. The purchasers had signed their respective sale and purchase agreements with the first defendant developer who subsequently went into liquidation. In each case, the party claiming for restitution under section 71 of the Contracts Act 1950 was able to leapfrog their immediate contractual counterparty to claim against the ultimate recipient of the benefit.

[46] In *Tanjung Teras* and *Kraas Solutions*, the Court of Appeal appears to have taken the view that as the thing done or delivered in question ultimately benefitted the defendant, it was to be regarded as having been done "for another person" within the meaning of section 71. Similarly, although the court was mindful of the contractual relationship between the plaintiff and a third party, and of the fact that the obligation to pay under the contract laid with the third party and not the defendant, the court was of the opinion that this did not alter the fact that the plaintiff never intended the work to be done gratuitously.

[47] In this regard, it may be observed that the Privy Council in *Siow Wong Fatt*, in interpreting the words "for another person" in section 71, did not expressly state that the words are to be limited to an immediate contractual counterparty or a person with which a plaintiff has a direct legal or factual relationship; nor did the Privy Council expressly exclude from the scope of section 71 persons who indirectly benefitted from the plaintiff's act. The Privy Council's observation that the words "for another person" had to be literally construed simply meant that a plaintiff cannot rely on section 71 to claim for incidental benefits conferred upon another person as a result of acts the plaintiff did for itself or for its own benefit. As the Privy Council observed, "doing the act for another person must be literally construed, for it is difficult to describe an act done for oneself as gratuitous; the adjective does not fit".[49]

49 See n 7 above at p 121.

[48] Indeed, if a literal construction of section 71 is to be adopted, the words "for another person" are certainly wide enough[50] to mean *any* person other than the plaintiff itself, regardless of any number of contracts or subcontracts superimposed between the plaintiff and the defendant. As the Madras High Court observed in *Damodara Mudaliar v Secretary of State for India*,[51] an act done for another person under section 71 "is not limited to persons standing in particular relations to one another, and except in the requirement that the Act shall be lawful, no condition is prescribed as to the circumstances under which it shall be done."

[49] More importantly, the reasoning of the Court of Appeal in *Tanjung Teras* and *Kraas Solutions* suggests that in a claim for restitution under section 71 of the Contracts Act 1950, it is artificial to analyse the legal or contractual relationship between the plaintiff and a third party (not the defendant) to conclude that the act of the plaintiff was, as a matter of *law*, done for *itself* or the *third party* under the contract, and not for the *defendant*. Such an interpretation would be overly mechanical and narrow, as it erroneously focuses on the interpretation of the contract between the plaintiff and the third party, and not the language of section 71 which is a statutory provision. In any event, such interpretation is also unrealistic: a plaintiff who, in consideration for payment or remuneration, discharges a contractual obligation resulting in a benefit to another person clearly does not intend to act gratuitiously; conversely, it does not make sense to say that a plaintiff who contractually acts for another in expectation of being paid is *ex post facto* acting for himself at the material time for the purposes of section 71. As seen above, since this issue was not expressly considered by the Privy Council in *Siow Wong Fatt*, or by the Supreme Court or Federal Court in any subsequent decision, it was certainly open to the Court of Appeal to interpret section 71 in the manner that it did.

[50] It is also apparent that the Court of Appeal has given section 71 a holistic interpretation, whereby the focus was on (i) whether the plaintiff can be said to have done an act for a person *other than itself*, (ii) whether

50 On the interpretation of the words "another person", see e.g. in a different context, *IRC v Trustees of Sir John Aird's Settlement* [1984] Ch 382; *Australian Competition and Consumer Commission (ACCC) v Link Solutions Pty Ltd (No 2)* (2010) 272 ALR 280.

51 (1894) 18 Mad 88 at 91–93.

the plaintiff had intended to seek remuneration or compensation for the act done (or in any event did not do so voluntarily or gratuitously), and (iii) the identity of the person who *in actual fact* ultimately enjoyed the benefit of the act done by the plaintiff.

[51] Such holistic interpretation given by the Court of Appeal in *Tanjung Teras* and *Kraas Solutions* is supported by the language of section 71 itself, and is further fortified by Illustration (a) thereto.[52] In Illustration (a), *A*, a tradesman, leaves goods at *B*'s house by mistake. *B* treats the goods as his own. He is bound to pay *A* for them. It is clear that *A* originally intended to deliver the goods to a third party pursuant to contract, but had delivered them to *B* by mistake instead. Certainly, *A* did not have *B* in mind at the time the goods were delivered – it is clear that *A* thought it was delivering the goods to another person. Yet Illustration (a) does not suggest that *A* is to be regarded having done the act for itself or the contractual party. *A* can recover from *B* as long as *B* treats the goods as his own.

[52] The Court of Appeal's observations in *Tanjung Teras* and *Kraas Solutions*, *viz.* that it is immaterial that the plaintiff had originally looked to its contractual counterparty for payment under the terms of the applicable contract, also appear to be supported by earlier precedent and authority. In *The Perak Iron Mining Co Ltd v Chong Voon Kim*[53] ("*Perak Iron Mining*"), the plaintiff had carried out repairs to the defendant's lorries and delivered goods for the benefit of the defendant. The defendant was insured with the Peoples Insurance Company of Singapore, where there was some arrangement between the parties and the insurance company for the latter to pay for repairs done by the plaintiff to the defendant company's lorries. The defendant sought to resist liability on the ground that there was no contractual

52 It is trite law that the illustrations in statutes such as the Contracts Act 1950 show how the principle already enunciated in the relevant section to which the illustration is appended is to be applied, or how the particular facts of the case supposed by the illustration come under the principle, and that the courts must accept the illustrations given as being both of relevance and value in the construction of the text. The illustrations should in no case be rejected because they do not square with ideas possibly derived from another system of jurisprudence as to the law with which they or the sections deal: see e.g. *Saadat Kamel Hanum v Attorney-General for Palestine* [1939] AC 508, PC at 524; *Lala Balla Mal and another v Ahad Shah and another* (1918) 2 Madras LJ 614, PC at 617; *Mahomed Syedol Ariffin v Yeoh Ooi Gark* [1916] 2 AC 575, PC.

53 See n 12 above.

relationship between the parties, and that the defendant had never requested the plaintiff to do the work or to provide the goods. The FMS Court of Appeal held that the plaintiff was entitled to recover pursuant to section 71 of the Contracts Act 1950. Hill JA observed:[54]

> In my view it was a correct application of these principles in the light of section 71 to enter summary judgment for the plaintiff.
>
> The defendant company was insured with the Peoples Insurance Company of Singapore and it appears from the record that there was some arrangement between the parties and the Insurance Company for the latter to pay for repairs, etc., done by the plaintiff to the defendant company's lorries. The correspondence shews that when certain bills were rendered to the Insurance Company by the plaintiff payment was refused on the ground that no report of any accident had been made by the defendant company. Much was made of this by defendant's counsel before Azmi J. but whatever the contractual position may be between the defendant and the Insurance Company, I cannot see how it can affect the liability of the defendant company to pay the plaintiff for work done, etc., under section 71 of the Contracts Ordinance. …
>
> It would therefore appear that the defendant's remedy lies against the Peoples Insurance Company.

[53] The decision in *Perak Iron Mining* is important, as it demonstrates that so long as a defendant has directly or ultimately enjoyed the benefit of the act done by the plaintiff, it did not matter that the plaintiff had previously looked to a third party for payment for the same act. What matters is that the plaintiff did not intend to act gratuitously. Unless it can be shown that the plaintiff had in fact already been paid for the act in question, restitution can and should be awarded under section 71.

[54] Importantly, *Perak Iron Mining* also suggests that the contractual position between the *defendant* and the third party is irrelevant in considering a defendant's liability under section 71. This is significant in the context of a three-party, employer-main contractor-subcontractor scenario. For example, if the contract between the employer and main contractor contains a clause prohibiting the main contractor from subcontracting the works, this would not provide a defence to an employer against a claim for restitution by the subcontractor based

54 Ibid, at p 271.

on section 71, if the employer had in fact enjoyed the benefit of the works done.[55] The employer's remedy would lie against the main contractor for breach of contract.

[55] Although not referred to in any of the recent Court of Appeal decisions, it is clear that *Perak Iron Mining* is consistent with and further supports the reasoning in those decisions.

VII. Common law decisions or principles inapplicable in interpreting section 71

[56] At this juncture, it is appropriate to note that in all the recent decisions of the Court of Appeal on section 71 of the Contracts Act 1950, the court has not referred to any English or common law decisions or principles in interpreting the meaning of section 71.

[57] This is important, as section 71 has sometimes been referred to as a "statutory *quantum meruit* claim" or "statutory embodiment of the common law principle of *quantum meruit*".[56] Indeed, certain scholars have suggested that section 71 is modelled upon, or should be interpreted or developed with reference to the principles of unjust enrichment under English law.[57]

[58] It is respectfully submitted that principles of English or common law should not be applied or referred to in interpreting the scope of section 71 of the Contracts Act 1950, as this may give rise to confusion or may cause the courts to unnecessarily restrict the scope of section 71.

[59] As is well known, the Contracts Act 1950 was largely modelled upon the Indian Contract Act, 1872.[58] Indian law parted ways with the English common law in respect of the law of restitution as early as 1872. This watershed moment in legal history came in the form of the

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55 In any event, such a clause cannot be invoked against the subcontractor by reason of the lack of privity of contract between the employer and the subcontractor.

56 See e.g. *Tanjung Teras Sdn Bhd v Kerajaan Malaysia* (n 16 above) at [31]; *Teras Kimia Sdn Bhd v Kerajaan Malaysia* [2014] 7 MLJ 584 at [89]. See also *Kumpulan Teknik Sdn Bhd v Murad Hashim Communication Sdn Bhd* (n 12 above) at 582.

57 See e.g. David Fung, "Restitution and Section 71 of the Contracts Act 1950" [1994] 2 MLJ lxxix; Alvin WL See, "Restitution of Non-Gratuitously Conferred Benefit in Malaysia: A Case for Sowing the Unjust Enrichment Seed" (2016) 11 *Asian Journal of Comparative Law* 141.

58 For a full historical account of the Contracts Act 1950, see V Sinnadurai, *Law of Contract*, 4th edn (2011), paras [1.05]–[1.12].

enactment of the Indian Contract Act, 1872, which was an ambitious attempt to codify the principles of contract law, largely based on the English common law as it then stood, with modifications where necessary to avoid the niceties or anomalies of English law. The restitutionary provisions of the Indian Contract Act, 1872, in particular, were a remarkable instance of legal reform which boldly deviated from English law, a fact which did not go unnoticed by learned legal commentators such as Cunningham and Shephard, Pollock, and Stokes.[59] Lest it be forgotten, English law did not formally recognise the principle of unjust enrichment until more than 120 years later in the celebrated House of Lords' decision in *Lipkin Gorman v Karpnale Ltd*.[60]

[60] Indeed, the Privy Council has repeatedly cautioned against referring to or applying English law or common law principles to explain, qualify or limit the scope of the restitutionary provisions of the Contracts Act 1950.[61] As the Privy Council famously observed in *Muralidhar Chatterjee v International Film Company Ltd*,[62] the courts are

59 As early as 1878, Sir HS Cunningham and Sir HH Shephard in their work, *The Indian Contract Act*, observed that under the Indian Contract Act, 1872 the notion of an implied contract is wholly got rid of, and the duty of paying is based in each case on a direct legal enactment: HS Cunningham and HH Shephard, *The Indian Contract Act, No IX of 1872*, 3rd edn, (1878), p xliii. Similarly, in 1909 Sir Frederick Pollock, a leading authority on the Indian Contract Act, 1872, observed that s 69 of the Act dealing with the reimbursement of a person paying money due by another in payment of which he is interested, "lays down in one respect a wider rule than appears to be supported by any English authority"; s 70, dealing with the obligation of a person enjoying benefit of non-gratuitous act, was regarded by Pollock as going "far beyond English law": Pollock and Mulla, *The Indian Contract Act*, 2nd edn (1909), pp 287 and 294; Whitley Stokes, commenting on s 72 of the Act which dealt with the liability of a person to whom money is paid or thing delivered by mistake or under coercion, bluntly observed that "[t]his gets rid of the English fiction of an implied contract and promise to pay": W Stokes, *The Anglo-Indian Codes*, Vol 1 (1887), p 586 note 7.

60 [1991] 2 AC 548, HL.

61 See e.g. *Official Assignee of Madras v Mercantile Bank of India Ltd* [1935] AC 53, PC at 62 ("[T]he construction of the section … must depend on its precise words; … there is nothing in the section requiring its scope to be so limited … these words must be construed as they stand"); *Harnath Kuar v Thakur Indar Bahadur Singh* (1922) LR 50 IA 69; AIR 1922 PC 403; (1923) 1 Madras LJ 489 at 493, PC ("the plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of the section, and it has to be seen whether the facts of any case come within its scope."). See also *Musammat Bhagwati v Banarsi Das* AIR 1928 PC 98; (1928) 1 Madras LJ 689, PC.

62 (1943) LR 70 IA 35; AIR 1943 PC 34; (1943) 2 Madras LJ 369, PC.

"not concerned to make the Act agree in its results with English law."[63] There is no doubt that the Privy Council in *Siow Wong Fatt* had its earlier advice in mind, for the Privy Council did not refer to a single English authority in interpreting section 71 of the Contracts Act 1950.

[61] In this regard, it is unhelpful to attempt to interpret the words "for another person" in section 71 by reference to English law or common law cases or principles. For if common law principles were to be followed or applied, it is clear that all of the claims for restitution in *Tanjung Teras*, *Kraas Solutions*, *Mega Mayang* and *Lim Meow Khean* would have failed, as the enrichment in each case would not be regarded as being "at the expense of" the claimants. Indeed, the facts of cases such as *Tanjung Teras*, *Kraas Solutions* and *Mega Mayang* are in all material aspects on all fours with the facts of the English Court of Appeal decision in *MacDonald Dickens* and the High Court of Australia's decision in *Lumbers*, yet diametrically opposed decisions were arrived at: the Court of Appeal was able to award restitution under section 71 of the Contracts Act 1950, but arguably would not have been able to do so at common law.

VIII. Position under Roman law

[62] For completeness, it is in this regard that the true origins of the restitutionary provisions of section 71 remain of relevance and importance. The author has elsewhere suggested that the restitutionary provisions of the Contracts Act 1950 were more likely than not modelled upon Roman law.[64] In particular, section 71 appears to have been modelled upon the Roman law action of *negotiorum gestio*, which has been described as involving a situation where a person, or the "gestor", looks after or manages another person's affairs without his authority or knowledge, and in the absence of any contract between the parties.[65] Towards the end of the nineteenth century, section 70 of the Indian Contract Act, 1872 (the equivalent of section 71 of the Contracts Act 1950) had already been recognised as resembling *negotiorum gestio*:

63 (1943) 2 Madras LJ 369 at 374. *Muralidhar Chatterjee* was followed by the Federal Court in *Yong Mok Hin v United Malay States Sugar Industries Ltd* [1967] 2 MLJ 9, FC.

64 See generally Low (n 6 above), Ch 3.

65 WW Buckland, *A Text-Book of Roman Law: From Augustus to Justinian* (1921), p 533; Reinhard Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (1996), p 433.

Sir Frederick Pollock observed that the rule laid down in the section was suggested "perhaps indirectly by the Roman law";[66] Whitley Stokes thought that "Section 70 confers a right resembling that of the Roman *negotiorum gestor*".[67] Cunningham and Shephard observed that section 70 of the Indian Contract Act, 1872 "appears to adopt a broader principle and one more in accordance with the doctrine of Roman law. … the '*negotiorum gestor*'".[68]

[63] To better understand the true scope of section 71, it may therefore be helpful in this specific context to look at the position under Roman law, in particular the *negotiorum gestor* action and its subspecies, the closely related *actio de in rem verso*.[69] Professor Reinhard Zimmermann in examining the *negotiorum gestor* and *actio de in rem verso* refers to C. 4.26.7.3 of the *Codex Iustiniani* (Justinian Code):

> "*Alioquin si cum libero rem agente eius, cuius precibus meministi, contractum habuisti et eius personam elegisti, pervades contra dominum nullam te habuisse actionem, nisi vel in rem eius pecunia processit vel hunc contractum ratum habuit*."
>
> *A* has given a loan to *B* who, however, acted on behalf of *C*. Normally *A* would be confined to an action against *B*, the person whom, after all, he chose to contract with. Yet, two exceptions are recognised in the final clause of our text: *A* may proceed against *C* (the "dominus"), if the money has been converted to his account or if he has ratified the contract … whether Roman or Byzantine: here there was an authoritative statement to the effect that a remedy could be available

66 Pollock and Mulla, *The Indian Contract Act* (n 59 above), pp 294–29.

67 W Stokes, *The Anglo-Indian Codes* (n 59 above), p 534.

68 Cunningham and Shephard, *The Indian Contract Act, No IX of 1872* (n 59 above), p 205. See also Sir WH Rattigan, *The Science of Jurisprudence; Chiefly Intended for Indian Students*, 3rd edn (1899), p 310; RN Gooderson, "English Contract Problems in Indian Code and Case Law" [1958] *Cambridge Law Journal* 67 at 68–69. The right to restitution under s 71 of the Contracts Act 1950 is also comparable to the doctrine of recompense under Scottish law, the development of which was influenced by Roman law: Bell, *Principles of the Law of Scotland*, 10th edn (1899), pp 247–248, s 538. See Goff and Jones, *The Law of Restitution*, 7th edn (2007), p 24, note 59f, which suggests that s 70 of the Indian Contract Act, 1872 is comparable to the principles of Scots law.

69 The *actio de in rem verso* is said to be closely allied to *negotiorum gestio* and indeed was merely a species of it: see Lee JW Aitken, "*Negotiorum Gestio* and the Common Law: A Jurisdictional Approach" (1988) 11 *Sydney Law Review* 566 at 588.

against third parties who derived a benefit from a transaction to which they were strangers. It is a plain case of third-party enrichment.[70]

[64] Professor Zimmermann further observes that the *actio de in rem verso* was seen by the writers of the *ius commune* as "yet another emanation of the equitable principle that nobody should be allowed to enrich himself at the expense of another. The traditional core example remained one where *C* had been enriched as a result of a contract between *A* and *B*, and it was this contract which was seen by many as the basis of the action against the third party",[71] and that "So close was the relationship between *actio utilis de in rem verso* and *actio negotiorium gestorum*, in fact, that the borderlines were often blurred and an *actio negotiorum gestorum* was granted in place of an *actio utilis de in rem verso*."[72]

[65] It is thus clear that Roman law had no difficulty in granting restitution in third-party enrichment cases, where a claimant would be allowed to leapfrog its contractual party to claim against the defendant who had been enriched as a result of the contract between the plaintiff and a third party, as long as the defendant had "converted" the benefit to his own use. This is clearly mirrored in the language of section 71, which imposes an obligation to make restitution where a defendant "enjoys the benefit" of the act done by the plaintiff, which was not intended to be done gratuitously.

[66] Indeed, a common thread which ran through all of the recent Court of Appeal decisions in *Tanjung Teras*, *Kraas Solutions*, *Mega Mayang* and *Lim Meow Khean* was that the defendant to the section 71 restitutionary claim therein had clearly retained and enjoyed the benefit of the non-gratuitous acts done by the claimant, but unconscionably refused to make any compensation therefor. It is clear that the Court of Appeal in each of these cases regarded this as a crucial factor which went towards satisfying the conditions for recovery under section 71.

IX. Policy considerations

[67] For completeness, although a claim for restitution under section 71 of the Contracts Act 1950 ultimately falls to be determined based on

70 Reinhard Zimmermann, *The Law of Obligations – Roman Foundations of the Civilian Tradition* (n 65 above), p 879.
71 Ibid.
72 Ibid, at p 880.

the wording of the section itself, there are certain policy considerations which merit examination as a result of an expansion of the already broad scope of recovery under section 71.

(i) Allocation of insolvency risk

[68] The first policy consideration often invoked against leapfrogging is that a plaintiff who has entered into a contract accepts the risks of non-payment by, or even insolvency of, its contractual counterparty. According to Professor Peter Birks, the plaintiff "must accept the risks of dealing with his chosen contractual counterparty. The insolvency regime would be subverted if [the plaintiff] could find ways of leapfrogging an insolvent [contractual counterparty]."[73] In *MacDonald Dickens & Macklin (a firm) v Costello*,[74] the English Court of Appeal observed:

> The second point of principle is whether a restitutionary claim should be allowed to undermine the contract between Oakwood and the claimants, that is to say, the way in which the parties chose to allocate the risks involved in the transaction. The parties arranged the transaction as one in which legally enforceable promises were made only between Oakwood and the claimants, even though the benefit of the contract was to be conferred on Mr and Mrs Costello. The obligation to pay for the claimants' services, and so the risk of non-payment, was contractually confined to Oakwood. If a claim was permitted directly against Mr and Mrs Costello it would shatter that contractual containment. It would also alter the usual consequences of Oakwood's insolvency, which was one of the risks assumed by the claimants in contracting with Oakwood, since a direct claim against Mr and Mrs Costello would improve the claimants' position over Oakwood's other unsecured creditors. …[75]

[69] The integrity of the insolvency regime and the interests of other unsecured creditors are important policy considerations. For example, in a case where a subcontractor leapfrogs the main contractor (who has become insolvent) to claim directly against the employer for the value of works performed or services rendered, the liquidators of

73 Peter Birks, "At the expense of the claimant: direct and indirect enrichment in English law" in D Johnston and R Zimmermann (eds), *Unjustified Enrichment – Key Issues in Comparative Perspective* (2002) 493 at 253.

74 See n 16 above.

75 Ibid, at pp 250–251

the insolvent main contractor may potentially be deprived of a claim under its contract with the employer in respect of the same works or services, which in turn would reduce the amount of assets or funds potentially available for distribution to unsecured creditors. The subcontractor will effectively be able to improve its position in the event of the main contractor's insolvency, as it may look towards the developer for full recovery.

(ii) Redistribution of contractual risks and moral hazards

[70] The second policy consideration is that to allow "leapfrogging" restitutionary claims would effectively mean that the law or restitution and unjust enrichment would be invoked to redistribute risks which have been allocated by the mutual agreement of the parties. As seen above, the courts have repeatedly cautioned against utilising the law of restitution and unjust enrichment so as to override, subvert or defeat the terms of any contract between the parties and the allocation of risks therein.[76]

[71] The position is the same even under section 71 of the Contracts Act 1950. Indeed, the Court of Appeal in *Kerajaan Malaysia v Ken Reach Builder Sdn Bhd*[77] ("*Ken Reach Builder*") held that the claim for restitution based on section 71 therein could not succeed as all the works done by the claimant and the terms of payment were governed by the terms of the contract between the plaintiff and the defendant. *Ken Reach Builder* of course was not a case dealing with third-party enrichment. However, it is arguably somewhat anomalous that a defendant main contractor who is party to a contract with the plaintiff subcontractor can invoke the contract as a defence to a section 71 claim, whereas the employer who is a stranger to the subcontract cannot rely on or point to the contractual allocation of risks between the main contractor and subcontractor under that subcontract to resist liability under section 71.

[72] In this regard, it is important to note that a plaintiff in the position of an unpaid subcontractor still retains the right to claim against the main contractor for breach of contract. While in principle, there is nothing objectionable to a plaintiff having a contractual claim against the main contractor and an alternative claim against the developer in restitution provided that there is no double recovery by the plaintiff, in

76 See para [12] above.
77 See n 14 above.

practice a plaintiff may understandably attempt to seek full recovery instead from the defendant employer or developer which may be perceived to have substantial means or "deeper pockets" compared to the main contractor.

[73] A further associated policy consideration is the moral hazard which may be created by allowing "leapfrogging" claims, whereby the third party, usually but not invariably the main contractor, will be able to effectively transfer or redistribute the risk of *its own* non-payment or insolvency to its contractual counterparty, while evading or escaping its contractual obligations or liability altogether. Great care should be taken not to introduce uncertainty in the law or unintended consequences to commercial contracts freely entered into, especially considering the fact that subcontracting is commonplace in the commercial world.

[74] An example of such unintended consequences may be illustrated by the facts of the relatively recent decision of the Federal Court in *Usima Sdn Bhd v Lee Hor Fong (trading under the name and style of Pembinaan LH Fong)*[78] ("*Usima*"). In that case, the public works department ("JKR") had appointed the appellant ("Usima") to carry out certain construction works ("the works"). Usima subcontracted the works to the respondent ("LHF") pursuant to a letter of award ("LOA") which stated that the subcontract shall be governed by the terms and conditions of the main contract between JKR and Usima. Disputes between the parties led to Usima terminating the subcontract. Usima alleged that LHF had abandoned the works. LHF sued Usima, *inter alia*, for monies owing in respect of work done as reflected in three interim certificates. Usima raised a counterclaim, *inter alia*, for monies it had incurred to engage new subcontractors to complete the works. The Court of Appeal, reversing the High Court's decision, held that LHF was entitled to be paid on the interim certificates measured and certified by the employer's consultant before they were issued. Before the Federal Court, Usima argued that the amounts in the interim certificates upon which judgment was entered for LHF included payments that Usima had made directly to third-party subcontractors that LHF had engaged and that, therefore, based on section 71 of the Contracts Act 1950, those payments to the third-party subcontractors should be deducted from LHF's claim.

78 See n 10 above.

[75] In dismissing Usima's appeal on this point, the Federal Court held that Usima's reliance on section 71 of the Contracts Act 1950 was inconsequential as it failed to satisfy all the four conditions as laid down by *Siow Wong Fatt*. While it satisfied the condition that the act done was lawful and was not intended to be gratuitous, Usima failed to satisfy the two conditions that the doing of the act or delivery of the thing must be "for another person" and also that "the other person enjoyed the benefit of the act or the delivery". According to the Federal Court:

> … While we may agree that the act was lawful, it failed to satisfy the second test …
>
> … We may also agree with learned counsel on the third condition that it was not intended to be gratuitously done, but again, Usima failed to satisfy the fourth condition because it was in Usima's interest and for its own benefit for the payment to be made in order to have the project completed. To achieve that, the third parties must be duly paid. The payment was for/towards the completion of the project awarded to Usima. Usima failed to satisfy the condition that the payment was made "for another person".[79]

[76] As a result of the recent Court of Appeal decisions in *Tanjung Teras*, *Kraas Solutions* and *Mega Mayang*, an employer will be exposed to claims for works by a third-party subcontractor if the main contractor fails to pay the latter. The employer may be compelled to accept the services rendered by the subcontractor and make payment in order to complete the project. The Court of Appeal's decision in *Perak Iron Mining* then suggests that the employer's recourse is against the main contractor. However, the Federal Court's decision in *Usima* demonstrates that the employer might not be able to rely on section 71 to claim for restitution from the main contractor in such circumstances, as it will be regarded as having acted for its own benefit in order to complete the project.[80]

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79 Ibid, at p 290.

80 On the facts of *Usima*, it is arguable that the appellant Usima could have instead obtained restitution or reimbursement of the sums paid to LHF's subcontractors pursuant to s 70 of the Contracts Act 1950, which provides that "A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other." See generally Low (n 6 above), Ch 8.

(iii) Fairness to defendant and moral hazard

[77] A third policy consideration, closely linked to the second above, which may be taken into account is fairness to a defendant who is the ultimate beneficiary of the act done by the plaintiff, for example, a defendant in the position of an employer who has enjoyed the benefit of a subcontractor's works. In the recent Court of Appeal decisions, the employer in question had on the facts of the particular case retained and enjoyed the benefit of the acts done by the subcontractors claiming for restitution, while unconscionably refusing to make payment. However, it would arguably be a harsh result to impose liability on an employer who took all steps to make it clear that it would not be accepting liability for the acts done or things delivered by the subcontractor. For example, the employer could in its contract with the main contractor expressly prohibit subcontracting, or expressly provide that liability to pay subcontractors remained solely with the main contractor. However, such contractual terms are not binding on the subcontractor due to lack of privity of contract, and in any event the Court of Appeal decision in *Perak Iron Mining*[81] suggests that the contractual relationship between the employer and the subcontractor is immaterial to the employer's liability under section 71.

[78] It could be argued that a defendant employer could at all material times expressly inform the subcontractor that it was not assuming any liability to pay, and that the subcontractor's only recourse was against the main contractor.[82] Indeed, if a defendant has knowledge that a plaintiff is providing services or doing anything for the benefit of the defendant, and that the plaintiff is likely to incur substantial costs and expenses in so doing, it is arguably incumbent upon the defendant to either protest or object to the services or work being performed, or make it clear to the plaintiff that the defendant does not accept any liability to pay (or is merely willing to pay a limited sum of compensation) for the services or work done by the plaintiff. Failing to do so may mean that the defendant will be estopped from

81 See n 54 above.

82 Indeed, the act of protesting liability to pay throughout was one of the reasons for which the claim for restitution under s 70 of the Indian Contract Act, 1872 was rejected by the Privy Council in *Governor-General in Council, represented by the General Manager, South Indian Railway v The Municipal Council, Madura* (n 27 above).

contending that the plaintiff had intended to perform the services or works gratuitously, and may expose the defendant to liability under section 71.[83] However, it is not in every case that a defendant would have knowledge that the works or services in question were being rendered by a subcontractor. In practice and as a matter of commercial reality, it is unlikely that a defendant, especially a lay person, would anxiously or repeatedly carry out due diligence and enquiries to ensure that it is not dealing with a subcontractor.

[79] For completeness, the issue of fairness to the defendant employer may be highly relevant in a situation where the defendant has in fact already made full payment to a main contractor in respect of the works done by the plaintiff subcontractor, but the main contractor has become insolvent or has wilfully failed to make payment to the plaintiff subcontractor. In such a case, allowing the plaintiff to obtain restitution from the defendant employer pursuant to section 71 would mean that the defendant has to incur and pay for the same liability twice over. This surely cannot be right. The question that the courts have yet to fully consider and answer is whether in such circumstances, the fact that the defendant has made payment to the main contractor provides a complete defence to a plaintiff subcontractor's claim for restitution under section 71.[84]

(iv) A matter for the legislature?

[80] Ultimately however, it has to be borne in mind that section 71 of the Contracts Act 1950 is a provision of a written statute, which is to be construed according to its terms.[85] Indeed, it may be observed that the restitutionary provisions of the Contracts Act 1950 reflect a legislative policy which is in favour of allowing recovery in restitution on a broader basis than the English law.

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83 *Teras Kimia Sdn Bhd v Kerajaan Malaysia* (n 56 above). See Low (n 6 above), para [9.66].

84 In *Usima* (n 10 above), the Federal Court rejected the appellant's attempt to argue that payments made to subcontractors ought to be deducted from the amounts payable to the respondent main contractor under interim certificates, as the interim certificates were approved by the appellant itself, and the argument was only raised for the first time before the Federal Court and not dealt with in the courts below.

85 See paras [56]–[61] above.

[81] Leaving aside specific defences such as illegality or defences provided by other statutes such as the Limitation Act 1953, if the absence of any express statutory defences to, or control mechanisms in respect of, claims for restitution under the Contracts Act 1950 is to be regarded as an omission on the part of the drafters of the Contracts Act 1950 and which gives rise to a lacuna in the law, it is submitted that the proper course is for appropriate amendments to be made to the Contracts Act 1950 by Parliament to introduce any necessary statutory defences. It may be controversial to suggest that this lacuna can or should be filled by the courts, as the recognition of any such defences purely on grounds of policy may amount to judicial legislation.[86]

X. Conclusion

[82] It is submitted that the interpretation given to section 71 of the Contracts Act 1950 by the Court of Appeal in recent decisions such as *Tanjung Teras*, *Kraas Solutions*, *Mega Mayang* and *Lim Meow Khean* are a highly commendable and welcome development in the law of restitution and unjust enrichment in Malaysia. As seen from the discussion in this article, such a broad and purposive interpretation of section 71 appears to be correct in principle and accords with the Roman law origins of section 71. Indeed, the decisions in these cases demonstrate precisely how section 71 of the Contracts Act 1950 is, and has always been, much wider in scope than English law. This is especially so considering that, to date, the English courts remain steadfast in refusing to recognise "leapfrogging" restitutionary claims in third-party enrichment cases. In this regard, the Malaysian courts can truly be said to have taken the lead in mapping these uncharted waters.

[83] That said, it should be borne in mind that the apex court of Malaysia, the Federal Court, has yet to authoritatively rule on the issue of "leapfrogging" and third-party enrichment, both in the context of section 71 of the Contracts Act 1950 and in unjust enrichment claims at common law. It is hoped that the Federal Court will have an opportunity to visit and address this important and fascinating issue in the near future.

86 *Kleinwort Benson Ltd v Lincoln City Council* [1999] 2 AC 349, HL at 401, *per* Lord Hoffmann. See Low (n 6 above), paras [11.38]–[11.40].

[84] Until then, it is worth recalling the prescient observations of the then Supreme Court that although the terms of section 71 of the Contracts Act 1950 are unquestionably wide, if applied in accordance with well-defined principles they enable the courts to do substantial justice.[87] The flexibility of the Roman institution of *negotiorum gestio* as reflected in section 71 of the Contracts Act 1950 allows the courts to cope with new types of situations arising in modern times so as to retain its importance as "one of the tools ensuring a fair and reasonable allocation of risks."[88]

87 *New Kok Ann Realty Sdn Bhd v Development & Commercial Bank Ltd New Hebrides (In Liquidation)* (n 9 above).

88 R Zimmermann, *The Law of Obligations: Roman Foundations of the Civilian Tradition* (n 65 above), pp 447–448.

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